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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM Horry County
Court of Common Pleas
Paul M. Burch, Circuit Court Judge

Opinion No. 4617
Case Nos.
2006-CP-26-3194R
2006-CP-26-3195R
2006-CP-26-3196R

BRIEF OF RESPONDENTS

THELMA M. POCH, as the 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.

of whom BAYSHORE CONCRETE
PRODUCTS/SOUTH CAROLINA, INC.,
BAYSHORE 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.

of whom BAYSHORE CONCRETE PRODUCTS/
SOUTH CAROLINA, INC. and BAYSHORE
CONCRETE PRODUCTS CORPORATION are

Respondents.

THELMA M. POCH, individually and as
Personal Representative for the ESTATE
OF KENNETH O. POCH, and JULIUS POCH,

Petitioners,

v.

BAYSHORE CONCRETE PRODUCTS/
SOUTH CAROLINA, INC., BAYSHORE
CONCRETE PRODUCTS CORPORATION
TIDEWATER SKANSKA GROUP, INC.,
and TIDEWATER SKANSKA INC.,

of whom BAYSHORE CONCRETE PRODUCTS/
SOUTH CAROLINA, INC. and BAYSHORE
CONCRETE PRODUCTS CORPORATION are

Respondents.

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE COURT OF APPEALS CORRECTLY AFFIRM THAT BAYSHORE SC AND BAYSHORE CORP. ARE ENTITLED TO WORKERS' COMPENSATION IMMUNITY PURSUANT TO THE EXCLUSIVITY PROVISION OF THE WORKERS' COMPENSATION ACT UNDER THE STATUTORY EMPLOYMENT AND/OR SPECIAL EMPLOYMENT ANALYSES WHEN PETITIONERS WERE PERFORMING THE WORK OF RESPONDENTS?**

- II. **DID THE COURT OF APPEALS CORRECTLY AFFIRM THAT BAYSHORE SC AND BAYSHORE CORP. ARE ENTITLED TO IMMUNITY FROM PETITIONERS' TORT SUIT BECAUSE THEY PROPERLY SECURED WORKERS' COMPENSATION COVERAGE WHICH WOULD HAVE COVERED PETITIONERS' INJURIES HAD THEY NOT COLLECTED FROM ANOTHER SOURCE?**

STATEMENT OF THE CASE

This appeal arises from a civil action that was filed by Petitioners Kenneth Poch ("Poch") and Kevin Key ("Key"), in addition to and following their collection of workers' compensation benefits for onsite injuries they sustained while working for Respondents, Bayshore Concrete Products/South Carolina, Inc. ("Bayshore SC") and Bayshore Concrete Products Corporation ("Bayshore Corp.") on the Carolina Bays Parkway project. Since Petitioners were performing the work of the Respondents when they were injured and Respondents clearly would have been obligated to provide workers' compensation coverage to Petitioners, Petitioners' sole remedy was through the Workers' Compensation Act. Accordingly, the Court of Appeals correctly affirmed the trial court's dismissal of their lawsuit pursuant to the exclusivity provision of the Act.

Following a period of discovery, Bayshore SC and Bayshore Corp. filed a Motion to Dismiss or, Alternatively, Motion to Determine Workers' Compensation Exclusivity/Jurisdiction. (R. pp. 171-75). The trial court thereafter issued an order on April 19, 2007,

confirming the parties' agreement that the court would consider affidavits, deposition testimony, relevant records, memoranda of law and oral argument. (R. pp. 6-9). In spite of this agreement and the court's order, Petitioners filed motions to exclude affidavits of Keith Colonna, Larry Lenart, and Vernon Dunbar. (R. pp. 474-539). Following the hearing on all motions, the trial court issued an order on July 19, 2007, in which it made findings of fact and a final determination that Bayshore SC and Bayshore Corp. were immune from civil liability pursuant to workers' compensation exclusivity. (R. pp. 10-17). The trial court further denied Petitioners' motions to exclude affidavits.

On September 9, 2009, the Court of Appeals unanimously affirmed the trial court's ruling, holding that Bayshore SC and Bayshore Corp. were entitled to tort immunity as Petitioners' statutory employers. Poch v. Bayshore Concrete Products/S.C., Inc., 686 S.E.2d 689 (S.C. Ct. App. 2009). In doing so, the Court of Appeals rightfully rejected Petitioners' concocted theory that Bayshore Corp. and Petitioners were "co-subcontractors" on the subject project and found that both Bayshore SC and Bayshore Corp. were entitled to workers' compensation exclusivity as statutory employers who would have provided workers' compensation benefits to Petitioners had they not recovered the same from Job Place. Since the Court of Appeals ruled that Respondents were entitled to immunity based upon their statutory employer status, it did not address the borrowed or leased employee argument.

Now before this Court, Petitioners have raised two alleged errors in the Court of Appeals' ruling. First, they allege that the Court of Appeals failed to recognize that Bayshore Corp. was a "co-subcontractor" of Bayshore SC. In reality, Bayshore Corp.

was the “owner” of the project and the upstream employer of both Petitioners and Bayshore SC. Petitioners erroneously rely on misstatements of fact regarding the nature of Larry Lenart’s employment and the relationship between Bayshore SC and Bayshore Corp. Petitioners apparently concede that Bayshore SC is a statutory employer of Petitioners, but they fail to recognize that Petitioners were working on a project that was “owned” by Bayshore Corp; that Bayshore Corp. created Bayshore SC to perform this work; and that Petitioners’ performance of this work directly benefited Bayshore Corp. as “owner” of the project and equipment and as Lessee of the project site.

Second, Petitioners erroneously allege that Bayshore Corp. and Bayshore SC are not entitled to workers’ compensation exclusivity since Bayshore Corp. and Bayshore SC failed to secure workers’ compensation insurance coverage. It is a patently false allegation that Respondents did not secure workers’ compensation coverage. The record will show that Respondents did have workers’ compensation coverage, which would have covered Petitioners had they not secured benefits from their direct employer, Job Place.

The record is clear that Respondents Bayshore Corp. and Bayshore SC are immune to Petitioners’ tort claims, since Petitioners were performing the sole work of both Bayshore Corp. and Bayshore SC, both of which would have been responsible for providing workers’ compensation benefits to Petitioners had they not collected it from another source. Therefore, both Bayshore SC and Bayshore Corp. are immune from Petitioners’ civil lawsuit pursuant to the exclusive remedy provision of the Workers’ Compensation Act.

FACTS

On June 6, 2002, Petitioners were tragically injured in a work-related accident at the Bayshore SC worksite in Longs, South Carolina. Both Key and Poch were laborers leased by Bayshore SC from Job Place, an employee leasing agency. (R. pp. 881-84).

Bayshore SC is a separately incorporated subsidiary and remote casting yard of Virginia-based parent company Bayshore Corp. (R. pp. 851-76). Bayshore Corp. and Bayshore SC are in the business of manufacturing pre-cast concrete products for use in construction projects. (R. pp. 851-76). Bayshore Corp. held a Board of Directors meeting on April 21, 2000, to discuss a bid it secured to supply pre-cast concrete forms for use in the Carolina Bays Parkway project, otherwise known as SC Highway 31, in Horry County, South Carolina; literally the same day, Bayshore Corp. incorporated its subsidiary Bayshore SC for the sole purpose of acting as a remote casting yard to fulfill the order for the Carolina Bays project locally. (R. pp. 851-76, 917-918). Bayshore Corp. executed a lease for the plant and purchased casting equipment from the previous tenant, Traylor Brothers, to be used by Bayshore SC to complete the project. (R. pp. 851-76, 917).

At the time of the accident, the Carolina Bays project was in its final stages, whereupon Bayshore SC was in the process of dismantling the equipment and casting beds, used to create the pre-stressed concrete forms, and performing site cleanup. (R. pp. 669-73, 839). The equipment consisted of steel pillars driven into the ground at each end of a mold, topped by concrete caps or abutments. (R. pp. 639-42, 840). These pillars and abutments were used to hold high tension steel wires in the pre-stressed concrete girders

and forms. (R. pp. 639-42, 840). When the molds were no longer needed, Bayshore Corp. and its subsidiaries typically removed and dismantled casting beds. (R. pp. 639-45, 665-73, 839, 894-901). In this case, returning the site to its original condition was also a material term of the Lease executed by Bayshore Corp. (R. pp. 639-42, 665-73, 839, 894-901).

