

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

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

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

**APPENDIX
(VOLUME III)**

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

v.

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

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

and

Kevin Key and Sandra Key, ...Petitioners,

v.

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

**Bayshore Concrete Products
Corporation, Tidewater
Skanska Group, Inc., and
Tidewater Skanska, Inc.,.....Defendants,**

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

and

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

v.

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

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

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SC Court of Appeals

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable Judge Paul M. Burch

Case Nos.

2006-CP-26-3194R

2006-CP-26-3195R

2006-CP-26-3196R

THELMA M. POCH, as the 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.

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

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.,

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,

Appellants,

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. WHETHER THE TRIAL COURT ERRED IN FINDING THAT BAYSHORE CORP. WAS ENTITLED TO IMMUNITY FROM APPELLANTS' CLAIMS BASED ON THE WORKERS' COMPENSATION ACT EXCLUSIVITY PROVISIONS?**
 - A. WHETHER THE TRIAL COURT ERRED IN FAILING TO DISTINGUISH BETWEEN BAYSHORE CORP. AND BAYSHORE SC IN MAKING ITS FINDINGS CONCERNING BAYSHORE CORP.'S EMPLOYER-EMPLOYEE RELATIONSHIP TO APPELLANTS?**
 - B. WHETHER THE TRIAL COURT ERRED IN FINDING THAT BAYSHORE CORP. WAS APPELLANTS' EMPLOYER?**
 - 1. BAYSHORE CORP. WAS NOT APPELLANTS' STATUTORY EMPLOYER EXEMPT FROM COMMON LAW LIABILITY TO APPELLANTS.**
 - 2. BAYSHORE CORP. WAS NOT APPELLANTS' SPECIAL OR BORROWING EMPLOYER EXEMPT FROM COMMON LAW LIABILITY TO APPELLANTS.**
 - 3. APPELLANTS WERE NOT SUBCONTRACTORS OF BAYSHORE CORP.**
 - C. WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND THAT BAYSHORE CORP.'S EMPLOYEES AT THE SITE WERE CO-SUBCONTRACTORS TO APPELLANTS AND, AS SUCH, BAYSHORE CORP. IS LIABLE FOR THEIR NEGLIGENCE WHICH CAUSED INJURY TO APPELLANTS?**
 - D. WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND THAT BAYSHORE CORP. IS LIABLE TO APPELLANTS AS THE LESSEE OF THE PROPERTY WHICH CONTAINED A DANGEROUS CONDITION?**
 - E. WHETHER THE TRIAL COURT ERRED IN FINDING THAT BAYSHORE CORP. HAD WORKERS' COMPENSATION COVERAGE FOR APPELLANTS?**
- II. WHETHER THE TRIAL COURT ERRED IN FINDING THAT BAYSHORE SC WAS ENTITLED TO IMMUNITY AS APPELLANTS' EMPLOYER WHEN IT DID NOT SATISFY THE STATUTORY REQUIREMENTS?**
- III. THIS COURT SHOULD NOT CONSIDER EVIDENCE PRESENTED IN AFFIDAVITS SUBMITTED BY DUNBAR, COLONNA, AND LENART.**

- A. THIS COURT SHOULD NOT CONSIDER THE EXPERT TESTIMONY OFFERED ON ISSUES OF LAW IN VERNON F. DUNBAR, ESQUIRE'S AFFIDAVIT.
- B. THIS COURT SHOULD EXCLUDE THE TESTIMONY OFFERED IN KEITH COLONNA'S SECOND AFFIDAVIT UNDER THE "COMPETING" OR "SHAM" AFFIDAVIT DOCTRINE.
- C. THIS COURT SHOULD EXCLUDE THE AFFIDAVIT OF LARRY LENART BECAUSE APPELLANTS WERE DENIED ANY OPPORTUNITY TO CROSS-EXAMINE THE WITNESS.

STATEMENT OF THE CASE

This appeal concerns three cases arising out of a tragic accident that occurred on June 6, 2002: a wrongful death action¹ filed by the heirs of Appellant Kenneth Poch, a survival action² filed on behalf of Poch's estate, and personal injury and loss of consortium claims³ brought by Appellants Kevin and Sandra Key. The Complaints, which were filed on November 10, 2003, assert claims based on negligence, premises liability, breach of contract, and fraud against Defendants Bayshore Concrete Products Corporation, Bayshore Concrete Products/South Carolina, Inc., Skanska AB, Skanska USA Civil, Inc., Beers Skanska, Skanska USA Building, Inc., Skanska Project Development USA, Tidewater Skanska Group, Inc., Tidewater Skanska, Inc., and Skanska USA, Inc., of whom Bayshore Concrete Products Corporation and Bayshore Concrete Products/South Carolina, Inc. are Respondents herein.

On June 26, 2005, the trial court entered an Order dismissing the cases pursuant to Rule 40(j), SCRCF; the cases were reinstated on June 26, 2006, under the case numbers set

¹03-CP-26-6826

²03-CP-26-6824

³03-CP-26-6825

forth above. Appellants filed Amended Complaints on January 26, 2007, refining their claims and dismissing Defendants Skanska AB, Skanska USA Civil, Inc., Beers Skanska, Skanska USA Building, Inc., Skanska Project Development USA, and Skanska USA, Inc.

On August 14, 2005, Respondents filed a Motion for Summary Judgment or, Alternatively, for a Hearing to Determine Worker's Compensation Exclusivity Jurisdiction, or Alternatively, Motion to Dismiss for Lack of Subject Matter Jurisdiction on behalf of Bayshore Concrete Products Corporation and Bayshore Concrete Products/South Carolina, Inc. With this Motion, Respondents sought an full evidentiary "mini-trial" on the merits concerning whether an employer/employee relationship existed between Appellants and Respondents and a determination of Respondents' alleged immunity from liability due to the exclusive remedy of South Carolina's workers' compensation laws. Appellants opposed Respondents' Motion. On April 19, 2007, the trial court issued an Order which declined Respondents' request for the presentation of live witnesses and allowing the parties to present evidence by way of affidavits, deposition testimony and applicable records or documents to address Respondent's Motion to Dismiss or, alternatively, to Determine Worker's Compensation Exclusivity/Jurisdiction, at a hearing to be held on May 31, 2007.⁴

In advance of the hearing, Appellants filed Motions asking the trial court to disregard the testimony contained in three affidavits submitted by Respondents. Appellants sought to exclude from the trial court's consideration facts contained in the second affidavit submitted by company president S. Keith Colonna dated April 25, 2007, which contradicted testimony Colonna rendered during his deposition and in his first affidavit filed on April 18, 2005.

⁴Due to a scheduling conflict, the hearing was eventually held on June 1, 2007.

Appellants further asked the trial court to exclude the affidavit of former Workers' Compensation Commissioner Vernon F. Dunbar, Esquire, which offered primarily legal arguments and conclusions. Finally, they moved to exclude the affidavit of Larry Lenart, because he failed to appear for his deposition, thus denying Appellants any opportunity to cross examine the witness.

On August 6, 2007, the trial court entered an Order constituting "a final determination on the merits of the applicability of Workers' Compensation exclusivity to [Respondents]." Therein, the trial court found that Respondents were Appellants' employers within the jurisdiction of the Workers' Compensation Act and dismissed them from the action finding that the Court lacked subject matter jurisdiction over them. Concurrently, the trial court issued three Orders denying Appellants' Motions to Exclude the affidavits of Colonna, Dunbar, and Lenart. Appellants timely moved for reconsideration of these Orders on August 16, 2007, which was denied on November 14, 2007 in one composite Order. Appellants timely filed notice of this appeal on December 10, 2007.

FACTS

On June 6, 2002, Appellant Kenny Poch was killed and Appellant Kevin Key gravely injured when the trench in which they were working caved-in and trapped them under several feet of soil. (R. pp. 783-784, 807-812). Poch was buried alive and eventually suffocated to death. (R. pp. 810-811). Key managed to dig himself free as he listened to his co-worker's desperate cries for help. (R. p. 712; pp. 810-811). Key has suffered significant physical injuries and on-going mental debilitation as a result. (R. pp. 766-769, 771-772, 773-775, 776).

The trench was located at 2563 Fire Tower Road, Little River, South Carolina, a site that was leased by Virginia corporation, Respondent Bayshore Concrete Products Corporation ("Bayshore Corp."). (Colonna Aff. R. p. 3, ¶ 4). Respondent Bayshore Concrete Products/South Carolina, Inc. ("Bayshore SC"), a subsidiary of Bayshore Corp., had been using the site to produce pre-cast concrete girders for the Carolina Bays Parkway in Myrtle Beach. (Colonna Aff. R. p. 3, ¶¶ 3-4; pp. 738, 740, 743, 751-757). Bayshore Corp. employee Larry Lenart dug the deep, un-shored trench on the site, from which it was understood that Poch and Key would remove dirt from around steel beams or rods with a shovel. (R. pp. 777-778; 787-788, 804, 812-814; p. 729). Lenart then left the premises, knowing that Poch and Key were alone in the trench. (R. pp. 725-726; pp. 710-712; pp. 761-762). When the unsupported walls of the trench collapsed on Appellants, there was no one else in the vicinity to hear their cries for help. (R. p. 808, lines 14-23). Subsequently, OSHA cited Bayshore SC for three serious violations that resulted in this tragic incident. (R. pp. 889-891; pp. 733, 735; p. 742). OSHA reduced the fines, however, because in part Poch was not "an employee of Bayshore". (R. p. 736, lines 20-24).

At the time of the trench collapse, Poch and Key were residents of South Carolina, who had entered into contracts of employment with Personal Resources of Georgia, Inc. ("PRI") to be sent out on various jobs as temporary workers. (R. p. 827). PRI leased Poch and Key to Carolina Staffing, Inc. d/b/a Job Place of Conway ("Job Place"). (R. p. 582, pp. 715-716). In turn, Job Place contracted with the South Carolina corporation, Respondent Bayshore SC to send its employees, including Key and Poch, to clean-up the site to its pre-leased condition. (R. p. 672; p. 744; p. 903).

In addition to leasing the facility, Bayshore Corp. sent some of its own employees to South Carolina to work as subcontractors to Bayshore SC. (R. pp. 597-599). Bayshore SC separately employed numerous employees at the site whose wages and benefits it directly paid. (R. pp. 606-609, 670). Respondents agree, however, that none of the Bayshore entities were Appellants' actual employers. (R. pp. 734, 736). Neither Bayshore Corp. nor Bayshore SC paid for, provided or secured any benefits to Poch or Key, including the payment of workers' compensation. (R. pp. 588, 589-590; p. 625; pp. 747-748; pp. 833-834). Rather, PRI and Job Place provided Poch and Key with workers' compensation coverage and benefits. (R. pp. 907-916, ¶¶ 4(b), 8(a); pp. 588, 589-590; p. 625).

Unfortunately, Bayshore SC misrepresented to Job Place the nature of the work that its workers would be asked to perform at the site. Bayshore SC contracted with Job Place to provide workers for the light industrial work of cleaning-up the work site and dismantling equipment. (R. p. 902; p. 903; p. 904). *See also*, (R. p. 703; pp. 727-728). The job code describing the work for which Bayshore SC contracted entails cleaning and debris removal – i.e., tasks such as removing scrap lumber, scrap metal, and other scrap material used in construction, as well as washing windows, sweeping, mopping, scrubbing tile, and polishing plumbing fixtures. (R. pp. 583-584). At no time did Bayshore SC inform Job Place that the Job Place employees would need to work in deep trenches to dismantle and remove foundational support structures or perform excavation work. (R. pp. 705, 719). Poch and Key were not trained for trench work or in “heavy industrial” safety protocols and Job Place would not have sent them to the facility had they known they would be working in a trench.

(R. pp. 701-706, 709, 713-714, 717-718; pp. 584-587; p. 730). (Coyle, Cason and Cutchin testifying that Mr. Key and Mr. Poch were not intended to work in trenches).

ARGUMENTS

The existence of the employer-employee relationship is a jurisdictional question that involves a question of law to be decided by the court. *Porter v. Labor Depot Employer*, 372 S.C. 560, 567, 643 S.E.2d 96 (Ct. App. 2007). Accordingly, this Court has both the power and the duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence. *Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 443 S.E.2d 803 (1994). Here, the preponderance of the evidence demonstrates that, as a matter of law, neither Bayshore Corp. nor Bayshore SC are shielded by the Workers' Compensation Act's statutory immunity from liability for Appellants' claims.

I. THE TRIAL COURT ERRED IN FINDING THAT BAYSHORE CORP. WAS ENTITLED TO IMMUNITY FROM APPELLANTS' CLAIMS BASED ON THE WORKERS' COMPENSATION ACT EXCLUSIVITY PROVISIONS.

While workers' compensation law generally bars an employee from seeking a remedy in tort against his employer for harm suffered in the ordinary course and scope of employment, only "employers" are entitled to rely upon the workers' compensation exclusivity clause. *See Edens v. Bellini*, 359 S.C. 433, 439, 597 S.E.2d 863, 866 (Ct. App. 2004) (holding that coverage under the South Carolina Workers' Compensation Act depends on the existence of an employment relationship.). Since Bayshore Corp. never entered into a contract for the hire of Appellants it cannot meet the requirements of either the statutory employer or special employer/borrowed employee doctrines. As a result, it cannot rely upon the workers' compensation immunity from suit. Rather Bayshore Corp.'s employees served

as a co-subcontractors to the Bayshore SC and Job Place workers at the facility. Co-subcontractors are specifically excluded from workers' compensation coverage. S.C. Code Ann. § 42-1-540 (1976). As such, a remedy in tort or contract is permissible against Bayshore Corp. for both its employees' negligence and the dangerous conditions on the property it leased that led to Appellants' damages. Accordingly, the trial court should not have dismissed Appellants' claims against Bayshore Corp.

A. THE TRIAL COURT ERRED IN FAILING TO DISTINGUISH BETWEEN BAYSHORE CORP. AND BAYSHORE SC IN MAKING ITS FINDINGS CONCERNING BAYSHORE CORP.'S EMPLOYER-EMPLOYEE RELATIONSHIP TO APPELLANTS.

A significant portion of the trial court's opinion was based on the erroneous finding that Bayshore Corp. stood in the same position as its subsidiary Bayshore SC in relation to the employment of Appellants. In so doing, the trial court disregarded the separate factual and legal identities of the two corporations and, thus, improperly allowed Bayshore Corp. to piggy-back onto the employer status of Bayshore SC.

South Carolina courts have long held that employees of a subsidiary corporation are not deemed to be the employees of the parent corporation by virtue of the parent-subsidiary relationship. *Carroll v. Smith-Henry, Inc.*, 281 S.C. 104, 104, 313 S.E.2d 649 (Ct. App. 1984); see also, e.g., *Lane v. Kingsport Armature & Electric*, 676 F. Supp. 108, 111 (W.D. Va. 1988) ("[S]ubsidiary employees are not employees of the parent under normal parent-subsidiary relationship."); *Latham v. Technar, Inc.*, 390 F. Supp. 1031 (E.D. Tenn. 1974) (same). Thus, even if the trial court correctly found that Bayshore SC was Appellants' "employer" under South Carolina law, there is no basis at law or in fact to extend that status

to its parent company, Bayshore Corp., which was a separate and distinct corporate entity at the time of the accident. Rather, the trial court improperly allowed Respondents to pierce their own corporate veil when it held that “because Bayshore SC was performing the work of Bayshore Corp., both Bayshore Defendants are entitled to immunity pursuant to Worker’s Compensation exclusivity.” (R. p. 15). In so doing, however, the trial court relied on a misinterpretation of *Nix v. Columbia Staffing*, 322 S.C. 277, 471 S.E.2d 718 (Ct. App. 1996).

Nix does not involve a situation where, as here, a parent company sought to benefit from the employment status of its subsidiary. Rather, in *Nix*, the court was faced with a determination of whether Duke Power was responsible for the acts of employees “lent” to it by a subcontractor. 322 S.C. at 281. In the case at bar, however, neither Appellants nor the Bayshore SC employees were “lent” to Bayshore Corp. In fact, the trial court’s reasoning on this point is oddly circular. It found that Appellants “were performing the work of Bayshore SC and Bayshore Corp. since they were leased employees under direct control and supervision of Bayshore SC at the time of this accident and were performing the work of both Bayshore SC and Bayshore Corp.” (R. p. 15).

Rather the proper analysis should follow that adopted in the workers’ compensation context by the South Carolina Federal District Court interpreting South Carolina law in *Monroe v. Monsanto Company*, 531 F. Supp. 426 (D.S.C. 1982). In *Monsanto*, plaintiff lost his left arm in a cutter machine while employed by Fovil Manufacturing Company (“Fovil”). Hale Manufacturing Company (“Hale”) designed, built and placed the cutter in the Fovil plant. Both Fovil and Hale were subsidiaries of Monsanto Textile Company (“Monsanto”). As a result, plaintiff filed suit against Monsanto and Hale. Defendants raised the workers’

compensation law as a bar to the action, asserting that all three corporations were essentially a single entity, and, therefore, plaintiff's suit against Hale and Monsanto was barred because plaintiff was entitled to workers' compensation benefits from Fovil. The *Monsanto* court disagreed.

In reaching its decision that neither Hale nor Monsanto were immune from suit based on their corporate relationship to Fovil, the court noted that there are "benefits to be derived by the parent corporation maintaining a separate identity from that of the subsidiary, including the general rule that the parent corporation is not liable for the contracts of the subsidiary." *Id.* at 432. Thus, having retained whatever benefits may be available to themselves as separate and distinct corporations, associated corporations may be estopped to deny their separate existence. *Id.* (citing 18 C.J.S. *Corporations* § 5, p. 374). That should be the case with Bayshore Corp. in its relationship to its subsidiary, Bayshore SC.

The *Monsanto* court distilled the following factors which, among others, should be considered in deciding whether two related businesses are considered as separate and distinct corporations for workers' compensation purposes:

- (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 entities?
- (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?

Applying these factors to the case at bar, it is clear that Bayshore Corp. cannot claim workers' compensation immunity based on its relationship as the parent company of Bayshore SC at the time of the accident. When it appeared to be advantageous to their position, Respondents intentionally and conveniently blurred the line between the very separate and distinct corporate entities of Bayshore SC and Bayshore Corp. in the course of this litigation (*e.g.* counsel repeatedly referred "generically" just to "Bayshore" in referencing the various subsidiaries and the parent company). (R. p. 666, lines 5-25). Nonetheless, company president Keith Colonna admitted that the "South Carolina company [Bayshore SC] was run as a separate entity." (Colonna Aff. R. p. 841, ¶ 11).

First, at the time of the incident Bayshore SC and Bayshore Corp. maintained separate corporate identities. (Colonna Aff. R. p. 841, ¶ 11; p. 592, lines 15-19; p. 746, lines, 2-7; p. 731, lines 7-12; p. 732, lines 4-14). Bayshore Corp., a Virginia corporation, formed Bayshore SC as its wholly owned subsidiary on April 21, 2000, to produce prestressed, precast concrete for construction projects in South Carolina. (R p. 892; Colonna Aff. p. 838, ¶ 4; pp. 738, 740, 743, 751-757). The officers consciously entered into separate contracts on behalf of the distinct corporations and differentiated between the two corporations when charging expenses. (R. p. 650, lines 11-16; p. 738, lines 3-11; p. 764, lines 22-25). The parent company treated its subsidiary as a separate entity. As Colonna testified, Bayshore Corp. would submit and accept bids from its "subsidiary companies as customers, just like

we did their competitors.” (R. p. 621, lines 22-24). Further, while the companies would eventually merge in December of 2006, at the time of the accident, Bayshore Corp. and Bayshore SC were formally recorded as being separate corporate entities. (R. p. 892; p. 893). See *Woodside v. Woodside*, 290 S.C. 366, 370, 350 S.E.2d 407, 410 (Ct. App. 1986) (“The corporate form may be disregarded only where equity requires the action to assist a third party.”) See also, *Monsanto*, 531 F. Supp. at 432 (citing *Gordon v. Hollywood-Beaufort Package Corp.*, 213 S.C. 438, 49 S.E.2d 718 (1948); *Brown v. Moorhead Oil Co.*, 239 S.C. 604, 124 S.E.2d 47 (1962))(finding that absent a merger, both the parent corporation and the subsidiary corporation maintain a separate and independent existence).

Second, while several persons served as members of the Boards of Directors of both companies, the Boards were not identical. (R. pp. 591-593). In addition, the entities kept separate corporate minutes. See, e.g., (R. p. 917; p. 918).

Third, the corporations were headquartered and transacted the main part of their business from separate locations. (R. p. 892; p. 893). Bayshore Corp. operated out of Cape Charles, Virginia, while Bayshore SC primarily operated from Myrtle Beach, South Carolina. (R. p. 609, lines 2-14).

Fourth, the businesses each hired and paid their own employees separately. (R. pp. 608-609, p. 670, lines 1-4). Although for about a week at the inception of the project, employees of Bayshore Corp. helped sign up employees of Bayshore SC, Bayshore SC then hired staff for its own operations in South Carolina. (R. pp. 608-609). All of Bayshore SC employees were paid by the South Carolina corporation using a South Carolina payroll service. (R. pp. 608-609, p. 670, lines 1-4). When an employee of the parent company did

work on a Bayshore SC project, his wages were paid to him by Bayshore Corp., which then charged Bayshore SC for the expense like any other subcontractor. (R. p. 601, line 18-p. 602, line 5; p. 604, lines 2-12).

Fifth, the employees were aware of the distinction between the two corporations. (R. p. 731, lines 7-12; p. 732, lines 4-14). Only Bayshore Corp. had the authority to hire and fire the salaried Bayshore Corp. employees. (R. p. 622, lines 3-16). Bayshore Corp. employees were paid by Bayshore Corp. with Bayshore Corp. checks. (R. p. 923). On the other hand, as Bayshore SC employees were hired they were required to fill out Bayshore SC job applications and were paid with Bayshore SC checks by a South Carolina payroll service. (R. pp. 606, p. 609, lines 2-14). Finally, Bayshore SC acted alone in hiring the temporary workers, including Appellants Poch and Key, to assist on the site. (Colonna Aff. R. p. 841, ¶ 6).

Looking at the final three *Monsanto* factors, while the two corporations may have engaged in similar business activities, Bayshore SC's operations were limited to the South Carolina site, while Bayshore Corp. had varied operations in several locations. (Colonna Aff. R. p. 838, ¶ 4). The two corporations strictly maintained separate books, account records, and bank accounts. (R. pp. 610, 613, 665; Colonna Aff. p. 841, ¶ 11). Each corporation maintained separate self-insured reserves. (R. p. 613, lines 6-22). Likewise, both entities had separate federal tax identification numbers, and were required to file separate tax reports. (R. p. 607, lines 20-22).

The burden of proof lies with the party asserting that the corporate entity should be disregarded. *Woodside*, 290 S.C. at 370, 350 S.E.2d at 410. Based on the weight of the factors discussed above, it is clear that the balance tips strongly in favor of maintaining the

separate and distinct nature of the two companies. Equity should not allow Bayshore Corp. to create an ambiguity with regard to whether or when it wishes to be considered a separate entity and use it as a sword or a shield – depending upon the type of liability that is sought to be imposed. Bayshore Corp. is responsible for its independent acts of negligence, as well as its negligence as a lessor of the property, and cannot claim the protection of the workers compensation exclusivity bar since it was not ever, in any legal sense, Appellants' employer.

As Respondents admit, “[o]nly [Bayshore SC] had anything to do with this accident and the activities at the Horry County site.” (Colonna Aff. R. p. 841, ¶ 11).⁵ Therefore, in analyzing Bayshore Corp.’s role and status in this litigation, the trial court erred in failing to distinguish between the parent and its subsidiary.

B. THE TRIAL COURT ERRED IN FINDING THAT BAYSHORE CORP. WAS APPELLANTS’ EMPLOYER.

The record contains no evidence from which it can be determined that Appellants had any employment relationship with the parent company, Bayshore Corp. Coverage under the Workers’ Compensation Act depends on the existence of an employment relationship evidenced by a contract for employment. *Shuler v. Tri-County Elec. Co-op.*, 374 S.C. 516, 521, 649 S.E.2d 98 (Ct. App. 2007) (holding that “a contract of employment” is the jurisdictional factor used to determine if an employment relationship exists” and that “an

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Colonna later submitted a second affidavit dated April 25, 2007, in which he sought to contradict this statement and to blur the distinctions between these two entities. (Second Colonna Aff. R. p. 851-876). As discussed in more detail in Section V below, Appellants assert that neither the trial court nor this Court should consider this second affidavit based on the “competing” or “sham” affidavit doctrine. *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629 (2004).

employee's right to demand payment for his services from the employer is essential to the establishment of an employment relationship.") According to the president of both Bayshore Corp. and Bayshore SC, when he signed the agreement with Job Place for Appellants' services, he did so on behalf of Bayshore SC. (R. p. 650, lines 3-16). David Eastwood, the "nonexecutive chairman" of Bayshore Corp., also testified that the Job Place agreement was signed by Mr. Colonna on behalf of Bayshore SC. (R. pp. 737, 744, lines 19-21): ("I think this was clearly between Bayshore Concrete Products of South Carolina [and Job Place] . . ."). There is no evidence that Appellants looked to Bayshore Corp. as their employer or that they had any right to demand payment from Bayshore Corp. Accordingly, there is no basis to support a finding that Bayshore Corp. was Appellants' employer.

1. BAYSHORE CORP. WAS NOT APPELLANTS' STATUTORY EMPLOYER EXEMPT FROM COMMON LAW LIABILITY TO APPELLANTS.

The trial court further erred when deemed Bayshore Corp. to be Appellants' statutory employer. Under the Act, the following four elements must be satisfied before a person or company is deemed to be an employer: (a) the existence of an "owner," who (b) undertakes to perform work in the owner's trade, business, or occupation, by (c) hiring another person (d) to perform that work. *E.g., Eaddy v. Mettler Hauling & Rigging Co.*, 284 S.C. 270, 272, 325 S.E.2d 581 (Ct. App. 1985). If these four elements exist, then the statutory employer is liable to pay workers' compensation to any injured worker just as if that worker were the statutory employer's direct employee. *Id.* The preponderance of the evidence demonstrates that Bayshore Corp. does not satisfy this test in relation to Appellants.

First, Bayshore Corp. was not the owner of the project. Bayshore SC owned the job on the Carolina Bays project. As Colonna asserted. “[o]nly [Bayshore SC] had anything to do with this accident and the activities at the Horry County site.” (Colonna Aff. R. p. 841, ¶ 11). Bayshore Corp., as the parent company holding all the stock, only had an equity interest in seeing that Bayshore SC succeeded in its task. Respondents have never produced any document or other credible evidence demonstrating that Bayshore Corp. was the “owner” of the project or that it had “hired” Bayshore SC to be its contractor on the job. Rather, the job in question was in some respects the sole purpose of Bayshore SC’s existence. (Colonna Aff. R. p. 838, ¶ 4).

Likewise, the trial court erred in finding that the work performed by Appellants was work in Bayshore Corp.’s “trade, business or occupation.” According to Donald Kellam, the Bayshore Corp. safety director of over 15 years, he never provided safety training concerning digging or working in trenches to Bayshore Corp. employees. (R. pp. 758, 759-760). He testified that Bayshore Corp. does not normally do work that requires trenches. (R. p. 760, lines 2-6). He explained that there was no need for him to have experience or training in excavation because Bayshore Corp. had never needed that skill before and it was not foreseeable to him that work would be needed at its job sites. (R. p. 763, lines 2-16). While it is not unusual for Bayshore Corp. employees to remove casting forms in the course and scope of their business, such work does not usually involve excavation or digging. (R. p. 765, lines 10-12). Likewise, Colonna testified that Bayshore Corp. was not in the demolition business. (R. p. 639, line 19-p. 640, line 2). Rather Colonna distinguished removal of stressing bed abutments as was done by Appellants on the day of the accident from the

“normal facility work” performed by Bayshore Corp. in putting up and taking down casting forms. (R. p. 644, lines 8-24).

Finally, as discussed above, the evidence is clear that Bayshore Corp. did not hire Appellants to perform any work at the site. If anything, Appellants were hired by Bayshore SC. (R. p. 902; p. 650, lines 3-6; pp. 744-745). Accordingly, Bayshore Corp. does not meet the test to be deemed Appellants’ statutory employer under the Act.

2. BAYSHORE CORP. WAS NOT APPELLANTS’ SPECIAL OR BORROWING EMPLOYER EXEMPT FROM COMMON LAW LIABILITY TO APPELLANTS.

The trial court further erred in finding that Bayshore Corp. was the Appellants’ special or borrowing employer. This doctrine applies when one employer lends his employee to a second employer, who then exercises control over that employee. *Brownlee v. Charleston Motor Express Corp.*, 189 S.C. 204, 200 S.E. 819 (1934); *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 175, 624 S.E.2d 439 (Ct.App. 2005) (using the terms “borrowed employee” and “special employer” in reference to the same doctrine). To be deemed Appellants’ special employer in addition to Bayshore SC, Bayshore Corp. must satisfy a three-prong test: (a) Bayshore Corp entered into a contract of hire, express or implied, with Appellants; (b) the work being done was essentially that of Bayshore Corp.; and (c) Bayshore Corp. had the right to control the details of the work. *Eaddy*, 284 S.C. at 272. The test is conjunctive; thus, **all three elements** must be met before Bayshore Corp., as a purported special employer, may claim the benefit of the workers’ compensation exclusivity defense to tort claims. *E.g., DeBerry v. Coker Freight Lines*, 234 S.C. 304, 313,

108 S.E.2d 114, 119 (1959) (“When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.”).

Here, Bayshore Corp. fails to meet the first prong of the test. As discussed above, Bayshore Corp. did not enter into an express or implied contract of hire with Appellants: “A contract for hire is an essential feature of the employment relation.” *Kirksey*, 314 S.C. at 43 (quoting 1B Arthur Larson, *The Law of Workmen's Compensation* §47.10 at 8-302 (1992)) (internal quotations omitted). In addition “an employee's right to demand payment for his services from the employer is essential to the establishment of an employment relationship.” *Shuler*, 374 S.C. at 521. Here, Respondents are emphatic that the contract for hire was between Job Place and Bayshore SC alone. (Colonna Aff. R. p. 839, ¶ 6; R. p. 650, lines 3-6; pp. 744-745). There was no expectation on behalf of Appellants or either Bayshore entity that Bayshore Corp. would ever be responsible to pay Appellants' wages.