The removal of the casting beds necessarily involved removing the concrete abutments by digging trenches around the buried steel girders and cutting the girders away. (R. pp. 665-73). Since most of Bayshore SC's regular payroll employees had quit to find other work due to the winding up of the project, Bayshore SC had to lease manual laborers from Job Place to assist its remaining employees in the site dismantling process. (R. pp. 671-73). Bayshore SC provided the leased employees with equipment, closely controlled the performance of their work, and had the right to terminate leased employees from the jobsite. (R. pp. 800-04).

On June 6, 2002, Petitioners worked with Larry Lenart, Bayshore SC's supervisor, to dig around buried steel girders so that the concrete abutments could be cut loose by Bayshore SC's welders. (R. pp. 791-96). Petitioners were breaking down the equipment and packing up tools for shipment back to Bayshore Corp. (R. pp. 785-96). Lenart used a backhoe for approximately 30 minutes to dig a ten-foot trench around the caps and girders and entered the trench himself to show Petitioners how to clear dirt from around the girders. (R. pp. 790-96, 877-80). The trench collapsed on Petitioners while inside it, injuring Key and fatally injuring Poch. Both Poch and Key received workers' compensation benefits through Job Place. (R. pp. 881-84). Both Bayshore SC and

Bayshore Corp. had workers' compensation insurance that covered Petitioners. (R. pp. 611-15, 844-45). Petitioners subsequently filed personal injury claims against Bayshore SC and Bayshore Corp. in civil court.

ARGUMENT

Bayshore Corp. and Bayshore SC are entitled to tort immunity pursuant to the exclusive remedy provision of the Workers' Compensation Act, South Carolina Code Section 42-1-540, since Petitioners were solely performing the work of both Bayshore SC and Bayshore Corp.¹ and since both Bayshore Corp. and Bayshore SC would have been responsible for providing workers' compensation benefits to Petitioners:

The South Carolina Workman's Compensation Act provides that when an injured employee accepts the benefits of the provisions of that Act, his common law remedies against his employer are extinguished. The definition of employer within that section is not limited to the injured person's immediate employer; rather, **the Act expands the definition to include all of those for whom the employee is working, either directly or indirectly.**

McCaskey v. Daniel Int'l Corp., 442 F.Supp. 1360, 1362 (D.S.C. 1977) (emphasis added)
(internal citations omitted).

The purpose of workers' compensation is to afford the benefits of compensation to the men exposed to the risks of one's business while placing the burden of paying compensation upon the organizer of the enterprise, so that both the owner and the workers employed to do his work are subjected to the requirement of the Workers' Compensation Act and the workers receive double protection. See Blue Ridge Rural

¹ This Court has held the true test to determine jurisdiction within the Workers' Compensation Act is: "Was the employee doing something for the subcontractor which bore some reasonably direct relation to the performance of the work undertaken by the subcontractor?" See Smith v. Fulmer, 198 S.C. 91, 15 S.E.2d 681, 683 (S.C. 1941).

Electric Co-Op v. Byrd, 238 F.2d 346 (4th Cir. 1956) (overruled on other grounds). Since Bayshore SC and Bayshore Corp. would have provided workers' compensation benefits to Petitioners had Job Place failed to do so, Respondents are entitled to exclusivity under the Workers' Compensation Act. See Brittingham v. Williams Sign Erectors, Inc., 299 S.C. 259, 264, 384 S.E.2d 319, 322 (S.C. Ct. App. 1989). The fact that the employer seeking exclusivity did not actually pay workers' compensation benefits to the injured employee is of no consequence. Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 74, 267 S.E.2d 524, 528 (S.C. 1980)². "It is South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Worker's Compensation Act." Edens v. Bellini, 359 S.C. 433, 440, 597 S.E.2d 863, 866-67 (S.C. Ct. App. 2004). See also Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 300, 676 S.E.2d 700, 702 (S.C. 2009) (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").

That Respondents Bayshore SC and Bayshore Corp. are entitled to tort immunity under the workers' compensation exclusivity provision of the Act is supported by a two-tier analysis. First, while Petitioners apparently concede that Bayshore SC is a statutory employer under the Workers Compensation Act, the facts will show that Bayshore SC is

² In Parker, the injured employee, Parker, was directly employed by a subcontractor, Yetter Homes, Inc., which was working for the general contractor, Williams & Madjanik, Inc. Since Yetter Homes, Inc., paid Parker's workers' compensation benefits, Parker sued Williams & Madjanik, Inc. In finding that Williams & Madjanik, Inc. was entitled to exclusivity, the Court held Parker was working for Williams & Madjanik, stating that, "As a practical matter both [Yetter Homes, Inc. and Williams & Madjanik, Inc.] absorbed the cost of coverage through their contracts with those who agreed to actually perform the work." Id.

also a special employer, since Petitioners are leased employees. Second, Bayshore Corp. is entitled to immunity as an upstream, statutory employer of Petitioners and as an owner of the project on which Petitioners were working. Petitioners' erroneous claims that Bayshore Corp. is not entitled to immunity, on the bases that the Court of Appeals erred in failing to recognize Bayshore Corp. as a "co-subcontractor" to Petitioners and in failing to find that Bayshore Corp. does not inherit Bayshore SC's immunity by way of the parent/subsidiary relationship, are both misguided arguments based on false and misstated facts.

Lastly, it is important to note that the employment relationship between Petitioners, Bayshore SC and Bayshore Corp. is such that both Bayshore SC and Bayshore Corp. would have been obligated to provide workers' compensation benefits to Petitioners if they had not obtained benefits from Job Place. There is no doubt that under these facts, Bayshore SC and Bayshore Corp. would fall under the Workers Compensation Act for purposes of providing workers' compensation benefits to Petitioners. The analysis must therefore work both ways, in that, if Respondents would have been required to provide workers' compensation benefits to Petitioners, then Respondents must also be immune to tort liability. Thus, the Workers Compensation Act required Respondents to secure, and they did secure, workers' compensation coverage which would have benefited Petitioners. Petitioners' contention that neither Bayshore Corp. nor Bayshore SC had secured workers' compensation benefits is an erroneous allegation based on Petitioners' misstatements and omission of material facts in order to force the law to fit the theory of their case.

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THAT BAYSHORE SC AND BAYSHORE CORP. ARE ENTITLED TO IMMUNITY PURSUANT TO THE EXCLUSIVITY PROVISION OF THE WORKERS' COMPENSATION ACT.

Bayshore SC and Bayshore Corp. are entitled to tort immunity, pursuant to the exclusive remedy provision of the Workers Compensation Act, South Carolina Code Section 42-1-540, since Petitioners were solely performing the work of Bayshore SC and Bayshore Corp. Bayshore SC qualifies as both a special employer and statutory employer to Petitioners, since Petitioners were leased employees under the direction and control of Bayshore SC and since Petitioners were performing the necessary and essential work of Bayshore SC.

Bayshore Corp. is a statutory, upstream employer, since the work being performed by Petitioners, through Bayshore SC, was part of Bayshore Corp.'s trade, business, and occupation and had been previously performed by Bayshore Corp. Moreover, as an "owner" of the project, Petitioners were performing work that directly benefitted Bayshore Corp. The record will show that Bayshore Corp. was the leaseholder of the jobsite and that the Petitioners' work in dismantling the plant site satisfied the lease's requirement to return the site to its pre-lease condition.

Petitioners wrongfully claim that Bayshore Corp. is not entitled to immunity since Bayshore Corp. and Petitioners are "co-subcontractors" and since Bayshore Corp. cannot be immune by virtue of the parent/subsidiary relationship between Bayshore SC and Bayshore Corp. The claim that Bayshore Corp. and Petitioners are "co-subcontractors" must fail since Petitioners have tortured certain facts in the record and completely omitted others, thus allowing them to contort the employment relationship between the

parties to fit their purported legal claim. Similarly, Petitioners mistakenly argue that Bayshore Corp. relies solely upon its parent/subsidiary relationship with Bayshore SC to achieve immunity, whereas in truth, Bayshore Corp. is entitled to immunity because Petitioners were performing the work of Bayshore Corp.