Likewise, the work being performed by Appellants on the facility premises was that of Bayshore SC, who had contracted for the placement of the Appellants to perform specified work. (Colonna Aff. R. p. 841, ¶ 11 (“Only [Bayshore SC] had anything to do with this accident and the activities at the Horry County site.”)). Accordingly, Bayshore Corp. cannot be deemed Appellants' special employer in a manner sufficient to take advantage of the worker's compensation immunity.

3. APPELLANTS WERE NOT SUBCONTRACTORS OF BAYSHORE CORP.

The trial court further erroneously concluded that Bayshore Corp. was entitled to Workers' Compensation immunity under the subcontractor analysis, as discussed in *Bailey v. Owen*, 298 S.C. 36, 39, 378 S.E.2d 63, 65 (S.C. App. 1989), *reversed on other grounds*,

Bailey v. Owen, 301 S.C. 399, 392 S.E.2d 186 (1990). Under this analysis, an employee of a subcontractor is deemed to be the employee of the general contractor, as opposed to an independent contractor, if the employee was injured while performing the work or activity of the general contractor. The trial court correctly found that South Carolina courts look to three factors to determine whether the employee was performing the general contractor's work: 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. *Id.* The trial court overlooked the prerequisite to this analysis, however, that Respondents would need to demonstrate that Bayshore Corp. retained the services of Bayshore SC, who in turn retained Appellants, to perform work on Bayshore Corp's behalf. The record simply does not support such a finding.

The trial court erroneously overlooked this prerequisite as it again failed to distinguish between the parent corporation and its subsidiary. The work being done on the site may have been part of the business of Bayshore SC, but not that of Bayshore Corp. There is no evidence that Bayshore SC was working as a contractor for Bayshore Corp. on this project. Rather Bayshore Corp. set Bayshore SC up as a separate entity to independently perform work in South Carolina. As Respondents asserted, "[o]nly [Bayshore SC] had anything to do with this accident and the activities at the Horry County site." (Colonna Aff. R. p. 841, ¶ 11).

In addition, the trial court's finding that work performed by Appellants was a necessary and essential part of business for Bayshore Corp. was in error. As discussed

above, Bayshore Corp. was not in the demolition business and its employees had never performed excavation or trench work before. (R. pp. 758, 759-760, 763, 765; pp. 639-640, 644). Accordingly, Bayshore Corp. is not entitled to claim an employment relationship with Appellants.

C. BAYSHORE CORP.'S EMPLOYEES AT THE SITE WERE CO-SUBCONTRACTORS TO APPELLANTS AND, AS SUCH, BAYSHORE CORP. IS LIABLE FOR THEIR NEGLIGENCE WHICH CAUSED INJURY TO APPELLANTS.

As discussed above, the trial court erred in finding that Bayshore Corp. had an employment relationship with Appellants. Rather the preponderance of the evidence indicates that the Bayshore Corp. employees on site at the time of the accident were co-subcontractors to Appellants. Workers' Compensation immunity does "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 (1976).

The Supreme Court directly addressed this issue in *Boone v. Huntington & Guerry Elec. Co.*, 311 S.C. 550, 430 S.E.2d 507 (1993) (stating that the issue before the court was "[w]hether the exclusivity provisions of §§ 42-1-540 and -5-10 extend immunity to a subcontractor sued for negligence by an owner's employee"). In that case, Boone, an employee of J.P. Stevens, was injured when she tripped over a power cord that had been placed over a roadway by Huntington & Guerry Elec. Co. (the "Electric Company"), a subcontractor of J.P. Stevens. *Id.* at 551. In seeking the benefit of immunity from suit, the Electric Company claimed to be the statutory employee of J.P. Stevens, and consequently, a co-employee of Ms. Boone. *Id.* at 552. The Supreme Court rejected this argument,

however, finding that while a subcontractor may be classified as a "statutory employee" of the owner for the purposes of workers compensation liability, that classification does not render the subcontractor a "statutory co-employee" of the owner's employee. *Id.* at 553. Moreover, it stated that whether a subcontractor qualifies as a statutory employee is not relevant to determine the subcontractor's immunity. *Id.* Rather, "[t]he exception to immunity in §42-1-540 applies to a subcontractor hired by the injured employee's employer whether or not that subcontractor qualified as a statutory employee." *Id.*

Likewise, on facts nearly identical to the case at bar, the Court of Appeals found that an injured Talent Tree, Inc. temporary employee who was leased to the Milliken-Magnolia Plant could bring suit against Sanders Brothers, Inc., whose employee was also leased to Milliken. *Day v. Sanders Brothers, Inc.*, 315 S.C. 95, 431 S.E.2d 629 (Ct. App. 1993). The court held that "the subcontractor sued by the plaintiff was not the plaintiff's employer and one who had any worker's compensation liability to the plaintiff." *Id.* at 96. Indeed, the court classified both the Talent Tree temporary worker and the Sanders Brothers employee as subcontractors hired by a common employer, Milliken. *Id.* As such, Sanders Brothers was not entitled to immunity from suit by the injured temporary worker.

Larry Lenart dug the trench that later collapsed trapping Key and killing Poch. (R. pp. 790-791, 794-795, 820-821). Lenart was clearly an employee of Bayshore Corp., not Bayshore SC at the time of the accident. Bayshore Corp. offered Lenart a salaried staff position on February 1, 2001. (R. p. 924). Bayshore Corp. paid his salary and benefits. (R. p. 923). When Lenart had a change of address in January of 2001, he submitted paperwork to the Tidewater Construction Corporation Employee Health Benefit Plan indicating that he

was a salaried employee of Bayshore Corp. (R. p. 925). Lenart was not terminated from his employment with Bayshore Corp. until December 31, 2004. (R. p. 926). As a Bayshore Corp. employee at the Bayshore SC location, Lenart acted as a subcontractor to Bayshore SC aiding in Bayshore SC's work at the site. (See R. p. 601, line 18 - p. 602, line 5 (Colonna testifying that Lenart was expensed to Bayshore SC, but Bayshore Corp. paid Lenart's salary)). Therefore, as the employer of the subcontractor whose negligence injured Plaintiffs, Bayshore Corp. is not entitled to immunity from suit under the Workers' Compensation Act.

D. BAYSHORE CORP. IS LIABLE TO APPELLANTS AS THE LESSEE OF THE PROPERTY WHICH CONTAINED A DANGEROUS CONDITION.

In addition to supplying subcontractors to work at the site, Bayshore Corp. maintained the leasehold on the facility on which Plaintiffs were injured. (R. pp. 894-901). When Bayshore Corp.'s employee, Lenart, dug the un-shored trench that injured Appellants, he was, or should have been, aware of the dangerous condition of the trench, yet he allowed Appellants to enter it. "The owner [or lessee] of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." *Sims v. Giles*, 343 S.C. 708, 718, 541 S.E.2d 857 (Ct. App. 2001)(citing *Larimore v. Carolina Power & Light*, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000)). The possessor of land owes an "active or affirmative duty" to protect business visitors even from a condition on the land whose danger is known or obvious where the possessor should anticipate harm despite such knowledge or obviousness. *Sims*, 343 S.C. at 716 (quoting the Restatement (Second) of Torts §343A (1965) expressly adopted by the Supreme Court in *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d

361, 362 (1991)). Business visitors may include employees of co-subcontractors engaged in a common enterprise. *Sims*, 343 S.C. at 731. Bayshore Corp. owed Appellants as business visitors to its leased facility the affirmative duty of care to provide a safe environment. (R. p. 626, lines 16-17 (“[I]t was our location and we had a responsibility to provide a safe workplace.”)). By virtue of Bayshore Corp. employee Lenart allowing Appellants to enter the unsafe trench he created, Bayshore Corp. breached that duty thus rendering this matter inappropriate for determination in Bayshore Corp.’s favor.

E. BAYSHORE CORP. DID NOT HAVE WORKERS’ COMPENSATION COVERAGE FOR APPELLANTS POCH AND KEY.

The trial court further erred when it found that Bayshore Corp. had Workers’ Compensation insurance which would have covered Appellants Poch and Key. Respondents did not submit to the trial court an insurance policy of Bayshore Corp. that provided coverage for Appellants. Nor does the record contain any other evidence that Bayshore Corp.’s policies would have provided coverage. The affidavit of Richard Stadler, the construction underwriter for St. Paul/Travelers Insurance Company, states only that Bayshore SC’s insurance policy would have provided Workers’ Compensation coverage to Key and Poch. (Richard Stadler Aff. R. p. 84⁵, ¶3). It is silent as to Bayshore Corp.

In fact, Bayshore Corp. admitted that it failed to “secure” workers’ compensation benefits for Appellants. (R. p. 625, lines 19-25⁶). Each entity who seeks to take advantage

⁶ “Q: So Bayshore Concrete Products Corp. and Bayshore Concrete of South Carolina, Inc. did not secure workers’ compensation coverage for those [PRI/Job Place] workers; correct?

THE WITNESS: Correct.” (R. p. 625, lines 19-25).

of workers' compensation immunity has a separate duty to secure workers' compensation benefits for the worker that is to assist in its trade or business. *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 327, 523 S.E.2d 766, 773 (1999) ("An employer who refuses or neglects to secure such compensation becomes liable either under the Act or in an action at law") (citing S.C. Code Ann. § 42-5-40 (1985)⁷). Failing the entity's demonstration in this regard, "nothing in the Act prohibits an employee from recovering both workers' compensation benefits from one employer and tort damages from an upstream employer who failed to secure compensation." *Id.*

This was the exact result reached by the Supreme Court of South Carolina in *Harrell v. Pineland Plantation, Ltd.* In *Harrell*, Pineland ran a vacation resort in Colleton County, South Carolina. Pineland hired Folk to run Pineland's daily operations, and, in turn, Folk's employee Harrell performed that work. *Id.* at 318. When Harrell was injured, he settled his workers' compensation claim against Folk and sued Pineland in tort. *Id.* at 319. After determining that Pineland was a statutory employer pursuant to S.C. Code Ann. § 42-1-400 (1976), and, therefore, could be eligible to assert the exclusive remedy of workers'

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To the extent that the trial court's opinion is based on its statement that "S.C. Code Ann. §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" this is pure error. (R. p. 16, ¶2). The statute actually explicitly states: "Any employer required to secure the payment of compensation under this title who refuses or neglects to secure such compensation . . . he 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 (1976).

compensation benefits as a defense to the tort suit, the court held that Pineland was not entitled to assert that defense in this instance because it had not “secured” workers’ compensation coverage for Harrell. *Harrell*, 337 S.C. at 326-331

Accordingly, merely satisfying the elements to be deemed a statutory employer is insufficient to utilize the statutory employer immunity to tort liability – the statutory employer must also secure workers’ compensation benefits for the statutory employee even if the statutory employee’s immediate employer has already secured those benefits. To demonstrate that it has secured workers’ compensation benefits for a claimed statutory employee, a statutory employer must satisfy the requirements of S.C. Code Ann. § 42-1-415(B) (Supp. 2006), which provides that the employer “must collect documentation of insurance . . . on a standard form acceptable to the commission. The documentation must be collected *at the time* the contractor or subcontractor *is engaged* to perform work. . . .” (Emphasis added).

There is no evidence that Bayshore Corp. collected a certificate of insurance documenting that Poch and Key were covered by PRI’s workers’ compensation insurance policy at the time they began work at the site. Indeed, the evidence suggests that neither Bayshore entity inquired about such documentation until after the accident took place. Bayshore Corp. chairman David Eastwood testified that company president Colonna was responsible for making sure that workers’ compensation coverage was in place. (R. p. 749, line 16-p. 86, line 3). Colonna admits that he had no conversations with Job Place or PRI prior to the accident. (R. p. 626, lines 2-6). According to a letter from Bayshore SC’s counsel, the companies became aware that PRI had workers’ compensation coverage for its

employees because another PRI employee was previously injured. (R. p. 927). This letter makes clear, however, that even Bayshore SC failed to collect the necessary documentation at the time Appellants were engaged to begin work at the site: "When the accident happened on Thursday we searched the job file and noted that we did not have a current insurance certificate for your company." *Id.* Accordingly, Bayshore Corp. cannot rely on § 42-1-415 as a basis for asserting that it "secured" compensation benefits for an injured worker. *E.g.*, *Harrell*, 337 S.C. at 330 (stating that a statutory employer need not directly secure compensation for a statutory employee if § 42-1-415 is satisfied); *Hardee v. W.D. McDowell*, 372 S.C. 413, 419, 642 S.E.2d 632 (Ct. App. 2007) (holding that a general contractor's failure to secure the documentation required under § 42-1-415 on each job rendered the section inapplicable).

II. THE TRIAL COURT ERRED IN FINDING THAT BAYSHORE SC WAS ENTITLED TO IMMUNITY AS APPELLANTS' EMPLOYER BECAUSE IT DID NOT MEET THE STATUTORY REQUIREMENTS.

The trial court erred in finding that Bayshore SC was entitled to immunity under the Workers' Compensation Act. As discussed above, Bayshore SC, like Bayshore Corp., cannot take advantage of its alleged position as Appellants' statutory employer because it failed to satisfy the requirements of S.C. Code Ann. § 42-1-415 (Supp. 2006), which required it to collect documentation of insurance *at the time* Appellants were engaged to perform work. The trial court erred when it disregarded this evidence and afforded Bayshore SC immunity in spite of this statutory deficiency.

Likewise, the trial court should have found that Bayshore SC failed to meet the first prong of the borrowed employee test: whether the employee made a contract of hire, express

or implied, with Bayshore SC. *Eaddy*, 284 S.C. at 272. The contract of hire between Bayshore SC and Job Place for Appellants services is fatally flawed under South Carolina law. Section 40-68-70 of the South Carolina Code requires that a contract between the temporary employment agency (defined by statute as the "licensee") and the client company specify "whether the licensee, the client company, or both, are securing workers' compensation liability." S.C. Code Ann. § 40-68-70(A)(7) (Supp. 2006). When the licensee is supplying the workers' compensation coverage, then the licensee "shall disclose to . . . each client company . . . information relating to any insurance . . . provided for the benefit of its assigned employees." S.C. Code Ann. § 40-68-110(A) (Supp. 2006).