A. Bayshore SC is Entitled to Immunity Under Workers' Compensation Exclusivity

1. Bayshore SC Is Entitled to Workers' Compensation Exclusivity as Petitioners' Special Employer

Petitioners are the "borrowed" or "lent" employees of Bayshore SC. In South Carolina, the special employer or borrowed employee analysis is a three-prong analysis: (1) the existence of an express or implied contract of hire; (2) the lent employee is performing the work of the special employer; and (3) the special employer had the right of control over the lent employee. DeBerry v. Coker Freight Lines, 234 S.C. 304, 108 S.E.2d 114 (S.C. 1959)³. Bayshore SC is entitled to immunity as a special employer since Petitioners were leased, or borrowed, employees performing the work of, and under the direct control of, Bayshore SC. When an employee is leased through an employee leasing agency, the applicable test is whether the special or leasing employer had right of control over the leased employee, since there is no question that the leased employee is performing the special employer's work and not that of the leasing agency. See Nix v. Columbia Staffing, Inc., 322 S.C. 277, 281, 471 S.E.2d 718, 720 (S.C. Ct. App. 1996). The special, or borrowed, employee analysis is significant since the majority of

³ In finding that a trucking company was the special employer of leased truck driver, where the driver was under the direction and control of the trucking company, the this Court said, "the right or power of control retained by the person for whom the work is being done is uniformly regarded as the essential criterion for determining whether the workman is an employee or an independent contractor." DeBerry at 304, 116-17.

jurisdictions hold that such employees are not the same as subcontractors. See fn. 6, *infra*. Thus, if this Court finds that Petitioners were special or borrowed employees to Bayshore SC, as distinguished from subcontractors under the statutory employer analysis, then Petitioners' erroneous "co-subcontractor" analysis becomes irrelevant.

In Nix, the plaintiff, a subcontractor for Duke Power, was injured when he fell from scaffolding built by employees leased by Duke Power from CSI (Columbia Staffing, Inc.), an employee leasing agency. Id. at 280, 719. The court in Nix held that CSI was entitled to workers' compensation exclusivity since the leased employees were the lent employees of Duke, thus sharing Duke's tort immunity. See id. at 281, 720. The court used a right-of-control test in finding CSI immune, when it said:

CSI took prospective employees' applications, performed various administrative tasks, and then sent them to Duke Power, where Duke assigned the employees their tasks. The employees performed their assigned tasks under the direct supervision and control of Duke Power. Duke Power also provided the employees with all equipment necessary to perform work. Furthermore, the trial judge found Duke had full authority to reject, transfer, or terminate the employees sent by CSI.

Id.

Other South Carolina cases have held that special employers are immune from civil suit brought by their leased employees. In Day v. Sanders Bros., Inc., 315 S.C. 95, 431 S.E.2d 629 (S.C. Ct. App. 1993), Day was a leased employee from Talent Tree and was injured while being leased to Milliken Magnolia Plant. The South Carolina Court of Appeals held that "Day could not sue Milliken because of the exclusive remedy provision of the workers' compensation act." Id. at 96, 630; see also Eaddy v. A.J. Metler Hauling & Rigging Co., 284 S.C. 270, 325 S.E.2d 581 (S.C. Ct. App. 1984) (holding that a driver

who was lent by his employer to Metler Hauling was deemed an employee of Metler for purposes of workers' compensation, since Metler benefited from his work and had right of control over details of his work). In Huff v. Marine Tank Testing Corp., 631 F.2d 1140 (4th Cir. 1980), a welder leasing company, Perry Welding, assigned plaintiff to work at Allied, who supplied the leased welders with welding fuel, assigned all work to the leased welders, controlled the manner of their work and generally treated the leased workers as Allied employees. Id. at 1142. In finding that Allied was entitled to exclusivity, the Huff court said:

Clearly, Perry Welding was not a sub-contractor . . . There was never an undertaking on Perry's part to accomplish any specific work. Its obligation was fulfilled when it supplied welders and equipment. It was a source of supply of manpower to satisfy a temporary need. They functioned substantially as those widely-known suppliers of temporary help Manpower, Inc. and Kelly Girl, Inc., each of which has been held not to have been the primary employer when injuries occurred in the performance of a temporary job . . . Perry Welding had no concern with the details of the work being done by the welders. It fully performed its part of the bargain when it supplied the equipment and qualified welders who would accept the direction of Allied supervisors . . . The work being done was entirely Allied's work. It was solely responsible for working conditions and hazards which might be encountered in the course of the work . . . [S]ince Allied paid Perry Welding on a man-hour basis, the relation of Allied to the wages that plaintiff actually received was much less indirect than it would have been if Perry Welding had undertaken to accomplish a specific construction objective by its employees and resources.

Id. at 1143. Numerous other jurisdictions have explicitly held that a leased employee is always performing the special employer's work and that the only meaningful test is right of control. See fn. 6, *infra*.

Bayshore SC is immune from tort liability as special employer since (1) it had the right of control over Petitioners and their work; (2) provided equipment to Petitioners;

and (3) had the right to terminate Petitioners from the job site. See Huff at 1143. First, Bayshore SC controlled Petitioners' work and how they performed it. Jolene Coyle of Job Place testified that Petitioners were under the direct control and supervision of Bayshore SC and that Bayshore SC was solely responsible for ensuring Petitioners did their job. (R. p. 173). Bayshore SC set the work schedule for Petitioners and instructed them on how to perform their work. (R. pp. 723-24). In fact, Job Place never supervised Petitioners and understood that Petitioners would be under the supervision of Larry Lenart, Bayshore SC's supervisor. (R. p. 720).

Petitioner Key described Bayshore SC's extensive right of control when he testified Petitioners always worked at the direction of Bayshore supervisors, who told them where to go on the jobsite, what to do, and with whom to do it. (R. 780-81, 824). On the day of the accident, Lenart gave Petitioners specific directions as to how the casting beds were to be dismantled, actually working alongside Petitioners. (R. pp. 137-38). Lenart instructed Petitioners they would be removing casting beds out of the ground. (R. p. 825). Lenart told Petitioners where the casting beds were to be removed and directed them to that area. (R. p. 825). These specific examples clearly show Bayshore SC's right of control over Petitioners and their work.

Second, Bayshore SC provided equipment to Petitioners. Other than leather shoes and hard hats, which workers were required to bring with them to work, Bayshore SC provided the leased employees with all work equipment including shovels, work gloves, safety glasses and other equipment used in deconstructing the facility. (R. pp. 691, 780-81). Third, Bayshore SC had the right to terminate Petitioners. Key testified that

Bayshore SC had the right to ask leased employees to leave the job site and that Bayshore SC specifically terminated one leased worker for not working hard enough or fast enough. (R. pp. 781-82, 819).

Since Bayshore SC had the right of control over Petitioners and the manner in which they performed the work, provided equipment to them, and had the right to fire them or ask them to leave the job site, Bayshore SC is the special employer of Petitioners and is entitled to workers' compensation immunity.

2. Bayshore SC is Entitled to Workers' Compensation Exclusivity as Petitioners' Statutory Employer

Alternatively, Bayshore SC qualifies as the statutory employer of Petitioners and is entitled to workers' compensation exclusivity. In determining whether a worker is a statutory employee, South Carolina courts consider three factors, whether: (1) the activity is an important part of the owner's trade or business; (2) the activity is a necessary, essential, and integral part of the owner's business; or (3) the activity has been previously performed by the owner's employees. Bailey v. Owen, 298 S.C. 36, 39, 378 S.E.2d 63, 65 (S.C. Ct. App. 1989), *reversed on other grounds*, Bailey v. Owen, 301 S.C. 399, 392 S.E.2d 186 (S.C. 1990). Only one of these three factors needs to be satisfied and the guidepost is whether the activity being conducted is part of the general trade or occupation of the owner. Hopkins v. Darlington Veneer Co., 208 S.C. 307, 311, 38 S.E.2d 4, 6 (S.C. 1946).

In fact, Petitioners have admitted in their Court of Appeals brief that the "work being done [by Petitioners] on the site may have been part of the business of Bayshore SC." (Court of Appeals Brief of Appellants, p. 20, § I, B, 3). Moreover, Petitioners have

not preserved the issue before this Court whether Bayshore SC is a statutory employer of Petitioners. Therefore, Petitioners concede that Bayshore SC satisfies the Bailey test for statutory employer. An analysis of the relevant case law in fact confirms that Bayshore SC is entitled to immunity as statutory employer of Petitioners.