Because neither Job Place nor Bayshore SC ever transferred the documentation required by §§ 40-68-70 and 40-68-110, the contract for hire between Job Place and Bayshore SC was in violation of the statutes. Public policy dictates that the terms of the contract for hire ought not be enforced when the parties to the contract did not comply with all the terms of the law when executing the agreement. *See, e.g., Miller v. Central Carolina Tel. Co.*, 194 S.C. 327, 8 S.E. 335 (1940) (holding that a telephone company could not enter private contracts when it had a legally imposed duty to provide service to all customers alike); *McConnell v. Kitchens*, 20 S.C. 430, 435-36 (1889) ("[W]hile it is true that the legislature has not, in so many words, declared that it shall not be lawful to sell any commercial fertilizer in this State, unless the regulations above prescribed have been complied with, or that a contract for the sale of such fertilizer, without complying with such regulations, shall be illegal and void, yet it seems to us manifest that the real object of the legislation set out above was to prohibit the sale of commercial fertilizers unless the

prescribed regulations are complied with, in order to protect the farming interest from deceit or imposition in the sale of an article which has come to be so extensively, if not universally, used by the farmers of the country, as commercial fertilizers.”); *Restatement (Second) Contracts* § 178(1) (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”). Thus, Bayshore SC should not be deemed Appellants’ employer because no valid contract for hire existed with Job Place since the parties to the employee lease agreement did not comply with all the applicable State statutes governing the transaction.

In addition, Bayshore SC fraudulently misrepresented the work that it required the temporary employees to perform for the purpose of inducing Job Place to enter into the contract. *See* (R. p. 705, lines 8-20, p. 719, lines 15-17 (Coyle testifying that Bayshore SC contracted for “light industrial” clean-up work and never revealed that it would require “heavy industrial” trench work of the temporary employees)); *see also*, (R. pp. 584-587; pp. 701-706, 709, 713-714, 717-718 (Cason and Coyle testifying that Job Placement and PRI would never have agreed to lease its temporary employees had they known that Bayshore SC would require them to work in trenches)). The “practice of fraud is against public policy, and fraud will, as a general rule, vitiate all contracts into which it enters” *Altman v. Stand. Mutual Life Ins. Co.*, 204 S.C. 151, 154, 28 S.E.2d 636 (1944). If the elements of fraud are met then the contract for hire with Job Place is vitiated by the fraud, and thus, 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.⁸

Moreover, no contract of employment exists because the parties to the contract never reached a meeting of the minds and, therefore, acceptance of the terms of the contract could not occur. (R. pp. 584-587; pp. 701-706, 709, 713-714, 717-718). "The necessary elements of a contract are offer, acceptance, and valuable consideration." *Tomlinson v. Mixon*, 367 S.C. 467, 479, 626 S.E.2d 43 (Ct. App. 2006) (citing *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 581 S.E.2d 161 (2003)). A contract may be rescinded upon the ground of mistake, "where the mistake is not mutual, [but] unilateral, and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition in any form of the party opposed in interest to the reformation or rescission, without negligence on the part of the party claiming the right. *Alderman v. Bivin*, 233 S.C. 545, 552, 106 S.E.2d 385, 389 (1958).

In this case, regardless of any alleged fraud, Bayshore SC clearly intended for Appellants to work in deep trenches to dismantle foundational structures when it approached Job Place about hiring its temporary employees. Equally clear, neither Job Place nor PRI were aware that trench work would be included among the tasks that its employees would

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To recover in an action for fraud and deceit, a plaintiff must prove the following nine elements:

- (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted upon by the person; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury.

Lundy v. Palmetto State Life Ins. Co., 256 S.C. 506, 510, 183 S.E.2d 335 (1971).

perform, nor did they consider the high risk job within the compass of light industrial clean-up and dismantling of equipment – the tasks for which it agreed to loan its employees. (R. pp. 584-587; pp. 701-706, 709, 713-714, 717-718, 719). Both Job Place and PRI considered trench work to be “heavy industrial” and vehemently deny that they would have placed Plaintiffs or their other employees to perform trench work, a task that they were unprepared and unqualified to perform. (R. pp. 584-587; pp. 701-706, 709, 713-714, 717-718). Indeed, PRI explained that it had employees that were qualified to handle “heavy industrial” work involving trench work, but that Job Place typically would not place employees where the job code associated with work was considered dangerous or presented a high risk, such as trench work. (R. p. 584, line 11-p. 585, line 14, p. 587, lines 3-25). Accordingly, because the parties never reached a full accord as to the tasks that were to be completed by the temporary employees, no contract for hire was ever formed; and thus, Bayshore SC is not entitled to hide behind the shield of workers’ compensation immunity.

III. THIS COURT SHOULD NOT CONSIDER EVIDENCE PRESENTED IN THE AFFIDAVITS OF DUNBAR AND LENART AND IN THE SECOND AFFIDAVIT OF COLONNA.

In its consideration of this appeal, this Court has both the power and the duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence. *Kirksey*, 314 S.C. at 45. In the proceeding below, Appellants filed Motions asking the trial court to disregard the testimony contained in three affidavits submitted by Respondents, which the trial court denied. Appellants re-assert those arguments herein and ask that this Court exclude these affidavits from its consideration of the evidence, as well. In so doing, it is important to note that this objection is not based on the mere fact that the

testimony was offered via affidavit. Indeed, Appellants consented to the presentation, in general, of evidence via affidavit and deposition transcript rather than by live testimony at the hearing. In so doing, however, they did not waive their right to have the opportunity to cross-examine Respondents' witnesses via deposition prior to the hearing nor did they waive their right to make other objections to the admissibility or relevance of the testimony contained in affidavits.

A. THIS COURT SHOULD NOT CONSIDER THE EXPERT TESTIMONY OFFERED ON ISSUES OF LAW IN VERNON F. DUNBAR, ESQUIRE'S AFFIDAVIT.

This Court should disregard the affidavit of former Workers' Compensation Commissioner Vernon F. Dunbar, Esquire. (R. pp. 846-850). While Mr. Dunbar may very well be considered an expert in the field of Workers' Compensation, his affidavit is little more than an application of facts to the law as Mr. Dunbar thinks the law ought to be applied in this case. "In general, expert testimony on issues of law is inadmissible." *Dawkins v. Fields*, 354 S.C. 58, 65, 580 S.E.2d 433 (2003). Where expert testimony is offered to establish a conclusion of law, the court should exclude that testimony because it invades the court's exclusive province. *O'Quinn v. Beach Assocs.*, 272 S.C. 95, 106-107, 249 S.E.2d 734, 739-40 (1978). A trial court commits reversible error when it considers testimony that is designed not to assist it to understand certain facts, but rather consists of legal argument why the court should rule, as a matter of law, in a party's favor. *Green v. State*, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002).

Here, paragraphs six (6) through nine (9) of Dunbar's affidavit contain his summary of facts gleaned from various depositions and affidavits interpreted in a light most favorable

to Respondents' position. (R. pp. 848-849, ¶¶ 6-9). The remaining paragraphs, however, contain Dunbar's legal conclusions that go to the heart of the issues to be decided by the Court, including the ultimate conclusion as to whether Respondent Bayshore SC was entitled to tort immunity under the Workers' Compensation Act.⁹ (R. pp. 848-850, ¶¶ 7-11). Like Professor Freeman's affidavit that the Supreme Court found should have been excluded in *Dawkins*, Mr. Dunbar's affidavit "reads as if it could have been respondents' oral argument to the trial court at the summary judgment hearing." 354 S.C. at 65.

This Court should exclude Dunbar's affidavit, just as the Supreme Court did Professor Freeman's, because it consists in its majority of "simply legal argument as to why summary judgment should be [granted]." *Id.* See also, *Mason v. City of Indianapolis*, 1:06-cv-258, 2007 U.S. Dist. LEXIS 67349 at *2 (S.D. Ind. Sept. 11, 2007) (excluding the affidavit of a criminal defense attorney as to the meaning of a state statute and whether probable cause existed: "[T]he meaning of a statute and the existence of probable cause on undisputed facts are questions of law. As such, Farlow's opinions on the meaning . . . are immaterial to the court's decision . . . and will not be considered.").

B. THIS COURT SHOULD EXCLUDE THE TESTIMONY OFFERED IN KEITH COLONNA'S SECOND AFFIDAVIT UNDER THE "COMPETING" OR "SHAM" AFFIDAVIT DOCTRINE.

This Court should also disregard the evidence offered in the second affidavit of company president S. Keith Colonna dated April 25, 2007. (Second Colonna Aff. R. pp.

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Incidentally, if this Court should determine that it will consider Mr. Dunbar's affidavit, it should also take note that Mr. Dunbar declined to opine that Bayshore Corp. was entitled to share in Bayshore SC's statutory employer immunity status.

851-876). Respondents initially submitted an affidavit executed by Colonna dated April 18, 2005. (Colonna Aff. R. pp. 836-843). In this first affidavit, Colonna asserts that Bayshore Corp. and Bayshore SC were run as two separate and distinct corporate entities and disavowed any involvement by Bayshore Corp with the activities at the site. (Colonna Aff. R. p. 841, ¶ 11). Colonna's sworn deposition testimony likewise supported this version of the facts. Thereafter, Respondents submitted a second affidavit executed by Colonna, which contradicted testimony he rendered during his deposition and in his April 18, 2005 affidavit, by seeking to blur the distinction between the two companies and rather claiming that Bayshore SC was performing the work of Bayshore Corp. (Second Colonna Aff. R. pp. 851-876; Colonna Depo., pp. 591-594, 607, 610, 613, 665). Likewise, the second Colonna affidavit contradicted the sworn testimony rendered by Respondents' other witnesses on this issue. (Second Colonna Aff. R. pp. 851-876; p. 746 (Eastwood); pp. 731, 732 (Dickens)).

Colonna testified accurately via his first affidavit that "[o]nly [Bayshore SC] had anything to do with this accident and the activities at the Horry County site. The South Carolina company [Bayshore SC] was run as a separate entity. It had its separate bank account." (Colonna Aff. R. p. 841, ¶ 11). In his deposition, he testified that while he served as the president of both Bayshore Corp. and Bayshore SC, the companies maintained separate and distinct corporate identities, with each corporation having its own federal tax identification number and separate minute books, account records, and bank accounts. (R. pp. 591-594, 607, 610, 613, 665). Colonna further testified in deposition that each corporation maintained separate self-insured reserves. (R. p. 613, lines 9-22). Moreover,

Colonna testified that Bayshore Corp. would submit and accept bids from its "subsidiary companies as customers, just like we did their competitors." (R. p. 621, lines 22-24).

This initial testimony by Colonna was consistent with that offered by other Bayshore Corp. and Tidewater Skanska witnesses offered by Respondents who confirmed that the corporate officers consciously entered into separate contracts on behalf of the distinct corporations and differentiated between the two corporations when charging expenses. (R. p. 650, lines 3-16; p. 744, line 5-p. 745, line 14; p. 764, lines 22-25).

The second Colonna affidavit reverses this position and attempts to blur the distinctions between the two entities. In direct contradiction of its earlier position that the "South Carolina company [Bayshore SC] was run as a separate entity" and that Bayshore Corp. had nothing to do with the activities being performed in South Carolina (Colonna Aff. R. p. 841, ¶ 11), Colonna asserts in his second affidavit that "[Bayshore SC] was performing the work of [Bayshore Corp.]." (Second Colonna Aff. R. p. 856, ¶ 9). The doctrine of judicial estoppel should bar Respondents from changing their position on the facts to blur the distinction between Bayshore Corp. and Bayshore SC to their advantage.

The "competing" or "sham" affidavit exception to the judicial estoppel test set forth by the Supreme Court holds that a court may disregard a subsequent affidavit that contradicts a party's own prior sworn testimony. *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629 (2004). In making this determination, this Court should consider the following: (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency

and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; and (6) when in relation to summary judgment, the second affidavit is submitted. *Cothran*, 357 S.C. at 218.

Looking at the first, third and fifth prongs which concern potential explanations for the contradictory statements, Respondents have provided none, other than to deny that the statements are inconsistent, which is clearly incorrect on its face. In addition, Colonna was certainly not unaware of or confused about the status of the two corporations he led or the activities each undertook in relation to the site.

The second prong addresses the importance of the facts to the litigation. Here, the contradictory statements are central to the issue of whether Bayshore Corp. is entitled to immunity as an upstream employer of the injured workers. Colonna's first affidavit established a clear distinction between the two companies and insisted that only Bayshore SC had "anything to do with" the activities at the site. In direct contradiction of this testimony, Colonna asserts in his second affidavit that "[Bayshore SC] was performing the work of [Bayshore Corp.]" at the site. (Second Colonna Aff. R. p. 856, ¶ 9). Thus, it was Colonna's second, contradictory affidavit that provided the support for key facts found by the trial court such as "the work performed by Bayshore SC on the Carolina Bays project was . . . ultimately performed for the benefit of Bayshore Corp." and that Poch and Key "were solely performing the work of Bayshore Corp. and Bayshore SC at the time of this accident." (R. pp. 12, 14) (Emphasis added). Pursuant to Colonna's first affidavit and the remainder

of the evidence submitted, there is no basis for a finding that the work at the site involved the direct interests of Bayshore Corp. at all.

The fourth prong looks to the frequency and degree of variation in the statements. Respondents gloss over the variations in the statements, asserting that there is nothing inconsistent in asserting in one affidavit that Bayshore Corp. had nothing to do with the activities on the site and then, in another, that it was Bayshore Corp's work that was being performed at the site. Moreover, Colonna's position in his initial affidavit was consistent with that offered by other Bayshore Corp. and Tidewater Skanska witnesses, as well as his own deposition testimony. No other testimony supports Colonna's contradictory position in his second affidavit.

Accordingly, the trial court erred in considering this second affidavit rather than finding Respondents were estopped from relying on it to support their change in positions concerning the corporate status of the two corporations. This Court should not fall into the same trap.

C. THIS COURT SHOULD EXCLUDE THE AFFIDAVIT OF LARRY LENART BECAUSE APPELLANTS WERE DENIED ANY OPPORTUNITY TO CROSS-EXAMINE THE WITNESS.

This Court should also decline to consider the evidence offered in the affidavit of Larry Lenart. (R. pp. 877-880). As the person who dug the ditch that collapsed on Appellants, Lenart is an important witness in the case. Lenart's testimony in the affidavit submitted by Respondents is contradictory to that offered not only by Appellants but even of that of Respondents' witnesses via their depositions and/or affidavits. In addition, Lenart has a significant criminal record. (R. pp. 928-929; pp. 930-931). Accordingly, Lenart's

credibility is highly suspect and rendered crucial Appellants' opportunity to cross-examine him.

On May 16, 2006, Appellants served Lenart with a subpoena for his deposition to take place at Respondents' counsel's office in Virginia on May 31, 2006. (R. pp. 932-939). Neither Respondents nor Lenart objected to the subpoena or the deposition. In fact, Respondents' counsel advised Appellants' counsel that Respondents had contacted Lenart and arranged to transport Lenart to the deposition. Appellants' counsel traveled to Virginia for the deposition, which required an overnight stay. On the morning of the deposition, Lenart failed to show up and, reportedly, left word that he had "moved to New York." Nonetheless, it was alleged he was sighted leaving his place of residence on a motor scooter that morning.

As a result, Appellants were unduly prejudiced by their inability to cross-examine the affiant, in clear contravention of South Carolina law. The right to the cross-examination of witnesses is "a most valuable right." *Goolsby v. Goolsby*, 229 S.C. 101, 92 S.E.2d 57 (1956); see *State of S.C. v. Nest Egg Society Today*, 290 S.C. 124, 131, 348 S.E.2d 381 (Ct. App. 1986); *Montgomery v. Robinson*, 93 S.C. 247, 76 S.E. 188 (1912) (recognizing a party's Constitutional and statutory right to cross-examine witnesses against them). "The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth." *Goolsby*, 229 S.C. at 112.

The Supreme Court has recognized that fundamental fairness requires the exclusion of the affidavit of a witness that a party had no opportunity to cross-examine, where, as here,

the party challenged the credibility of the witness, who was "an unsavory character with a long criminal record." *City of Spartanburg v. Parris*, 251 S.C. 187, 191, 161 S.E.2d 228 (1968). Likewise, in *Glen III v. Charlotte-Mecklenburg Bd. of Educ*, 903 F. Supp. 918, 937 (W.D. N.C. 1995), the federal district court excluded evidence in circumstances almost identical to those here, as follows:

One further matter before this Court which will be addressed is the failure of Robin B. Clarke, the Plaintiffs' "Advocate" who was subpoenaed by the Defendant, to be present for a deposition at 9:00 a.m. May 24, 1995 at the office of Defendant's counsel.

A copy of the subpoena was served upon her personally at her home on April 21, 1995, according to fn. 1 in Defendant's Supplemental Memorandum filed September 8, 1995. Further, according to that footnote, Ms. Clarke did not attempt to quash the subpoena but called the office of Defendant's attorneys on May 23, 1995 as a "courtesy" to advise counsel she would not appear for her deposition. No excuse was given. In view of her refusal to honor the subpoena the Court will strike all her testimony or other evidence from her from the record and will not consider it for any purpose.

Further, at a later time, the Court will probably issue a show cause order to Ms. Clarke to appear before this Court and explain why she should not be held in contempt.

Likewise, Appellants assert that fundamental fairness dictates that Lenart's affidavit should be excluded and disregarded for all purposes in conjunction with Respondents' Motion as Appellants were denied the opportunity to cross-examine him at any point.

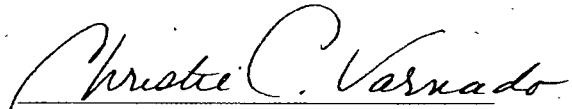
CONCLUSION

For the reasons stated, the Court should reverse the decision of the trial court dismissing Respondents Bayshore Corp. and Bayshore SC and should further find that the preponderance of the evidence demonstrates that, as a matter of law, neither Bayshore Corp. nor Bayshore SC are shielded by the Workers' Compensation statutory immunity from

liability for Appellants' claims. The Court should then remand this case back to the trial court for a full trial on the merits against all Respondents.

Respectfully submitted by,

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Charleston, South Carolina

August 7, 2008

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Judge Paul M. Burch,

Case Nos.

2006-CP-26-3194R

2006-CP-26-3195R

2006-CP-26-3196R

THELMA M. POCH, as the 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.

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

Respondents.

KEVIN KEY and SANDRA KEY,

Appellants,

v.

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TIDEWATER SKANSKA GROUP, INC.,
and TIDEWATER SKANSKA INC.,

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THELMA M. POCH, individually and as
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Appellants,

v.

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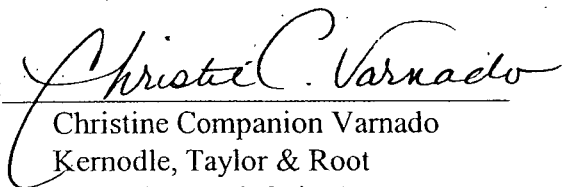
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Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellants complies with
Rule 211(b), SCACR.

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Appellants,

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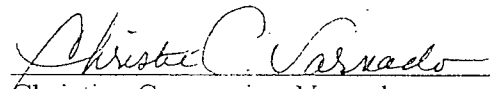
PROOF OF SERVICE

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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 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.,
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,

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

Respondents.

RESPONDENTS' INITIAL BRIEF IN OPPOSITION TO APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

- I. Whether Bayshore SC and Bayshore Corp. are entitled to tort immunity pursuant to the exclusivity provisions of the Workers' Compensation Act, under either special or statutory employer theories, when Appellants were performing the work of both Bayshore SC and Bayshore Corp.?
- II. Whether this Court should be allowed to consider the affidavits of Colonna, Lenart, and Dunbar?
 - A. Whether Colonna's affidavit is a competing or sham affidavit?
 - B. Whether Lenart's affidavit should be excluded since this Court's consideration of the affidavit is not dependent on Appellants' cross-examination of Lenart?
 - C. Whether this Court should not exclude the affidavit of Dunbar?

PROCEDURAL HISTORY

This appeal arises from a lawsuit filed by the Appellants, Kenneth Poch (hereinafter, "Poch") and Kevin Key (hereinafter "Key") for on-site injuries they sustained while working for the Respondents, Bayshore Concrete Products/South Carolina, Inc. (hereinafter, "Bayshore SC") and Bayshore Concrete Products Corp. (hereinafter, "Bayshore Corp."). After collecting workers compensation benefits, Appellants filed a civil action against Respondents, which the trial court dismissed, pursuant to the exclusivity provision of the Workers' Compensation Act. Since the Appellants were performing the work of the Respondents when they were injured and Respondents would have been obligated to provide workers compensation coverage to Appellants, their sole remedy was through the Workers' Compensation Act.

On or about April 19, 2007, the Honorable Steven H. John issued an Order confirming the agreement of the parties to schedule a hearing date for Defendants' Motion to Dismiss or, alternatively Motion for a Hearing to Determine Workers' Compensation Exclusivity/Jurisdiction. (Record at 6-9). The April 19, 2007, Order outlined the parties' agreement that the trial court would consider affidavits, deposition testimony, applicable records and/or documents in addition to memorandums of law and oral argument. (Record at 6-9). Subsequently, on or about May 21 and 22, 2007, Appellants filed Motions to Exclude the Affidavits of Keith Colonna, Larry Lenart, and Vernon Dunbar. (Record at 474-539).

The Motion to Dismiss, or, Alternatively, Motion to Determine Workers' Compensation Exclusivity/Jurisdiction was heard before the Honorable Paul M. Burch on June 1, 2007. Pursuant to the trial court's July 19, 2007, Order, the trial court made findings of fact and a final determination as to whether Bayshore SC and Bayshore Corp. were immune from civil liability pursuant to workers' compensation exclusivity. (Record at 10-17). On July 19, 2007, the trial court issued its eight page Order finding that Appellants were performing the work of Bayshore SC and Bayshore Corp. and that Respondents were immune from civil liability pursuant to workers compensation exclusivity. (Record at 10-17). The trial court found:

- That both Bayshore Corp. and Bayshore SC, a wholly owned subsidiary of Bayshore Corp., were in the same business of manufacturing pre-cast concrete forms for use in construction

projects and that Bayshore SC performed the work of Bayshore Corp. (July 19, 2007, Order);

- That Bayshore Corp. secured a bid to manufacture pre-cast concrete in South Carolina, incorporated Bayshore SC to fulfill that bid, and executed a lease and purchased equipment on behalf of Bayshore SC (July 19, 2007, Order);
- That it was a necessary and essential part of business for Bayshore Corp. and Bayshore SC to remove and dismantle concrete casting beds, that these activities were typically performed by their own employees, and that Appellants were working alongside Bayshore SC employees in dismantling concrete forms (July 19, 2007, Order);
- When most of Bayshore SC's regular workforce quit, Bayshore SC leased employees from Job Place/Personnel Resources (hereinafter, "Job Place"), an employee leasing agency, to assist Bayshore SC's employees in site clean up and equipment dismantling (July 19, 2007, Order);
- That Appellants were under the control of Bayshore SC, which provided both direction and equipment to Appellants, and were injured while assisting Bayshore SC's regular employees with the clean up and dismantling of the facility (July 19, 2007, Order);
- That Bayshore Corp. and Bayshore SC had workers compensation coverage and would have been responsible for paying benefits to Appellants had they not received them from Job Place (July 19, 2007, Order).

(Record at 10-17).

In applying the law to the above facts, the trial court held that Appellants were borrowed or leased employees performing the work of Bayshore SC and Bayshore Corp. (Record at 10-17). Therefore, Respondents were within the jurisdiction of the Workers' Compensation Act, were immune from the Appellants' claims, and were to be dismissed with prejudice. (Record at 10-17). In three

separate Orders, dated July 19, 2007, the trial court further denied Appellants Motions to Exclude the Affidavits of Colonna, Lenart, and Dunbar. (Record at 18-25). After the denial of Appellants' Motion to Reconsider on October 3, 2007, this appeal was filed. (Record at 26-27).

The Appellants raise three issues on appeal: first, that Bayshore Corp. is not entitled to workers' compensation exclusivity; second, that Bayshore SC is not entitled to workers compensation exclusivity; and third, that the Court of Appeals should not consider the affidavits of Colonna, Lenart, and Dunbar. However, Appellants arguments must fail since the evidence clearly shows that Respondents are entitled to workers compensation exclusivity, either under special and/or statutory employer theories and since Appellants have failed to show that this Court should exclude the affidavits of Colonna, Lenart, and Dunbar.

FACTS

On or about June 6, 2002, Appellants Key and Poch were tragically injured in a work-related accident at Bayshore SC in Longs, South Carolina. Both Key and Poch were laborers leased by Bayshore SC from Job Place, an employee leasing agency. (Record at 881-884).

Bayshore SC is a separately incorporated subsidiary and remote casting yard of Bayshore Concrete Products Corp., located in Cape Charles, Virginia. (Record at 851-876). Bayshore Corp. and Bayshore SC are in the business of

manufacturing pre-cast concrete products for use in construction projects.

(Record at 851-876). Around April, 2000, Bayshore Corp. secured a bid 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, and incorporated Bayshore SC to act as a remote casting yard in order to fulfill the work order locally. (Record at 851-876; at 918). Bayshore Corp. executed a lease and purchased equipment on behalf of Bayshore SC. (Record at 851-876; at 918).

At the time of the accident, June 6, 2002, the Carolina Bays project was in its final stages and Bayshore SC was in the process of dismantling the equipment and casting beds used to create the pre-stressed concrete forms, and site clean up. (Record at 669-673; at 836-843). The equipment consisted of steel pillars driven into the ground at each end of a mold, topped by concrete caps or abutments. (Record at 639-642; at 836-843). These pillars and abutments were used to hold high tension steel wires in the pre-stressed concrete girders and forms. (Record at 639-642; at 836-843). When the molds were no longer needed, Bayshore Corp. and its subsidiaries typically removed and dismantled casting beds. In this case, returning the site to its original condition was also a term of the lease Bayshore Corp. signed on behalf of Bayshore SC. (Record at 639-642; at 665-673; at 851-876; at 849-901).

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. (Record at 665-673). Since most of Bayshore SC's regular payroll employees had quit, Bayshore had to lease manual laborers from Job Place to assist its remaining employees in the site dismantling process. (Record at 671-673). Bayshore SC provided the leased employees with equipment, controlled their work, and had the right to terminate leased employees from the job site. (Record at 800-804).

On June 6, 2002, Appellants 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. (Record at 790-796). Appellants would break down the equipment and pack up tools for shipment back to Bayshore Corp. (Record at 785-796). 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 Appellants how to clear dirt from around the girders. (Record at 790-796; at 877-880). The trench collapsed on Appellants while inside the trench, injuring Key and fatally injuring Poch. Both Poch and Key received workers compensation benefits through Job Place. (Record at 881-884). Both Bayshore SC and Bayshore Corp. had workers' compensation insurance which would have covered Appellants. (Record at 844-845). Appellants subsequently filed personal injury claims against Bayshore SC and Bayshore Corp. in civil

court.

STANDARD OF REVIEW

In matters where the trial court has made a final determination upon the applicability of workers compensation exclusivity, that an employer is immune from liability as a statutory employer, or upon the jurisdiction of the Workers' Compensation Act, the question on appeal is one of law and the court reviews the entire record and decides the jurisdictional facts in accord with the preponderance of the evidence. See Cooke v. Palmetto Health Alliance, 367 S.C. 167, 172-173, 624 S.E.2d 439, 441 (S.C.App. 2005).

ARGUMENT

The bedrock issue in this appeal is whether Bayshore SC and Bayshore Corp. are immune from Appellants' claims pursuant to workers compensation exclusivity, when the Appellants were leased employees performing the work of both Bayshore SC and Bayshore Corp.¹ As leased employees, Appellants were performing the sole work of both Bayshore SC and Bayshore Corp., both of which would have been responsible for providing workers' compensation benefits to Appellants. Therefore, both Bayshore SC and Bayshore Corp. are immune from

¹ The Supreme Court of South Carolina 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).

Appellants lawsuit pursuant to the exclusive remedy provision of the Workers' Compensation Act.

That Respondents are entitled to exclusivity is supported by a two-tiered analysis. First, Bayshore SC is entitled to immunity both as a special employer² and as a statutory employer of Appellants. Appellants were leased by Bayshore SC to perform its necessary and essential work, while under its control. The record clearly shows that Bayshore SC was Appellants' special employer, and that their injuries are within the jurisdiction of the Workers' Compensation Act. Moreover, Bayshore SC is the statutory employer of Appellants since they were performing the work of Bayshore SC.

Second, Bayshore Corp. is entitled to immunity, under the statutory employer theory, as an upstream employer of Appellants. Since the work being performed by Appellants, through Bayshore SC, was part of Bayshore Corp.'s trade, business, and occupation and had been performed by Bayshore Corp. in the past, Bayshore Corp. is immune from liability. Since Appellants were performing the work of Bayshore SC, and Bayshore SC was performing the work of Bayshore Corp., Bayshore Corp. is immune as an upstream employer.

Lastly, the Affidavits of Colonna, Lenart, and Dunbar should not be excluded. First, Colonna's second affidavit complained is consistent with his

² A "special employer" relationship exists when a lent, or borrowed, employee is under the direction and control of another employer. See Cooke v. Palmetto Health Alliance, 367 S.C. 167, 175, 624 S.E.2d 439, 443 (S.C.App. 2005).

previous affidavit. Second, Lenart's affidavit should not be excluded since Appellants were not entitled to cross-examine Lenart. Third, Dunbar's affidavit should not have be excluded simply because it embraces an ultimate issue to be decided by the trial court.

I. 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 Worker's Compensation Act, S.C. Code of Laws §42-1-540, since Appellants were solely performing the work of Bayshore SC and Bayshore Corp. and since both Bayshore SC and Bayshore Corp. would have been responsible for providing workers' compensation benefits to Appellants.

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.**

See McCaskey v. Daniel International Corp., 442 F.Supp. 1360, 1362 (D.S.C. 1977) (emphasis added).