In Posey v. Proper Mold & Eng'g, Inc., 378 S.C. 210, 661 S.E.2d 395 (S.C. Ct. App. 2008), PME/Autegra, which manufactured products for the automotive industry and provided repair services, owned two commercial transport vehicles and employed two drivers with South Carolina Commercial Drivers Licenses. When PME/Autegra's own drivers were unavailable, it contracted with Tiger Transport Service, Inc. to supply a driver, Posey. Posey picked up items for repair, returned to PME/Autegra, and worked together with a PME/Autegra employee to unload molds. During the unloading process, Posey was injured when a crane operated by a PME/Autegra employee came loose and struck Posey in the head. Id. at 215, 398. Posey collected workers' compensation benefits from Tiger Transport, then filed a negligence suit against PME/Autegra. Id. The Court of Appeals upheld the trial court's dismissal of his suit, holding that Posey was a statutory employee of PME/Autegra.

In another recent case, the South Carolina Court of Appeals held that Wal-Mart was immune to tort suit pursuant to workers' compensation exclusivity when an employee of a product vendor was injured while assembling the vendor's product at Wal-Mart, for the benefit of Wal-Mart. Hancock v. Wal-Mart Stores, Inc., 355 S.C. 168, 173, 584 S.E.2d 398, 400 (S.C. Ct. App. 2003). The court's reasoning was that the employee's work was performed for the benefit of Wal-Mart and obligated Wal-Mart to

provide workers' compensation insurance, thus entitling Wal-Mart to the exclusive remedy provisions of the Workers' Compensation Act. Id. Additionally, in Wheeler v. Morrison Machinery Co., 313 S.C. 440, 438 S.E.2d 264 (S.C. Ct. App. 1993), Morrison Machinery was held to be the statutory employer of an asbestos removal subcontractor's employee, even though Morrison was not in the business of asbestos removal, because Morrison had used its own employees to remove asbestos insulation from machinery in the past and had used its own employees to remove asbestos alongside the hired subcontractors, and because it was necessary for the company to remove asbestos in order to maintain the machinery's function. Id. at 265-66. Finally, in Wright v. Westvaco Corp., 522 F. Supp. 775 (D.S.C. 1981), a paper mill was deemed a statutory employer when a subcontractor's employee was injured while removing old equipment to make room for new equipment. Id. at 776-78. The Wright court found workers' compensation exclusivity for Westvaco was proper and logical since Westvaco would have been responsible for workers' compensation insurance coverage, had the subcontractor not provided those benefits. See id.

Bayshore SC satisfies any one of the three tests enumerated in Bailey. First, the work performed by Petitioners was an important part of Bayshore's ("Bayshore" generally refers to both Bayshore SC and Bayshore Corp.) business activities. Colonna, president of both Bayshore SC and Bayshore Corp., testified that the collapsed trench was dug in order to dismantle a concrete casting bed by removing concrete abutments from steel piles driven into the ground. (R. pp. 639-41). Colonna testified that dismantling casting beds was performed regularly by Bayshore employees as a means of

changing concrete forms, and typically involves Bayshore personnel digging trenches and clearing dirt from around steel girders with hand shovels so the girders could be cut away. (R. p. 667). The dismantling of casting beds was important in that 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.” (R. p. 668).

Second, Colonna testified in his deposition that dismantling concrete casting beds was a necessary and integral part of Bayshore’s business. The initial construction of the concrete beds is routinely completed by regular, payroll employees at every Bayshore facility and the specific concrete bed being dismantled by Petitioners was constructed by regular Bayshore SC employees. (R. pp. 666-69). Dismantling the casting beds was also typically performed by Bayshore employees using the same methods Petitioners were instructed to use; *i.e.* entering a trench to dig around steel girders with a hand shovel, so that Bayshore employees could use a blowtorch to cut the concrete abutments from the steel piles. (R. p. 667-68). In addition, Lenart testified that he first dug the trench around the abutments with a backhoe and then instructed Petitioners to enter the trench to dig around the pile caps and steel beams with hand shovels so that Bayshore SC-employed welders could cut the steel beams. (R. pp. 877-80, 825).

Third, the construction and dismantling of these concrete forms and the site cleanup had previously been performed by Bayshore SC employees for several months prior to leasing Petitioners. (R. pp. 671-73). Bayshore SC’s regular employees quit to find other work since Bayshore Corp. was closing the South Carolina facility, requiring Bayshore SC to lease employees to assist the remaining regular employees with the site

cleanup and dismantling process. (R. pp. 671-73). According to both Colonna and Lenart, Bayshore SC's regular employees and Petitioners were working together to clean up the site and to dismantle the concrete forms. (R. pp. 672-73; 877-80). Lenart, the Bayshore SC Production Supervisor, (R. pp. 597-98), specifically testified that he dug the trenches himself, that he got into the trench with Petitioners to show them how to dig around the steel piles, and that Bayshore SC's regular employees would have entered the trench to cut the steel piles with welding equipment. (R. pp. 877-80). Lenart further testified that there was no division of labor and all employees, both leased and payrolled employees, disassembled facilities, dug trenches, separated steel, burned wood, loaded equipment, and disposed of trash. (R. pp. 877-80).

Testimony from Colonna and Lenart confirms that the Petitioners' work activities were important, necessary, and integral to both Bayshore SC and Bayshore Corp.'s regular business operations. These same activities were performed by all Bayshore employees in the past and would have been performed solely by Bayshore SC's employees at the time of this incident had it not experienced a staffing shortage. Therefore, in hiring leased employees to work alongside Bayshore SC employees in dismantling equipment, Bayshore SC was the statutory employer of Petitioners, obligating them to provide Petitioners' workers' compensation coverage and entitling Bayshore SC to immunity pursuant to workers' compensation exclusivity.

B. Bayshore Corp. Is Entitled to Immunity Pursuant to Workers' Compensation Exclusivity

1. Bayshore Corp. Is a Statutory, Upstream Employer Entitled to Immunity From Petitioners' Tort Claims

The Court of Appeals correctly affirmed that Bayshore Corp. is immune as an upstream statutory employer since Petitioners were performing the work of both Bayshore SC and Bayshore Corp. The Court of Appeals appropriately applied Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (S.C. Ct. App. 1997), wherein the injured Voss was the direct employee of Jones, who was in the business of selling Ramco equipment, due to the complete control Jones exerted over Voss in “directing where Voss works, as well as how and to whom Voss sells Ramco equipment.” Id. at 566-67, 587-88. Ramco was held to be the statutory employer of Voss since the selling of Ramco’s equipment was an activity without which Ramco could not remain in business, even though Ramco neither had involvement with Voss nor had control over Voss’ sale of Ramco equipment. Id.

Further, in Ost v. Integrated Products, Inc., 296 S.C. 241, 371 S.E.2d 796 (S.C. 1988), this Court held that the employees of National Sales Company, Inc. were the statutory employees of Integrated Products, Inc., even though National and Integrated were separately incorporated “sister” corporations. In Ost, this Court considered the close and intertwined business relations between the two companies: (1) the entire business of National was selling a product for Integrated; (2) the same family members served as similar officers of both corporations and “considered the two companies to comprise the Integrated Products, National Sales family;” and (3) both National and Integrated had previously engaged in the sale of the same product. Id. at 245-47, 799.

Just as in Ost, Bayshore Corp. is the statutory employer of Petitioners due to the intertwined business relations of Bayshore SC and Bayshore Corp. Essentially, the entire

business of Bayshore SC was performing Bayshore Corp.'s work. First, Bayshore SC was actually an extension of Bayshore Corp.'s business of manufacturing pre-stressed concrete forms for construction projects. Bayshore Corp. was in the business of manufacturing pre-stressed concrete forms for construction projects. Subsidiaries, such as Bayshore SC, were created to expand the general business of Bayshore Corp., essentially establishing remote casting yards for Bayshore Corp. and the business it generated. (R. pp. 852-76). In answering why the term "Bayshore" was used interchangeably between Bayshore Corp. and Bayshore SC, Colonna testified:

A. We felt like we had a well-established name in the industry, and when I was talking to customers all up and down the East Coast, I referred to Bayshore, rather than Bayshore Concrete Products/South Carolina, Inc.