The purpose of workers' compensation is to afford the benefits of compensation to the men exposed to the risks of its 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 Electric Co-Op v. Byrd, 238 F.2d 346 (4th Cir. 1956). If this Court finds Bayshore SC and Bayshore Corp. would have been responsible for providing workers' compensation benefits, then 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. App. 1989). The fact that the employer seeking exclusivity did not actually pay worker's compensation benefits to the injured employee is of no consequence. See Parker v. Williams and Madjanik, Inc., 275 S.C. 65, 74, 267 S.E.2d 524, 528 (S.C. 1980).³ "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." See Edens v. Bellini, 359 S.C. 433, 440, 597 S.E.2d 863, 866-867 (S.C. App. 2004).

A. Bayshore SC Is the Special Employer of Appellants.

Under the special employer analysis Bayshore SC is entitled to immunity since Appellants were leased employees performing the work of, and under the direct control of, Bayshore SC. The special employer, or lent employee, analysis

³ 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 Worker's 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." See Parker at id.

is typically a three-prong test: 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 employees. See DeBerry v. Coker Freight Lines, 234 S.C. 304, 108 S.E.2d 114 (S.C. 1959).⁴

When employees are 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. App. 1996).

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. See id. at 280, 471 S.E.2d at 719. Nix held that CSI was entitled to worker's compensation exclusivity since the leased employees were the lent employees of Duke, thus sharing Duke's tort immunity. See id. at 281, 471 S.E.2d at 720. The court used a right of control test in finding CSI immune, when it said:

CSI took prospective employees' applications, performed various

⁴ 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 DeBerry Court said, "that 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". See DeBerry at 304, 108 S.E.2d at 116-117.

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.

See id. Significantly, the court noted CSI's role as an employee leasing agency was solely that of an administrator and that CSI's responsibility ended once the employees were sent to Duke Power. See id.

Other South Carolina cases have held that special employers are immune from civil suit brought by their leased employees. In Day v. Sanders Brothers, Inc., 315 S.C. 95, 431 S.E.2d 629 (S.C. App. 1993), Day was a leased employee from Talent Tree and was injured while being leased to Milliken Magnolia Plant. See id. at 96, 431 S.E.2d at 630. The South Carolina Court of Appeals held, "Day could not sue Milliken because of the exclusive remedy provision of the workers' compensation act". See id. In Eaddy v. A.J. Metler Hauling & Rigging Co., 284 S.C. 270, 325 S.E.2d 581 (S.C.App. 1984), Coward Farm Center lent a driver, Eaddy, to Metler Hauling to transport steel. The court found Eaddy was an employee of Metler for purposes of worker's compensation exclusivity, since Metler benefitted from Eaddy's work and had right of control over Eaddy, including the manner and details of performing the job. See id. at 272, 325 S.E.2d at 583.

The Fourth Circuit held that right of control is the proper test when leased employees are injured, since there is no question that they are performing the

work of their special employer. In Huff v. Marine Tank Testing Corp., 631 F.2d 1140 (C.A. 4th 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. See 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 . . . since 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. 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.⁵ Therefore, where a leased employee is injured while working

⁵ See Lindsey v. Bucyrus-Erie, 161 Ariz. 457, 778 P.2d 1353 (Ariz. App. 1989) (holding that, "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"). Id. at 458, 778 P.2d at 1354. See also St. Claire v. Minnesota Harbor Service, Inc., 211 F.Supp. 521 (D.Minn. 1962); Beaver v. Jacuzzi Brothers, Inc., 454 F.2d 284 (C.A. 8 1972); Stephen v. Oates, 189 Ga.App. 6 (Ga.App., 1988);

for a special employer, the sole test for exclusivity is right of control, since the leased employee is performing the leasing employer's work and not that of the leasing agency.

Turning to the facts of this case, Bayshore SC is immune since it had the right of control over Appellants and their work, provided equipment to Appellants, and had the right to terminate Plaintiffs from the job site. First, Bayshore SC controlled Appellants work and how they performed it. Jolene Coyle, of Job Place, testified that Appellants were under the direct control and supervision of Bayshore SC and that Bayshore SC was solely responsible for ensuring Plaintiffs did their job. (Record at 723). Bayshore SC set the work schedule for Appellants and instructed them on how to perform their work. (Record at 723-724). In fact, Job Place never supervised Appellants and understood that Plaintiffs would be under the supervision of Larry Lenart, Bayshore SC's supervisor. (Record at 720).

Appellant Key described Bayshore SC's extensive right of control when he testified Appellants always worked at the direction of Bayshore supervisors, who told them where to go on the job site, what to do, and with whom to do it. (Record at 780-781; 824). On the day of the accident, Lenart gave Appellants specific directions on how the casting beds were to be dismantled, actually

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).

working alongside Appellants. (Record at 822-823). Lenart instructed Plaintiffs they would be removing casting beds out of the ground. (Deposition of Key, pg. 140). Lenart told Appellants where the casting beds were to be removed and directed them to that area. (Record at 835). These specific examples clearly show Bayshore SC's right of control over Appellants and their work.

Second, Bayshore SC provided equipment to Appellants. Other than leather shoes and hard hats, which workers were required to bring with them to work, Bayshore SC provided the leased employees with shovels, work gloves, safety glasses and other equipment used in deconstructing the facility. (Record at 691; at 780).

Third, Bayshore SC had the right to terminate Appellants. Key testified that Bayshore SC had the right to ask leased employees to leave the job site and that Bayshore SC specifically asked one leased worker to leave for not working hard enough or fast enough. (Record at 781-782; at 819).

Since Bayshore SC had the right of control over Appellants 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 Appellants and is entitled to immunity.

B. Bayshore SC Is the Statutory Employer of Appellants.

Even if Job Place is deemed a subcontractor of Bayshore SC, which Respondents deny, Bayshore SC is also entitled to immunity as a statutory

employer pursuant to South Carolina Code of Laws § 42-1-400, 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.

See id. The statutory employer analysis turns on the concept that an "owner" of a business, which creates a work environment exposing workers to the risk of physical injury, cannot avoid its responsibility to those workers by subcontracting out the labor; thus, the owner of a business enterprise must be accountable to provide worker's compensation coverage to employees of its subcontractors as if the employees were its own and, conversely, must be able to avail itself of worker's compensation exclusivity. See Parker v. Madjanik, 275 S.C. 65; 267 S.E.2d 524 (S.C. 1980)⁶.

Bayshore SC is Appellants' statutory employer if: 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

⁶ "The effect of these [worker's 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." See Parker at 72, 267 S.E.2d at 527-528.

previously performed by the owner's employees. See Bailey v. Owen, 298 S.C. 36, 39, 378 S.E.2d 63, 65 (S.C. 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 tests need to be satisfied and the guidepost is whether the activity being conducted is part of the general trade or occupation of the owner. See Hopkins v. Darlington Veneer Co., 208 S.C. 307, 311, 38 S.E.2d 4, 6, (S.C. 1946). Coverage under the Workers' Compensation Act is jurisdictional and the facts need only be determined by a preponderance of the evidence and on a case by case basis. See Hancock v. Wal-Mart Stores, Inc., 355 S.C. 168, 173, 584 S.E.2d 398, 400 (S.C. App. 2003).

In Hancock, the Court of Appeals of South Carolina held that Wal-Mart was immune pursuant to worker's 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. Id. at 174, 584 S.E.2d at 401. The Hancock Court found that the employee's job was to assemble the vendor's products on-site at Wal-Mart, under the supervision and direction of Wal-Mart staff. Id. Affidavits established that assembling products was a vital part of Wal-Mart's business, in that items on display always sell better than in the box. See id. Facts considered by the Hancock Court were that the employee checked in and signed out with Wal-Mart staff, was under the general direction of Wal-Mart staff, and that Wal-Mart utilized its own direct employees to assemble products for retail as well. Id.

The court's reasoning was that the employee's work was performed for the benefit of Wal-Mart and obligated Wal-Mart to provide worker's compensation insurance, thus, entitling Wal-Mart to the exclusive remedy provisions of the Workers' Compensation Act. See Id.

The Court of Appeals of South Carolina, in Wheeler v. Morrison Machinery Co., 313 S.C. 440, 438 S.E.2d 264 (S.C. App. 1993), held that a machinery company, Morrison, was the statutory employer of an asbestos removal subcontractor's employee, even though Morrison was not in the business of asbestos removal. Id. at 441-443, 438 S.E.2d at 265-266. The Wheeler Court relied on the fact that Morrison had previously used its own employees to remove asbestos insulation from machinery in the past, had used its own employees to remove asbestos alongside the hired subcontractors, and that it was necessary for the company to remove asbestos in order to maintain the machinery's function. Id. at 443, 438 S.E.2d at 266. Even where an employee performs a task that is nominally part of the owner's business, the owner is a statutory employer if the owner's direct employees would have performed the work and the owner would be responsible for providing worker's compensation coverage to the statutory employee.

In a case, factually similar to our own, 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. In Wright v. Westvaco Corp., 522

F. Supp. 775 (D.S.C. 1981), the court recognized that, even though Westvaco primarily manufactured paper, the maintenance of equipment, including the removal of obsolete equipment, was a task Westvaco would have performed itself but for a shortage of its own employees. Id. at 776-778. The Wright Court found workers' compensation exclusivity for Westvaco was proper and logical since Westvaco would have been responsible for worker's compensation insurance coverage, had the subcontractor not provided those benefits. See id.⁷

In the case at bar, Bayshore SC is the statutory employer of Appellants, since they were performing Bayshore SC's work, thus obligating Bayshore SC to provide workers' compensation coverage. Initially, it is important to note that Appellants concede, "The work being done [by Appellants] on the site may have been part of the business of Bayshore SC". (Brief of Appellants, pg. 20, § I, B, 3). In fact, Appellants do not argue that Bayshore SC fails to satisfy the Bailey test for statutory employer.

Moreover, Bayshore SC is a statutory employer since it satisfies any of the three tests enumerated in Bailey. First, the work performed by Appellants was an

⁷ See also Smith v. T.H. Snipes & Sons, Inc., 306 S.C. 289, 411 S.E.2d 439 (S.C. 1991) (holding that a subcontractor repairing a metal shearing machine used by owner's business was work that was necessary and essential to owner's trade, business, or occupation); See also Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 431 S.E.2d 631 (S.C.App. 1993) (holding that a car dealership was a statutory employer of an injured security guard since security services are necessary to protect automobile inventory from vandalism and theft).

important part of Bayshore's business activities.⁸ Keith 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. (Record at 639-641). 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. (Record at 667). The dismantling of casting beds was important in that Bayshore, "couldn't be in the business of precast concrete for long if you didn't have the capacity to change your form size and be able to meet customer needs." (Record at 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 that the specific concrete bed being dismantled by Appellants was usually constructed by regular Bayshore SC employees. (Record at 666-669). Dismantling the casting beds was also typically performed by Bayshore employees using the same methods Appellants were

⁸ Keith Colonna, president of Bayshore SC and Bayshore Corp., refers to both Bayshore Corp. and its subsidiaries, including Bayshore SC, generically as "Bayshore". (Deposition of Colonna, pg. 106-109). Colonna explains in his 4/25/07 affidavit, that Bayshore Corp. secured the bid to pour concrete for the Carolina Bays project and that Bayshore SC was formed by Bayshore Corp. specifically to fulfill that bid, acting, in effect, as a remote casting yard or division of Bayshore Corp.

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. (Record at 667-668).

Q. But generically, that process of taking apart one of these forms, and specifically an abutment, to be able to put stress onto these girders, that is a process which Bayshore would engage in as part of its normal business?

A. Yes.

Q. And that step-by-step process of digging with shovels, and cutting beams, is a process that's part of Bayshore's regular operations?

A. Yes.

(Record at 668). In addition, Lenart testified that he first dug the trench around the abutments with a backhoe and then instructed Appellants 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. (Record at 877-880; at 825).

Third, the construction and dismantling of these concrete forms and the site clean up, had previously been performed by Bayshore SC employees prior to leasing Appellants. (Deposition of Colonna ppg. 112-113). 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 clean up and dismantling process.

(Record at 672-673).

Q. And if your regular hourly workers had not went off to find other jobs, who would have been in the trench at the time it collapsed?

A. It could have either been a regular or salaried employee, an hourly employee, either one.

Q. But it would be a Bayshore/South Carolina employee?

A. Yes, it would have been.

(Record at 673). For several months before the Appellants were leased, Bayshore SC had used its own employees to dismantle, pack up, and clean up the South Carolina site. (Record at 671).

According to both Colonna and Lenart, on the day of this incident, Bayshore SC's regular employees and Appellants were working together to clean up the site and to dismantle the concrete forms. (Record at 672-673; at 877-880). Lenart specifically testified that he dug the trenches himself, and got into the trench with Appellants 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. (Record at 877-880). Lenarts' affidavit further states 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. (Record at 877-880).

Testimony from Colonna and Lenart confirm that the Appellants' 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 they 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 the Plaintiffs, obligating them to cover Appellants' workers' compensation coverage and entitling Bayshore SC to immunity under pursuant to workers' compensation exclusivity.

C. Bayshore Corp. Is a Statutory Employer Entitled to Immunity as an Upstream Employer.

Despite the fact that Bayshore Corp. and Appellants are not in a direct employment relationship, Bayshore Corp. is immune as an upstream statutory employer since Appellants were performing the work of Bayshore Corp. In Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (S.C.App. 1997), the injured Voss was deemed to be an 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 566-567, 482 S.E.2d at 587-588. 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.

In Ost v. Integrated Products, Inc., 296 S.C. 241, 371 S.E.2d 796 (S.C. 1988), the Supreme Court of South Carolina 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. The Ost Court looked to 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. See id. at 245-247, 371 S.E.2d at 799.

Just as in Ost, Bayshore Corp. is the statutory employer of Appellants due to the intertwined business relations of the two companies. First, Bayshore SC was actually an extension of Bayshore Corp.'s business of manufacturing prestressed concrete forms for construction projects. Bayshore Corp. was in the business of manufacturing prestressed 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. (Record at 851-876). 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." (Record at 651).

Second, Bayshore SC was created by Bayshore Corp. for the purpose of fulfilling a South Carolina bid procured by Bayshore Corp. (Record at 851-876).

In his deposition, Colonna testified that Bayshore Corp. was successful in procuring the South Carolina bid 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. (Record at 610-611). The Bayshore Corp. Board Minutes of April 21, 2000, 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.

(Record at 917). 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". (Record at 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. (Record at 665; at 851-876). 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.

(Record at 919-921). These board meeting minutes show conclusively that Bayshore SC was created by Bayshore Corp. as a temporary casting yard to perform Bayshore Corp.'s work. 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 Bayshore Corp., the leaseholder, and return the equipment back to Bayshore Corp. to be used at its other facilities.