Q. So you would use the term interchangeably?

A. Yes.

(R. p. 651). In this instance, the very job Bayshore SC was created to perform, the Carolina Bays project, was obtained by Bayshore Corp. and was the responsibility of Bayshore Corp. (R. p. 855). Second, Bayshore Corp. and Bayshore SC had intertwined business operations. Bayshore Corp. often conducted business for or directly on behalf of Bayshore SC, using Bayshore Corp. letterhead and signatures from Bayshore Corp.'s main offices in Virginia. (R. p. 854). In fact, all administrative business decisions for Bayshore SC, such as pricing, marketing, annual budgeting, customer service, etc., were made from the Bayshore Corp. main offices in Virginia. (R. p. 854). Bayshore SC used standard Bayshore Corp. applications and Bayshore Corp. letterhead; Bayshore SC's salaried employees were paid by Bayshore Corp. and then expensed to Bayshore SC's operating budget. (R. at 602-08). Both Bayshore Corp. and Bayshore SC also shared

safety protocols and manuals. (R. pp. 663-64). Employees of both Bayshore Corp. and Bayshore SC shared the same workers' compensation policies, 401(k) plan, and health care plans, all of which were paid by Bayshore Corp. and expensed to Bayshore SC for Bayshore SC employees. (R. pp. 602-04, 611-12). During the entire two years Bayshore SC existed, a South Carolina clerk would match up a receiving ticket and invoices and verify the quantities and send it to Bayshore Corp. in Virginia, which would send out a check that said Bayshore SC. (R. p. 652). As the sole shareholder of Bayshore SC, Bayshore Corp. realized all gross revenues of Bayshore SC. (R. p. 854).

Third, Bayshore Corp. and Bayshore SC shared employees and had similar business activities. Colonna and Donnie Kellam held positions with both Bayshore Corp. and Bayshore SC, but both of their salaries and expenses were paid solely by Bayshore Corp. and were not expensed to Bayshore SC, unlike the salary for Lenart, which was paid by Bayshore Corp. and expensed to Bayshore SC. (R. pp. 594, 661-62). Colonna and Kellam maintained their offices in Virginia and actually traveled from Virginia to South Carolina to perform work for Bayshore SC. (R. pp. 661-62, 853). The Board of Directors for Bayshore Corp. and Bayshore SC were substantially similar. In 2002, Bayshore SC's only two board members, Keith Colonna and John Chandler, were shared board members of Bayshore Corp. (R. p. 857).

Bayshore Corp. is immune from liability since Petitioners were performing its work in dismantling the casting beds at the South Carolina facility. This work was necessary and essential to all Bayshore entities in that casting beds are typically dismantled as part of their general trade and business. This is precisely the type of

relationship the Workers Compensation Act envisioned when it describes the concept of an upstream statutory employer. For these reasons, Bayshore Corp. would have been responsible for workers' compensation coverage and is immune pursuant to workers' compensation exclusivity as an upstream employer.

2. Bayshore Corp. Was an "Owner" of the Project Petitioners Were Working on and Petitioners' Work Directly Furthered Bayshore Corp.'s Obligations and Corporate Purpose

Bayshore Corp. is also entitled to workers' compensation immunity since Petitioners were performing the work of Bayshore Corp. as an "owner," as defined by the Workers Compensation Act, since the Carolina Bays Parkway project was a bid secured by Bayshore Corp., since Bayshore Corp. was the leaseholder of the facility Petitioners were dismantling, and since Bayshore Corp. purchased the equipment for use on the project, which Petitioners were dismantling to send back to Bayshore Corp. for use in other Bayshore Corp. projects. Pursuant to South Carolina Code Section 42-1-400, an "owner" of a project or enterprise may come within the jurisdiction of the Workers' Compensation Act as an upstream employer if the work of the injured worker is part of the owner's trade or business.

When any person, in this section and §§ 42-1-420 to 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 that workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400; see Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 73, 267 S.E.2d 524, 528 (S.C. 1980) (holding that a partnership building a mini-storage facility on land it owned was a statutory employer of an injured employee of a roofing subcontractor, since the injured roofer was working on the partnership's project, even though the partnership hired a general contractor to perform the actual work, who in turn hired the roofing subcontractor).⁴

Once the highest responsible person is determined under the Workers' Compensation Act, every intermediate contractor under him is responsible for workers' compensation coverage and is immune from civil suit. See McCaskey v. Daniel International Corp., 442 F. Supp. 1360, 1362 (D.S.C. 1977). This Court holds that the clear purpose of the Act is to "make the 'owner,' the [entity] who is interested in having the work done, liable to the employee so injured." Kennerly v. Ocmulgee Lumber Co., 206 S.C. 481, 34 S.E.2d 792, 795 (S.C. 1941) (holding that a lumber company that owned a sawmill and a wooded tract of land was the statutory employer of an injured employee of a logging subcontractor, even where that subcontractor alone was responsible for felling trees on the "owner's" property and bringing them to the "owner's" sawmill).

Bayshore Corp. is the statutory employer of Petitioners as the owner of the Carolina Bays Parkway project. Bayshore SC was created by Bayshore Corp. for the sole

⁴ "The effect of these [workers' compensation] provisions when brought into operation is to impose the absolute liability of an immediate employer upon the owner and/or general contractor although it was not in law the immediate employer of the injured workman... It is common knowledge that a substantial portion, and sometimes all, of construction contracts are carried out by way of subcontracts. 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 at 72, 527-28.

purpose of fulfilling a Carolina Bays bid procured by Bayshore Corp. (R. pp. 852-76). Colonna testified that Bayshore Corp. was successful in procuring the bid to perform work in South Carolina and a Bayshore Corp. board of directors meeting was held to decide on establishing a location in South Carolina, prior to the actual formation of Bayshore SC. (R. pp. 610-11). The Bayshore Corp. Board Minutes of April 21, 2000, further state:

Next came a review of potential work through geographic expansion. The Board discussed the pending order from Palmetto Transportation Constructors of \$10,000,000 and the available casting site in Longs, SC operated by Traylor Brothers. It was decided that the used equipment would be purchased from Traylor Brothers and a lease agreement would be negotiated with the owners of the property to secure the contract. Upon completion of the project, a decision would be made as to continuation of a presence in South Carolina.

(R. p. 917). The very next thing that happened was Bayshore Corp. incorporated Bayshore SC. The Bayshore SC Board Minutes of that same date subsequently establish Bayshore SC as a new entity adopting a financial year "in keeping with the parent company." (R. p. 918). Bayshore Corp. established Bayshore SC separately for purposes of financial accountability, but all the subsidiary companies effectively contributed toward the bottom line of Bayshore Corp. (R. pp. 105; 852-76). The Bayshore Corp. Board Minutes of January 22, 2002 (two years later) state:

The next order of business was a detailed discussion of the financial results and prospective work in South Carolina. It was decided that the unfavorable sales prices due to competition and the production cost overruns did not warrant an additional investment in land or a batch plant to convert the South Carolina plant into a permanent casting yard. RESOLVED, that the Directors of the Corporation recommend closing the temporary plant in Longs, South Carolina upon completion of the Palmetto Transportation Constructors Carolina Bays Parkway project and that the equipment be utilized in the remaining locations to expand capacity.

(R. pp. 919-21). These board meeting minutes show conclusively that Bayshore SC was created by Bayshore Corp. as a temporary casting yard for the purpose of performing Bayshore Corp.'s bid work on the Carolina Bays Project. To that extent, Bayshore SC was created to be a temporary presence and it was intended that Bayshore SC employees would dismantle the site for the interests of both Bayshore SC and for Bayshore Corp., as the leaseholder, and return Bayshore Corp.'s equipment back to it to be used at its other facilities. Colonna testified both in his deposition and affidavit that Bayshore Corp. secured the bid for the job in South Carolina, and that Bayshore Corp. created Bayshore SC for the sole purpose of fulfilling that bid. (R. pp. 605-08, 852-76). That Bayshore Corp. acquired the bid and created Bayshore SC to fulfill that job as a remote casting site is the paradigm example of an "owner" who is deemed a statutory employer.

Bayshore Corp. purchased the equipment which Bayshore SC used to make the concrete forms at the plant site. (R. pp. 917-18, 894-901). On April 21, 2000, the Bayshore Corp. board of directors authorized Bayshore Corp. to purchase used equipment for the project from the previous tenant, Traylor Brothers. (R. p. 917). On January 22, 2002, the Bayshore Corp. board of directors authorized that the same used equipment from the site be utilized in the remaining Bayshore subsidiary locations to expand their capacity. (R. pp. 919-20). By dismantling the equipment owned by Bayshore Corp. and returning that equipment back to Bayshore Corp., Petitioners were further performing the work of Bayshore as an "owner" of the equipment.