Third, Bayshore Corp. and Bayshore SC shared administrative resources concerning their employees. Colonna and Donnie Kellam held positions with both Bayshore Corp. and Bayshore SC, but both of their salaries were paid solely by Bayshore Corp. and were not expensed to Bayshore SC. (Record at 594; at 661-662). Colonna and Kellam actually traveled from Virginia to South Carolina to perform work for Bayshore SC. (Record at 661-662). 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. (Record at 601-604; at 611-612). Both Bayshore Corp. and Bayshore SC also shared safety protocols and manuals. (Record at 663-664).

Bayshore Corp. is immune from liability since Appellants performed its work in dismantling the casting beds at the South Carolina facility. This work is necessary and essential to all Bayshore entities in that casting beds are typically

dismantled as part of their general trade and business. However, dismantling casting beds and site clean up was particularly important to both Bayshore Corp. and Bayshore SC since the South Carolina site was meant to be temporary, dictating that Bayshore SC employees would have to dismantle the site to close the factory, returning the equipment to Bayshore Corp. and returning the site to its pre-lease condition for Bayshore Corp. Therefore, Bayshore Corp. would have been responsible for worker's compensation coverage and is immune pursuant to worker's compensation exclusivity.

D. Bayshore Corp. Is a Statutory Employer Entitled to Immunity as an Owner of the Project Appellants Were Working On.

Bayshore Corp. is also entitled to workers' compensation immunity since the Appellants were performing the work of Bayshore Corp. as an owner, since the Carolina Bays Parkway project was a bid secured by Bayshore Corp. and since Bayshore Corp. was the leaseholder of the facility where Appellants were working. Pursuant to South Carolina Code of Laws § 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. See Parker v. Williams and 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).

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). The Supreme Court of South Carolina held that the clear purpose of the Act was to, "make the 'owner', the [entity] who is interested in having the work done, liable to the employee so injured". See 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 clearly a statutory employer as the owner of the project Appellants were working on. Colonna testified in his deposition and affidavit of April 25, 2007, 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. (Record at 605-608; at 851-876). 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.

The Bayshore Corp. Board Meeting Minutes, clearly show that Bayshore Corp. entered into the Lease and purchased equipment on behalf of Bayshore SC. (Record at 917; at 918; at 894-901). The terms of the Lease required Bayshore Corp. to return the property to its pre-lease condition. (Record at 898). Colonna testified that he traveled 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". (Record at 598). Since Bayshore Corp. was the named lessee on the Lease, Appellants were performing Bayshore Corp.'s responsibilities as an "owner" under the lease. By dismantling the equipment owned by Bayshore Corp. and returning that equipment back to Bayshore Corp., Appellants were further performing the work of Bayshore as an "owner". Therefore, Bayshore Corp. is entitled to immunity as an "owner".

E. Appellants Incorrectly Argue That Bayshore Corp. and Bayshore SC Are Not Entitled to Workers' Compensation Exclusivity.

Appellants have raised several erroneous arguments as to why Bayshore Corp. and Bayshore SC are not entitled to workers' compensation exclusivity. Appellants' arguments are based on misconceptions about the relationship between Appellants, Bayshore SC, and Bayshore Corp. and whether the requirements of the Workers' Compensation Act were satisfied.

1. Bayshore Corp. and Bayshore SC Are Entitled to Immunity Since Appellants Were Performing Both Companies' Work.

When Appellants were injured, they were performing the work of both

Bayshore SC and Bayshore Corp. Appellants mistakenly represent that Appellants were not performing the work of Bayshore Corp. by failing to recognize that Appellants' work for Bayshore SC was ultimately for the benefit of Bayshore Corp.

i. *Bayshore Corp. Does Not Rely on the Parent/Subsidiary Relationship for Immunity.*

The argument that Bayshore Corp. seeks to derive immunity from its parent/subsidiary relationship with Bayshore SC or that Bayshore Corp. is trying to pierce its own corporate veil, misses the point that Appellants were actually performing the work of Bayshore Corp. To say that Appellants were performing the work of Bayshore Corp. is an entirely different concept from arguing that Bayshore Corp. is immune solely because it owns Bayshore SC as a subsidiary. The difference is that Bayshore Corp. and Bayshore SC are in the same business. Bayshore Corp. created Bayshore SC solely to perform work which Bayshore Corp. secured a bid for. Bayshore Corp., as the leaseholder, also had a special interest in the dismantling and clean up of the site.

Appellants reliance on Monroe v. Monsanto, 531 F.Supp. 426 (D.S.C. 1982) (which specifically held that a company did not inherit immunity simply because its "sister" company was immune), is misplaced since Bayshore Corp. is not relying upon its parent/subsidiary relationship for immunity. However, even under Monsanto, Bayshore Corp. would still be entitled to exclusivity. First, Bayshore Corp. and its subsidiaries were referred to interchangeably as

"Bayshore" or "Bayshore Concrete Products" because they performed the same work and "Bayshore" was, "a well-established name in the industry". (Record at 651-652). Second, officers and board members of both Bayshore Corp. and Bayshore SC were substantially the same and operated out of Bayshore Corp.'s offices.⁹ (Record at 851-876; at 922). Third, Bayshore Corp. and Bayshore SC's shared officers, Keith Colonna and Donnie Kellam, both operated out of Bayshore Corp. offices in Cape Charles Va. and were both paid out by Bayshore Corp. without being expensed to Bayshore SC.¹⁰ (Record at 599; at 661). Fourth, Bayshore SC employees filled out Bayshore Corp. applications and Bayshore SC employees followed Bayshore Corp. safety manuals, since separate Bayshore SC documentation was not created. (Record at 607; at 663-664). Lastly, Bayshore Corp. and Bayshore SC were clearly in the same business, manufacturing pre-cast concrete forms and dismantling the casting beds, which furthered the general business of both entities and furthered the specific business and interests of Bayshore Corp., which was to establish a temporary casting site in South Carolina for the Carolina Bays Parkway Project and to return the site to

⁹ In fact corporate minutes for both entities were made at the exact same time and at the exact same place, involving substantially the same board members. (Record at 917; at 918).

¹⁰ Colonna's deposition indicates that all Bayshore SC salaried employees, were paid by Bayshore Corp. but that Bayshore SC employees working in South Carolina were expensed to Bayshore SC, while employees such as Colonna and Kellam who worked for Bayshore SC out of Bayshore Corp. in Virginia were paid solely by Bayshore Corp. and were not expensed. (Record at 594; at 598-604; at 661-662).

its pre-lease condition. (Record at 851-876; at 598; at 898; at 917; at 919-921; at 757).

ii. Site Clean Up and Dismantling were Responsibilities of both Bayshore SC and Bayshore Corp.

Appellants incorrectly argue that neither Bayshore SC nor Bayshore Corp. are entitled to immunity since they were not in the business of dismantling and cleaning up construction sites and since Bayshore Corp. was not directly involved with the day to day activities of the dismantling and site clean up. However, the record is replete with evidence that Appellants' activities were, in fact, the work of both Bayshore SC and Bayshore Corp. It is irrelevant that Bayshore Corp. was not directly involved in the actual dismantling and site clean up operations in order to fall within the jurisdiction of the Workers' Compensation Act.

First, it is not necessary to find that Bayshore Corp. and Bayshore SC were both in the general trade business or occupation of deconstruction or digging trenches, since it was necessary and essential to the business of both Bayshore Corp. and Bayshore SC that these concrete casting beds were dismantled -- generally for purposes of changing forms, and specifically for purposes of returning the South Carolina facility to its pre-lease condition and returning dismantled equipment. In fact, the direct connection between Appellants and Bayshore Corp. is so strong that Appellants even argue in their brief that the trial court should have found Bayshore Corp. liable directly to Appellants as the lessor of the premises. (Appellants Brief, pg. 20, §I,C).

Second, it is not necessary for Bayshore Corp. to have been directly involved in the actual digging of the trench or the actual equipment dismantling activities in order to be immune from Appellants' suit as the owner or organizer of the activities as an upstream statutory employer. Bayshore Corp. secured the Carolina Bays project, the Lease for the South Carolina facility, and purchased the equipment Appellants were dismantling. (Record at 851-876; at 917; at 894-901). Bayshore Corp. was ultimately responsible for the clean up and dismantling of the factory site, but that work was actually being performed by Bayshore SC, under Bayshore SC's supervisor Larry Lenart. (Record at 598; at 894-901; at 919-921; at 740-741). That Bayshore Corp. created Bayshore SC as a separate entity for the sole purpose of fulfilling its South Carolina bid and to dismantle the temporary site at the end of its lease, is sufficient to entitle Bayshore Corp. to workers' compensation exclusivity.

iii. Lenart Was a Bayshore SC Supervisor and Not a Co-Subcontractor of Appellants.

Appellants torture the record to reach the conclusion that Larry Lenart was a Bayshore Corp. employee who was loaned to Bayshore SC, thus making him a co-subcontractor of Appellants. The evidence clearly supports that Lenart was a Bayshore SC employee. First, Lenart was hired in South Carolina to be a Bayshore SC employee. Colonna clearly identifies in his deposition that Lenart was hired in South Carolina, having been working at Traylor Brothers, the plant that pre-existed Bayshore SC in Longs SC. (Record at 605; at 620). Second,

Lenart testified that he was an employee of Bayshore SC. (Record at 877-880).

Third, while applications filled out by Lenart may have been under the name of Bayshore Corp., 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."¹¹ (Record at 606-608). Lastly, Colonna testified to Appellants' question, "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". (Record at 620).

However, even if Appellants' mischaracterization of Lenart's employment status were true, which Respondents specifically deny, Appellants would still not be considered co-subcontractors of Lenart since Job Place is not a subcontractor and Appellants were solely performing the work of Bayshore SC and Bayshore Corp. Appellants were clearly not performing the work of Job Place, since Job Place's only business was to furnish leased employees. Therefore, Appellants were only performing the work of both Bayshore SC and Bayshore Corp., and were not co-subcontractors of Lenart.

¹¹ Documentation relied upon by Appellants, showing Lenart was issued a Bayshore Corp. check on 8/1/02, two months after this incident, are consistent with Colonna's testimony 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". (Record at 601).

2. Both Bayshore Corp. and Bayshore SC had Workers' Compensation Coverage and Complied with the Act.

The record clearly supports that both Bayshore Corp. and Bayshore SC had workers' compensation coverage and that they complied with the requirements of the Worker's Compensation Act, contrary to Appellants position.

I. *Bayshore Corp. and Bayshore SC Did Have Workers' Compensation Insurance Coverage.*

In their argument, Appellants rely upon Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 327, 523 S.E.2d 766, 773 (S.C. 1999), which 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". See id. at 319, 327, 423 S.E.2d at 770, 773. Appellants' position mistakenly relies upon a quotation from Colonna, which was taken out of context. The whole quotation is:

- Q. Who was responsible for securing workers' compensation coverage for those workers for Personnel Resources, Inc. and/or Job Place?
- A. The temporary service.
- Q. So Bayshore Concrete Products Corp. and Bayshore Concrete Products of South Carolina, Inc. did not secure workers' compensation coverages for these workers; correct?
- A. Correct.

(Record at 625). Colonna's testimony clearly indicates that the agreement between Bayshore SC and Job Place was that Job Place would obtain workers' compensation coverage for Appellants, not that Bayshore Corp. and Bayshore

SC did not have workers' compensation insurance at all.¹²

In fact, both Bayshore Corp. and Bayshore SC clearly had workers' compensation coverage, which would have covered Appellants if Job Place had failed to maintain workers' compensation coverage. Colonna testified that workers' compensation insurance was "secured" for Bayshore SC and Bayshore Corp. through a large construction umbrella policy. (Record at 611-615).¹³ Moreover, Richard Stadler, the underwriter for Bayshore Corp. and Bayshore SC testified that both companies had a workers' compensation policy which would have covered Appellants. (Record at 844-845).¹⁴ Thus, both Bayshore Corp. and Bayshore SC had secured workers' compensation coverage under Pineland.

ii. Bayshore Corp. and Bayshore SC Complied with the Requirements of the Act.

Appellants have also raised several incorrect, hyper-technical arguments that Bayshore SC has not met the statutory requirements required to qualify them for immunity pursuant to the Workers' Compensation Act.

¹² Jolene Coyle and Braxton Cutchin, of Job Place/Personnel Resources, testified that the fees paid by Bayshore SC for the Appellants included fees for the payment of workers' compensation coverage for Appellants, meaning, in effect, that Bayshore SC actually paid the workers' compensation premiums for Appellants through Job Place. (Record at 885-886; at 887-888).

¹³ In fact, Donnie Kellam, of Bayshore Corp., handled workers' compensation claims on behalf of both Bayshore Corp. and Bayshore SC. (Record at 615).

¹⁴ Appellants misinterpret the Stadler affidavit to read that only Bayshore Corp. had workers' compensation insurance, despite it saying that, "Bayshore Concrete Products Corporation and of South Carolina, Inc.", had workers' compensation coverage, which would have covered Appellants. (Record at 844-845).

First, Appellants mistakenly rely upon S.C. Code of Laws § 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. This statutory section applies 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 workers' compensation coverage, and are not seeking reimbursement from the Uninsured Employers' Fund. Moreover, subsection D of that statutory section specifically states, "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". See id.

Second, Appellants mistakenly argue that Bayshore SC is not a special employer of Appellants since it did not enter a contract of hire with Appellants, either express or implied. The record is clear that Bayshore SC contracted with Job Place to obtain the services of Appellants as leased employees, as evidenced by a Job Order and General Agreement between Job Place and Bayshore SC. (Record at 903; 905-906; at 679-708). Further, Appellants had an implied contract of hire since they voluntarily showed up to work and subjected themselves to the direction and control of Bayshore SC and its supervisor.

(Record at 777-782; at 789-807).

Third, S.C. Code §§ 40-68-70 and 40-68-110, do not apply, since they are not sections of the Workers' Compensation Act, and therefore, have no bearing on exclusivity. In fact, Section 40-68-70 (E) specifically appears to provide that workers' compensation exclusivity is governed by whether Job Place and Bayshore SC accepted the provisions of the Act, not whether they complied with the requirements of Title 40. See id. Moreover, Appellants' argument that Job Place and Bayshore must comply with the Professional Employer Organizations Act, in order to benefit from exclusivity, would have the devastating effect of preventing Appellants from receiving workers compensation benefits from Bayshore Corp. or Bayshore SC, due to an alleged technical deficiency in the Job Place/Bayshore agreement. Given the inclusive nature of the Workers' Compensation Act, this argument must fail.

Lastly, there is no defense of fraud, mistake, or lack of meeting of the minds to defeat Respondents' exclusivity. Appellants rely upon testimony from Jolene Coyle that she did not understand Appellants would be working in trenches since Job Place wrote "equipment tear down" on the job order. However, there is no precedence for this type of simple misunderstanding to serve as a basis for denying workers' compensation benefits or workers' compensation exclusivity. Further Appellants cannot satisfy **all nine elements of fraud**, as required by Lundy v. Palmetto State Life Ins., 256 S.C. 506, 510, 183

S.E.2d 335 (S.C. 1971), based only on the testimony from Jolene Coyle that she did not understand trench work to be involved in "equipment tear down". This is a simple, mutual misunderstanding at best.