The Bayshore Corp. Board Meeting Minutes of April 21, 2000, unequivocally show that Bayshore Corp. intended to enter into the Lease itself. (R. pp. 917-18, 894-

901). The terms of the November 1, 2000, Lease, executed by “Bayshore Concrete, a Virginia Corporation,” required Bayshore Corp. to return the property to its pre-lease condition. Section 1.02 of the Lease specifically says:

The parties agree that any and all changes, alterations, or improvements to the leased premises shall be removed upon expiration of the initial term of the lease or extension thereof. It is further understood that the existing facilities utilized by a previous tenant (Traylor Brothers), including but not limited to, piling concrete foundations . . . involved in the construction of . . . the Carolina Bays Parkway, shall be removed by Lessee.

(R. p. 895). Colonna testified that he travelled to Bayshore SC frequently on behalf of Bayshore Corp. “to meet with the landlord to make sure that the plant was being cleaned up to satisfy him.” (R. p. 598): Since Bayshore Corp. was the named lessee on the Lease, Petitioners were performing work which directly benefited Bayshore Corp.’s responsibilities as an “owner” under the Lease.

For these reasons, Petitioners’ work directly benefitted Bayshore Corp. If the Carolina Bays project failed, Bayshore Corp. would answer for the failure. If Bayshore Corp. failed to return the South Carolina plant site to its pre-lease condition, Bayshore Corp. would be sued for breach of contract. If Petitioners damaged the equipment they dismantled, Bayshore Corp. would have been unable to reuse the equipment. Therefore, Bayshore Corp. is clearly entitled to workers’ compensation immunity as an “owner.”

C. **Petitioners Misstated the Facts to Erroneously Conclude that Bayshore Corp. and Lenart are “Co-Subcontractors” to Petitioners**

Though the theory was rejected by both the trial court and Court of Appeals, Petitioners again hang their hat on the idea that they and Lenart/Bayshore Corp. were “co-subcontractors” on the Carolina Bays project, and that Bayshore Corp. is, therefore,

not entitled to workers' compensation immunity as Petitioners' statutory employer. In this regard, Petitioners incredibly claim that Bayshore Corp., which was in fact the project "owner," was actually a *subcontractor* performing work for its subsidiary, Bayshore SC. This is suspect reasoning at best.⁵ The Workers' Compensation Act clearly defines a subcontractor:

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 . . .

S.C. Code Ann. § 42-1-410, *Liability of Contractor to Workmen of Subcontractor* (emphasis added). Further, Black's Law Dictionary defines "subcontractor" as:

One who takes a portion of a contract from principal contractor or another subcontractor. One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance. One who takes from the principal or prime contractor a specific part of the work undertaken by the principal contractor.

BLACK'S LAW DICTIONARY (6th ed. 1990). Thus, a contractor is defined as a person who is hired to perform work by another person who does not do that same work. The subcontractor is the person the contractor hires to perform a part of that work. Pursuant to these definitions, there is simply no evidence that either Bayshore Corp. or Lenart entered into a contract as a "co-subcontractor" to Bayshore SC to perform work for

⁵ In describing Lenart as a "co-subcontractor," Petitioners confuse the notions of the subcontractor analysis and borrowed employer analysis. Lenart did not work for himself. Under Petitioners' theory, Lenart must be an employee of "subcontractor" Bayshore Corp., and Petitioners must be employees of Job Place. Thus, under Petitioners' theory, Bayshore Corp. must be a subcontractor to Bayshore SC, which is wholly unsupported by the record. However, Petitioners seem to "factually" describe Lenart as a borrowed employee from Bayshore Corp. to Bayshore SC. If Lenart is a borrowed employee, then Lenart is not a subcontractor, or "co-subcontractor," to Petitioners.

Bayshore SC, especially when the facts show Bayshore SC was created to perform Bayshore Corp.'s work in the first place.

1. Lenart Was an Employee of Bayshore SC and Was Not a Co-Subcontractor of Petitioners

Petitioners torture the record to reach the conclusion that Larry Lenart was a Bayshore Corp. employee, and that Bayshore Corp. contracted with Bayshore SC to loan Lenart's services, thus making him a co-subcontractor of Petitioners. However, even if Petitioners produce a mere scintilla of evidence that Lenart was a Bayshore Corp. employee, which is specifically denied, there is not a shred of evidence that Bayshore Corp. and Lenart were co-subcontractors of Petitioners.

Incredibly, Petitioners represent to this Court that "the only evidence brought forth that would indicate that Lenart was an employee of Bayshore SC rather than of Bayshore Corp. (VA) is Lenart's spurious, self-serving affidavit in which he attested that he was employed by Bayshore Concrete Products/South Carolina, Inc." (Petitioners' Brief p. 11 (I,B)). This assertion by Petitioners is patently false. There is plentiful evidence Lenart was a Bayshore SC employee:

- (1) Keith Colonna, president of Bayshore SC and Bayshore Corp., testified Lenart was hired in South Carolina to be a Bayshore SC employee. (R. pp. 605, 620). Colonna testified that Lenart was hired in South Carolina, having been working at Traylor Brothers, which was the plant that pre-existed Bayshore SC in Longs, South Carolina. (R. pp. 605, 620);
- (2) Lenart himself testified that he was an employee of Bayshore SC. (R. pp. 877-80);
- (3) Colonna, in his April 28, 2005, affidavit, testified: "The employees in South Carolina, including Larry Lenart, were all paid by Bayshore Concrete Products/South Carolina, Inc." (R. p. 841);

- (4) Colonna testified in his deposition, under questioning from Petitioners' counsel: "Q: And would the safety training that Mr. Lenart received, would that have been training he received while employed at Bayshore Concrete Products Corp.? Wasn't he one of the individuals that was transferred? /A: No. He was hired down in South Carolina." (R. p. 620:13-19);
- (5) Colonna further testified in his deposition that Lenart was the Production Supervisor at Bayshore SC who had ultimate responsibility for dismantling and demolition of the South Carolina site; in this regard, the following exchange occurred between Colonna and Petitioners' counsel: "Q: Any other salaried individuals who were involved in the dismantling and demolition project at the South Carolina site? /A: No. That would have been it. /Q: Who from Bayshore Concrete Products Corp. was involved in that project? . . . /A: I don't remember anyone else going down there [other than myself]." (R. pp. 597-598);
- (6) Petitioners' counsel asked Colonna if Lenart was transferred to the Bayshore Corp. Virginia office after the incident with Petitioners, to which Colonna responded: "That's right . . . And then he began drawing a paycheck from Bayshore Concrete Products Corporation instead of Bayshore Concrete Products/South Carolina." Colonna then explained that all salaried payroll came out of Bayshore Concrete Products Corporation and then the salary payroll was divided and expensed into the subsidiary corporations. (R. p. 601);
- (7) Colonna testified that Lenart was the last salaried employee at the South Carolina site. (R. p. 600);
- (8) Job Place employee Coyle testified that she understood Petitioners would be instructed by the supervising employee of the "client," whom she recalled was Larry Lenart. (R. p. 720). Petitioners do not dispute that Bayshore SC executed the General Agreement and was the "client" of Job Place and Colonna testified that the General Agreement with Job Place was executed by Bayshore SC. (R. pp. 650, 905).

Petitioners further support their claim with evidence that Lenart filled out Bayshore Corp. application and employment forms. Their reliance is misplaced. Colonna testified in his deposition that separate and distinct applications were not developed for the South Carolina corporation: "Q: And that standard application would be a Bayshore

Concrete Products Corp. application?/ A: Yes.” (R. pp. 606-08). Further, Petitioners assert that “*at the time of the accident* Lenart was a salaried employee of Bayshore Corp. . . . in contrast to hourly employees on the site who were paid by Bayshore SC,” which is an absolute mischaracterization of his testimony. (Petitioners’ Brief, p. 10). Colonna repeatedly confirmed that Lenart was hired in South Carolina as an employee of Bayshore SC and that although salaried production supervisors—as Lenart was for Bayshore SC—were paid with checks in the name of Bayshore Corp., that amount was immediately expensed “dollar for dollar” to Bayshore SC. (R. pp. 660-61, 669). Further, Colonna testified that Lenart was transferred from Bayshore SC to Bayshore Corp. after this accident, at which time “he began drawing a paycheck from Bayshore Concrete Products Corporation instead of Bayshore Concrete Products/South Carolina.” (R. p. 601):

2. Borrowed Employees Are Not Subcontractors

Even if Petitioners’ misrepresentation of Lenart’s employment status were true, which Respondents specifically deny, it would not be accurate to say Petitioners and Lenart were co-subcontractors, since Petitioners were solely performing the work of Bayshore SC and Bayshore Corp. Neither Petitioners nor Lenart were performing their own work, and Petitioners were not performing the work of Job Place, since Job Place’s only business was to furnish leased employees. Therefore, as leased employees, Petitioners are most likely special or borrowed employees to Bayshore SC. Courts throughout the country hold, in cases with facts parallel to those at issue, that a leased employee is not a subcontractor of the entity to whom he is leased, but rather is a special

employee performing the work of the special employer.⁶ If Petitioners are borrowed employees working under Bayshore SC, then they are not subcontractor employees of Job Place working under Lenart, an employee of Bayshore Corp., subcontractor to Bayshore SC. That analysis tortures the record on appeal.

Moreover, taking Petitioners' "facts" as accurate, if Bayshore Corp. (Lenart) and Job Place (Petitioners) are co-subcontractors of Bayshore SC, then who was the supervisor or contractor on site for Bayshore SC? Colonna testified that Lenart was the last salaried employee at the South Carolina site, (R. p. 600), and Petitioners admit that Lenart was the only person from whom they were taking their direction and instruction. (R. pp. 137-38, 780-781, 824-825). Petitioners' theory, taken to its conclusion, is illogical. If Lenart was a Bayshore Corp. employee and there were no other Bayshore SC

⁶ Huff v. Marine Tank Testing Corp., 631 F.2d 1140 (4th Cir. 1980) (holding that an employee leasing company "was not a subcontractor" since it "fully performed its part of the bargain" when it supplied qualified workers who would accept the direction of their special employer); Lindsey v. Bucyrus-Erie, 161 Ariz. 457, 778 P.2d 1353 (Ariz. Ct. App. 1989) (holding "the usual rule in cases involving labor contractors is that the employer obtaining workers from a labor service like Manpower assumes the status of special employer and is immune from tort liability"); Vigil v. Digital Equip. Corp., 925 P.2d 883 (N.M. Ct. App. 1996); Kenwal Steel Corp. v. Seyring, 903 N.E.2d 510 (Ind. Ct. App. 2009) (holding lessees of temporary workers must be regarded as employers because it eliminates potential for disparate treatment between permanent and temporary employees—"if we were to hold otherwise, the permanent employee would recover only under the Act while the temporary employee could possibly recover under the Act ... and still pursue a negligence action against the company hiring the temporary employee"); Dixie Lee Honey v. United Postal Service, 879 F. Supp. 615 (D. Miss. 1995); McMaster v. Amoco Foam Prods. Co., 735 F.Supp. 941 (D. S.D. 1990); Daniels v. Riley's Health & Fitness, 840 S.W.2d 177 (Ark. 1992); Capps v. Bariod-NL Indus., Inc., 784 F.2d 615 (5th Cir. 1986), *cert. denied* 479 U.S. 838, 107 S. Ct. 141 (1986); Ensey v. Ozzie's Pipeline Padder, Inc., 446 Fed.Appx. 977 (10th Cir. 2011); St. Claire v. Minn. Harbor Service, Inc., 211 F.Supp. 521 (D.Minn. 1962); Beaver v. Jacuzzi Bros., Inc., 454 F.2d 284 (8th Cir. 1972); Stephens v. Oates, 189 Ga. App. 6 (Ga. Ct. App. 1988); Pepperidge Farm v. Booher, 446 So.2d 1132 (Fla. App. 4 Dist. 1984); Marlow v. Mid South Tool Co., Inc., 535 So.2d 120 (Ala. 1988); Rhodes v. Alabama Power Co., 599 So.2d 27 (Ala. 1992).

salaried employees, there was no one at Bayshore SC for Lenart and Petitioners to work for. Petitioners were not subcontractors working alongside and independently with Lenart, they were working under Lenart's direct supervision, who himself was an employee of Bayshore SC.

Pursuant to the Act's definition of the contractor/subcontractor relationship, there must be evidence of a contract for the subcontractor to perform the work of the contractor. The only evidence Petitioners rely upon is that Lenart received Bayshore Corp. application documents and that Lenart's paychecks came from Bayshore Corp. These are insufficient facts to support Petitioners' claims.

D. Bayshore Corp. Is Immune From Liability Because Petitioners Were Performing Its Work, Not Because of a Parent/Subsidiary Relationship

Petitioners mistakenly argue that the Court of Appeals erred in holding that Bayshore Corp. is entitled to immunity due to its parent/subsidiary relationship with Bayshore Corp. simply because Bayshore Corp. is the parent corporation of Bayshore SC. This is a misreading of the Court of Appeals' opinion. The South Carolina Court of Appeals accurately identified the Respondents' position when it said: "Bayshore argues it receives immunity under the exclusivity provision because [Petitioners] were actually doing the work of Bayshore Corp., not because of a parent/subsidiary relationship." This Court, in Brown v. Moorhead Oil Co., 239 S.C. 604, 124 S.E.2d 47 (S.C. 1962), said that the test is whether the evidence is sufficient to justify that the subsidiary company is an "instrumentality" of the parent, in the same way that an agent is the instrumentality of its principal. Bayshore SC was an instrumentality of Bayshore Corp.

The Voss and Ost analyses, relied upon by the Court of Appeals, are intended to work through the determinative factors of whether a subsidiary corporation is performing the necessary and essential work of its parent corporation as an “instrumentality,” in much the same way that the statutory employer test analyzes whether a subcontractor was performing the work of its contractor as an “instrumentality,” and in much the same way the special, or lent, employee test analyzes whether a lent employee is performing the work of its borrowing, or special, employer, as an “instrumentality.”

The Court of Appeals correctly held that Bayshore Corp. is entitled to immunity under the workers’ compensation exclusivity provisions since Bayshore Corp. was the “owner” of the project, and Petitioners were performing the work of Bayshore SC, which was performing the project for Bayshore Corp. Petitioners’ work dismantling the South Carolina site was directly relevant to both Bayshore SC and Bayshore Corp.’s work associated with the Carolina Bays project and to Bayshore Corp.’s interest in the site equipment and its obligation to return the site to its pre-lease condition.

While the Moorhead Oil case correctly states the law, the facts of that case are not relevant to the case at bar, since Crown Royal Services, Inc. was not performing the work of Moorhead Oil. Moorhead Oil, 239 S.C. 604, 124 S.E.2d 47. Crown Royal and Moorhead Oil were “sister” entities with one common stockholder that engaged in two completely different businesses. Moorhead Oil sold petroleum products and owned a series of gas-stations. Id. at 607-10, 48-50. Crown provided tire-capping services. Id. Brown, an employee of Crown Royal, was injured and sought workers compensation’ benefits from Moorhead under the theory that the two companies were inter-related due

only to common ownership interests and common administrative management of the one common shareholder. There was no evidence, however, that Crown Royal performed the necessary and essential business of Moorhead Oil. Id. The Voss and Ost cases are distinguishable from Moorhead Oil in that they show “related” corporate entities where one entity is actually performing the necessary and essential work of the other.

Respondents have clearly stated that Bayshore Corp. and Bayshore SC are entitled to immunity under workers compensation exclusivity, not simply because of the parent/subsidiary relationship, and not simply because of the common administrative management they shared, but because Bayshore SC was an instrumentality of Bayshore Corp. Petitioners were performing the necessary and essential work of Bayshore SC, which in turn was performing the necessary and essential work of Bayshore Corp.

II. BAYSHORE CORP. AND BAYSHORE SC SECURED WORKERS' COMPENSATION INSURANCE AND COMPLIED WITH THE REQUIREMENTS OF THE ACT.

It is axiomatic that if Respondents would have been responsible for providing workers' compensation benefits under the Act, then they are entitled to immunity. Thus, in order for Respondents to take advantage of immunity under the exclusivity provisions of the Act, they must have secured workers' compensation coverage for Petitioners, either directly or indirectly.

Petitioners continue to rely upon Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 327, 523 S.E.2d 766, 773 (S.C. 1999), which correctly stands for the specific proposition that an upstream employer cannot take advantage of workers' compensation exclusivity where that employer failed to obtain workers' compensation coverage for

itself. Id. at 327, 773. However, this case is inapplicable since Respondents had secured workers' compensation coverage that would have provided benefits to Poch and Key had they not received the same from Job Place. Petitioners make serious misrepresentations to this Court when they ignore the clear facts of the record and claim that neither Bayshore Corp. nor Bayshore SC secured workers' compensation coverage for Petitioners.

The only factual basis Petitioners' cite for the proposition that Bayshore Corp. and Bayshore SC did not have workers compensation insurance is that a copy of the workers' compensation policy was not produced in the record. (Petitioners' Brief at p. 22). While making this assertion, Petitioners bury, in the footnotes, their recognition of an insurance company affidavit showing Bayshore SC and Bayshore Corp. did have workers' compensation coverage. (Petitioners' Brief, pp. 21-22). Specifically, Richard Stadler, a Travelers Insurance underwriter who was familiar with the policy covering Bayshore Corp. and Bayshore SC, testified that both entities had a workers' compensation policy that covered both Petitioners. (R. pp. 844-45). Petitioners ask that the "conclusory," "four-sentence" affidavit not be given any probative value, as if its length speaks to its veracity. Moreover, Petitioners disingenuously claim that Stadler's affidavit is a "self-serving" statement from "their" underwriter, despite Mr. Stadler's express statement that he was a construction underwriter for Travelers Insurance Company, not Bayshore SC or Bayshore Corp.

Further, Petitioners' own counsel thoroughly questioned Keith Colonna, president of both Bayshore Corp. and Bayshore SC, about the workers' compensation insurance,

which was “secured” for both companies through a construction umbrella policy at the time of the incident. (R. pp. 611-15).

- Q. I’m assuming at the South Carolina site workers’ compensation coverage was secured?
- A. Yes.
- Q. Is that correct?
- A. Yes.
- Q. And who was involved in securing the workers’ compensation insurance coverage for that site?
- A. It would have been myself by just calling and adding another company.

(R. p. 611). Petitioners’ counsel further questioned Mr. Colonna about how workers’ compensation claims at Bayshore SC were handled:

- Q. Who at Bayshore Concrete Products Corp. handled the workers’ compensation claims that were made?
- A. Donnie Kellam
- Q. And would he be the same individual that would have handled workers’ compensation claims coming out of the South Carolina site?
- A: Yes.

(R. p. 615). Additionally, Jolene Coyle and Braxton Cutchin, of Job Place/Personnel Resources, testified that the fees paid by Bayshore SC for leasing of the Petitioners included fees for the payment of Job Place’s workers’ compensation coverage for Petitioners, meaning, in effect, that Bayshore SC actually paid the workers’ compensation premiums for the benefits Petitioners received from Job Place. (R. pp. 885-88). Not only did Respondents have their own workers’ compensation policy, which would have covered Petitioners, but they actually paid the workers’ compensation premiums for the Job Place policy that actually paid benefits to Petitioners.

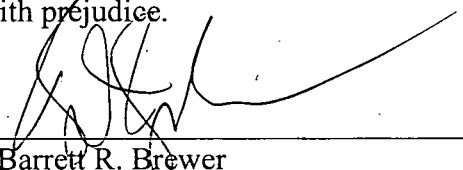
Petitioners further rely on two provisions of the South Carolina Code Ann. § 42-5-40, which provides penalties for an employer who “refuses or neglects to secure” workers’ compensation coverage. Here there is clear evidence Respondents secured workers’ compensation coverage. However, Petitioners are asking this Court to ignore that clear evidence that Respondents directly secured workers’ compensation coverage, simply because of a letter from Respondents’ counsel claiming Respondents didn’t have a “current” insurance certificate for Job Place. The letter clearly suggests that an initial insurance certificate was obtained, but that it was not current.

However, even if the admission that Respondents did not have a “current” certificate of insurance from Job Place is relevant, which is denied, neither of the Code provisions cited by Petitioners applies to the present facts. First, both Bayshore Corp. and Bayshore SC *had* workers’ compensation coverage, which would have covered Petitioners if Job Place had failed to maintain such coverage. Thus, South Carolina Code § 42-5-40, which sets forth penalties for failure to secure coverage, is not applicable here. Second, Petitioners continue to mistakenly rely upon South Carolina Code § 42-1-415 for the proposition that Bayshore Corp. and Bayshore SC were required to obtain a certificate of workers’ compensation insurance from Job Place. The Court of Appeals correctly affirmed that this Code provision applies only where a downstream employer fails to obtain workers’ compensation coverage, and the upstream employer seeks reimbursement from the Uninsured Employers’ Fund when it is forced to pay the benefits instead. This statute does not apply since Bayshore SC and Bayshore Corp. had directly secured workers’ compensation coverage and have not sought reimbursement from the Uninsured

Employers' Fund. Moreover, subsection "D" of that Code section specifically states that "nothing in this section shall be construed to abrogate the immunity to tort liability of any subcontractor under this title or any higher tier subcontractor, contractor, or project owner who may be considered a statutory employer." Id.

CONCLUSION

Bayshore SC is entitled to tort immunity pursuant to the exclusivity provisions of the Workers' Compensation Act under both special and statutory employer theories. Petitioners were performing the work of Bayshore SC, under its direct control, and Bayshore SC had workers' compensation coverage that would have covered Petitioners' injuries. Further, Bayshore Corp. is entitled to tort immunity as a statutory employer both as Petitioners' upstream employer and owner of the Carolina Bays Parkway project. It, too, had workers' compensation coverage which would have covered Petitioners' injuries had they not collected from another source. For these reasons, and based upon arguments and case law set forth above, Respondents respectfully request this Court to affirm the Court of Appeals' ruling that Bayshore SC and Bayshore Corp. are immune from Petitioners' civil suit and are to be dismissed with prejudice.



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Attorneys for Respondents

Charleston, South Carolina
August 6, 2012

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Opinion No. 4617
Case Nos.
2006-CP-26-3194R
2006-CP-26-3195R
2006-CP-26-3196R

CERTIFICATE OF SERVICE
BRIEF OF RESPONDENTS

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

v.

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

Of whom Bayshore Concrete
Products/South Carolina, Inc.,
Bayshore Concrete Products
Corporation are theRespondents.

and

Kevin Key and Sandra Key.....Petitioners,

v.

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

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

and

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

v.

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

of whom Bayshore Concrete
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Corporation are theRespondents.

and

Kevin Key and Sandra Key,Petitioners,

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Bayshore Concrete Products

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

I certify that I have served the Brief of Respondents on the Clerk of Supreme Court and
on Counsel for the Petitioners by serving copies of the same via U.S. Mail on August 6, 2012 to
the following:

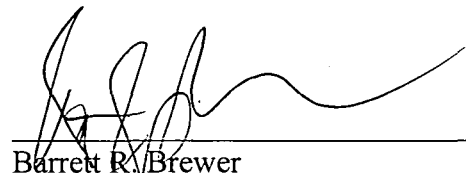
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and

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I further certify that on August 6, 2012 a facsimile copy of the Brief of Respondents was electronically transmitted to dhopkins@sccourts.org pursuant to Rule 262 (a)(2), SCACR. I further certify that Respondents' Brief complies with Rule 211(b) of the SCACR.

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Charleston, South Carolina
August 6, 2012

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August 6, 2012

VIA US MAIL

Daniel E. Shearouse, Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

File No.: 2004-0067 brb

Pm 8-6-12
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AUG 07 2012

Re: **Supreme Court Tracking No.: 2010-149288**

S.C. Supreme Court

Thelma M. Poch, as the Personal Representative for the estate of Kenneth O. Poch v. Bayshore Concrete Products/South Carolina, Inc., *et al.* 2006-CP-23-3194R
Kevin Key and Sandra Key v. Bayshore Concrete Products/South Carolina, Inc., *et al.*, 2006-CP-26-3195R

Thelma M. Poch, Individually and as Personal Representative for the Estate of Kenneth O. Poch, and Julius Poch v. Bayshore Concrete Products/South Carolina, Inc., *et al.* 2006-CP-26-3196R

Our File No.: 7000-1

Dear Mr. Shearouse:

Please find the original and fourteen copies of the Brief of Respondents in the above-referenced matters.

As per the enclosed Certificate of Service, the above documents were served on all parties on August 6, 2012.

With kindest regards, I remain

Very truly yours,

CLAWSON AND STAUBES, LLC


Barrett R. Brewer

BRB/etl
Enclosure

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Daniel E. Shearouse, Clerk of Court

August 6, 2012

Page 2

cc: Christine Companion Varnado, Esquire (with enclosures via email & US Mail)
John R. Kuhn, Esquire (with enclosures via email & US Mail)