Lastly, there is no valid argument there was a unilateral mistake or failure of the minds to meet since there is no evidence in the record to suggest Job Place ever conveyed to Bayshore SC that Appellants shall not work in trenches. Digging in trenches was clearly part of Bayshore SC and Bayshore Corp.'s "equipment tear down" activities and such a mis-communication is no basis to conclude that neither Bayshore SC nor Bayshore Corp. would be obligated to provide workers' compensation benefits, or otherwise, benefit from immunity.

II. THIS COURT SHOULD BE ALLOWED TO CONSIDER THE AFFIDAVITS OF COLONNA, LENART AND DUNBAR.

Appellants objections regarding the Affidavits of Colonna, Lenart, and Dunbar are unwarranted and this Court should be allowed to consider those affidavits.

A. Colonna's Affidavit Is Not a Competing or Sham Affidavit.

The Competing or Sham Affidavit rule, as set forth in Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (S.C. 2004), applies where a second affidavit is submitted to create "sham" genuine issue of fact. See id. at 218; 592 S.E.2d at 633. However, Colonna's affidavit does not satisfy the requirements for exclusion

under Cothran.¹⁵ First, Colonna's second affidavit asserts that both Bayshore Corp. and Bayshore SC are separate corporate entities. (Record at 855-856). Appellants mistakenly argue that Bayshore SC performing the work of Bayshore Corp. is somehow tantamount to denying a separate corporate existence between the two companies. Bayshore Corp. obtained a bid in South Carolina to perform work and created Bayshore SC to fulfill that job. (Record at 855-856). The explanation in Colonna's first affidavit, that only Bayshore SC was in charge of the day to day operations of the site, including digging trenches, is entirely consistent with the content of his second affidavit that Bayshore SC performed the work of Bayshore Corp. (Record at 836-843; at 851-876).

Second, Appellants' allegation that Colonna is trying to "blur the line" between Bayshore Corp. and Bayshore SC is not only incorrect, but irrelevant, since the central issue is not whether Bayshore Corp. and Bayshore SC are separate entities, but whether Bayshore SC, as a separate entity, was performing the work of Bayshore Corp. Even without Colonna's affidavits, this argument is fully supported by Colonna's deposition and the Bayshore Corp. Board Minutes,

¹⁵ In distinguishing between a sham affidavit and a correcting or clarifying affidavit, the following considerations provide guidance: (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted. See Cothran, at 218, 592 S.E.2d 633.

which show that Bayshore Corp. created Bayshore SC to fulfill a bid it obtained in South Carolina. (Record at 591-678; at 917; at 918; at 919-921).

There are no inconsistencies in Colonna's first and second affidavits and the Cothran test need not be applied. Moreover, given the Supreme Court of South Carolina's clear directive that this doctrine should be applied sparingly and, given this Court's ability to consider any inconsistencies as going toward the weight of the evidence, Colonna's second affidavit should not be excluded.

B. Lenart's Affidavit Should Not Be Excluded Since This Court's Consideration of the Affidavit Is Not Dependent on Appellants' Cross-Examination of Lenart.

The law of South Carolina does not support Appellants' position that this Court cannot consider a witness' affidavit simply because Appellants did not cross-examine the witness. Appellants mistakenly rely upon Goolsby v. Goolsby, 229 S.C. 101, 92 S.E.2d 57 (S.C. 1956) and City of Spartanburg v. Parris, 251 S.C. 101, 161 S.E.2d 228 (S.C. 1968), both of which address the situation where the court was to accept evidence by live testimony, and an affidavit was submitted in lieu of bringing the witnesses live. In cases where live witnesses were to be presented, the Supreme Court of South Carolina held that the affidavits should be excluded.

In contrast to Goolsby and Spartanburg, the evidentiary hearing agreed to by Appellants did not include live witnesses or testimony, but was only to include affidavits, depositions, and records. (Record at 6-9). The very fact that the trial

court's order allowed affidavits to be submitted, without qualification as to whether the affiants had been deposed, shows that Appellants are not entitled to have Lenart's affidavit excluded. The fact that Appellants agreed to the presentation of evidence in this manner, in April, 2007, knowing they had not yet obtained Lenart's deposition in May, 2006, is further evidence they waived their right to cross-examine Lenart. Appellants further waived any alleged right to cross-examination, since this matter was initially filed in 2004, and Appellants had a full two years to take Lenart's deposition. (Record at 28-67). Moreover, there is no evidence in the record that Appellants asked for a continuance or otherwise alerted the trial court that they were unable to go forward with the June 1, 2007, motion hearing due to their not obtaining Lenart's deposition.

Even if Appellants were entitled to cross-examine Lenart, which Respondents deny, it is moot to exclude the affidavit since Appellants have not specified how they are prejudiced. In fact, all the information contained in Lenart's affidavit can also be found in the deposition and affidavit of Colonna and deposition of Key.

C. This Court Should Not Exclude the Affidavit of Dunbar.

Pursuant to Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2003), an expert opinion is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Dunbar's affidavit attempts to assist the trier of fact in understanding the employer/employee relationship between Bayshore

South Carolina and the Plaintiffs in the context of workers' compensation. The existence of an employer-employee relationship is a jurisdictional question; an injured workers' employment status, as it affects jurisdiction, is a matter of law for decision by the court and includes findings of fact which relate to jurisdiction. See Edens v. Bellini, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (S.C.App. 2004).

Expert testimony may be admissible to the extent that the opinion of a person with specialized expertise assists the trier of fact. See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (S.C. 2008) As an expert in the field of workers' compensation and the determination of employer/employee relationships under the Workers' Compensation Act, Dunbar's testimony may assist the trier of fact. (Record at 846-850). Therefore, Dunbar's affidavit should not be excluded from consideration by this Court.

CONCLUSION

For the reasons stated in Respondents' Brief, and upon oral argument to this Court, the Respondents respectfully request this Court to find Bayshore SC and Bayshore Corp. the special and/or statutory employers of Appellants, such as to fall within the jurisdiction of the Workers' Compensation Act, and to affirm the trial court's ruling that Bayshore SC and Bayshore Corp. are immune from Appellants civil suit and are to be dismissed with prejudice. Respondents further respectfully request this Court not exclude the Affidavits of Colonna, Lenart, and Dunbar, grant such other relief to the Respondents as is just and equitable.



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August 4, 2008

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SC Court of Appeals

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Judge Paul M. Burch

Case Nos.

2006-CP-26-3194R

2006-CP-26-3195R

2006-CP-26-3196R

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

Appellants

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.

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.,

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,

Appellants,

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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In response to Respondents' brief, Appellants wish to clarify or correct certain statements of fact and legal arguments made therein to the extent they inaccurately reflect Appellants' arguments or the facts as they have been developed to date.

I. LARRY LENART WAS EMPLOYED BY BAYSHORE CORP., NOT BAYSHORE SC, AT THE TIME OF THE ACCIDENT.

Despite Respondents' assertions to the contrary, all credible evidence indicates that Larry Lenart was employed by Bayshore Corp., not Bayshore SC. Looking first at the Bayshore Corp. letter sent to Lenart on February 1, 2001, a year and a half prior to this June 6, 2002 accident, this offer of employment is written on Bayshore Corp. letterhead and signed by Bayshore Corp. president W. Vincent Campbell. The letter documents Bayshore Corp.'s offer to Lenart of a position on Bayshore Corp.'s salaried staff. When Lenart had a change of address in January of 2001, he submitted paperwork to the Tidewater Construction Corporation Employee Health Benefit Plan indicating that he was a salaried employee of Bayshore Corp. (R. p. 925). This form sets Lenart's initial date of employment with Bayshore Corp. as September 25, 2000. Lenart was not terminated from his employment with Bayshore Corp. until December 31, 2004. (R. p. 926).

Colonna testified that *at the time of the accident* Lenart was a salaried employee and, like all salaried Bayshore Corp. employees, was paid his salary and benefits by Bayshore Corp. (R. pp. 598-599, 602, 604, 669). This is in contrast to hourly employees on the site who were paid by Bayshore SC, via its South Carolina payroll service. (R. pp. 609, 672). Lenart did not manually dig in the trenches at the site like the Bayshore SC hourly employees or Appellants did; he provided supervision. (R. p. 796, line 21 - p. 797, line 1; p. 825, line

23 - p. 826, line 8). After the accident, Lenart was transferred by Bayshore Corp. to its Cape Charles, Virginia site. (R. p. 601, lines 7-11.) At the time of the accident, however, Lenart and other salaried Bayshore Corp. employees who worked at the South Carolina site were not paid directly by Bayshore SC, but rather their costs were expensed to Bayshore SC. (R. p. 604, lines 2-12; p. 671, lines 21-25). Thus, as a Bayshore Corp. employee at the Bayshore SC location, Lenart acted as a subcontractor to Bayshore SC aiding in Bayshore SC's work at the site.

II. BAYSHORE CORP. WAS NOT AN "UPSTREAM EMPLOYER" OF APPELLANTS POCH AND KEY.

Respondents assert they do not seek to gain immunity by disregarding the corporate distinctions between Bayshore Corp. and Bayshore SC, but rather intend to establish that Bayshore Corp. was the uppermost "upstream employer" of Appellants and, therefore, was entitled to immunity. In order to do, Respondents seek to demonstrate that Bayshore SC was doing the work of Bayshore Corp. This is no distinction, however, because the facts on which Respondents rely in making this assertion are all based on allegations that there is no practical distinction between the subsidiary and its parent. (*See* Second Colonna Aff. R. pp. 851-876).

Further, other than via a conclusory statements in Colonna's sham, second affidavit meant to support an allegation that Bayshore SC "was doing the work of" Bayshore Corp., there is no evidence to support such an assertion. (*See* Second Colonna Aff. R. pp. 851-876). Rather, Respondents assert that "[o]nly [Bayshore SC] had anything to do with this accident and the activities at the Horry County site." (Colonna Aff. R. p. 841, ¶ 11). In fact, the

evidence demonstrates that the job in question was the sole purpose of Bayshore SC's existence. (Colonna Aff. R. p. 838, ¶ 4). And it was Bayshore SC, not the parent company, that was cited by OSHA for safety regulation violations in conjunction with the accident. (R. p. 742, lines 10-15; p. 630, lines 1-10; pp. 889-891).

While the two corporations may have engaged in similar business activities in general, Bayshore SC's operations were limited to the South Carolina site, while Bayshore Corp.'s operations were principally in Virginia. (Colonna Aff. R. p. 838, ¶¶ 4, 3). The work being performed at the South Carolina site was all invoiced and expensed to Bayshore SC, the owner of the Carolina Bays project. (R. pp. 623-624, 659-660, 669-670, 671-672). Bayshore Corp., as the parent company, had only an equity interest in seeing that Bayshore SC succeeded in its task. (R. p. 740, lines 15-23; p. 746, lines 2-7; p. 665, lines 1-13). Indeed, as Colonna makes very clear in his first affidavit, it was **not** Bayshore Corp.'s work being done at the site, but rather solely that of Bayshore SC. (Colonna Aff. R. pp. 838-843). To find otherwise, one must pierce Bayshore SC's corporate veil. As discussed in Appellants' initial brief, there is no legal basis in this instance to support allowing these entities to deny their separate existence after having retained whatever benefits may have been available to them as separate and distinct corporations. See *Monroe v. Monsanto Company*, 531 F. Supp. 426 (D.S.C. 1982); *Woodside v. Woodside*, 290 S.C. 366, 370, 350 S.E.2d 407, 410 (Ct. App. 1986) ("The corporate form may be disregarded only where equity requires the action to assist a third party.").

III. NEITHER BAYSHORE CORP. NOR BAYSHORE SC PAID OR SECURED WORKER'S COMPENSATION BENEFITS FOR APPELLANTS POCH AND KEY.

First, it must be made clear that the Workers' Compensation benefits paid to Appellants Kenneth Poch and Kevin Key were paid not by either of the Respondents but by Carolina Staffing, Inc. d/b/a Job Place of Conway ("Job Place"). (R. pp. 907-916, ¶¶ 4(b), 8(a); Cason Aff. R. p. 883, ¶ 5.5; p. 588, p. 589, line 24-p. 590, line 11; p. 625, lines 7-25). In fact, Bayshore SC at all times maintained that Poch and Key were Job Place employees. (See R. p. 927). Further, the basis for Appellants' assertion that neither Bayshore Corp. nor Bayshore SC paid for, provided or secured any benefits to Poch or Key, including the payment of workers' compensation, is based on evidence provided by other sources, not just Colonna's admission in that regard. (See also, R. p. 588, p. 589, line 24-p. 590, line 11; p. 833, line 21-p. 834, line 12).

Respondent's argument that S.C. Code Ann. §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 cannot be applied to prevent an employer from benefitting from Worker's Compensation exclusivity is pure error. The statute explicitly states:

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 (1976)(emphasis added). It is in reliance on this section that our Courts have found 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. *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 327, 523 S.E.2d 766, 773 (1999) (citing S.C. Code Ann. § 42-5-40 (1985) for the proposition that an employer who refuses or neglects to secure such compensation shall be liable to the employee in an action at law for recovery of damages for personal injury).

Bayshore Corp. and Bayshore SC were self-insured. (R. p. 612, lines 8-19). Respondents did not submit to the trial court an insurance policy of these entities that provided coverage for Appellants. Failing the entity's demonstration in this regard, "nothing in the Act prohibits an employee from recovering both workers' compensation benefits from one employer and tort damages from an upstream employer who failed to secure compensation." *Id.*

To demonstrate that it has secured workers' compensation benefits for a claimed statutory employee, a statutory employer must satisfy the requirements of S.C. Code Ann. § 42-1-415(B) (Supp. 2007), which provides that the employer "must collect documentation of insurance . . . on a standard form acceptable to the commission. The documentation must be collected *at the time* the contractor or subcontractor *is engaged* to perform work. . . ." (Emphasis added). See, e.g., *Harrell*, 337 S.C. at 330 (stating that a statutory employer need not directly secure compensation for a statutory employee if § 42-1-415 is satisfied); *Hardee v. W.D. McDowell*, 372 S.C. 413, 419, 642 S.E.2d 632 (Ct. App. 2007) (holding that a general contractor's failure to secure the documentation required under § 42-1-415 on each job rendered the section inapplicable). Here, Respondents did not secure the proper

documentation until after the accident took place. (R. p. 927 (“When the accident happened on Thursday we searched the job file and noted that we did not have a current insurance certificate for your company.”)). Because Respondents cannot demonstrate that either Bayshore SC or Bayshore Corp. collected a certificate of insurance documenting that Poch and Key were covered by Job Place or PRI’s workers’ compensation insurance policy at the time the workers began work at the site, there is no evidence to support a claim that as alleged “upstream” employers, Bayshore Corp. or Bayshore SC secured compensation benefits for Appellants in a manner sufficient for them to claim statutory immunity from this action.

IV. THIS COURT SHOULD EXCLUDE THE TESTIMONY OFFERED IN KEITH COLONNA’S SECOND AFFIDAVIT UNDER THE “COMPETING” OR “SHAM” AFFIDAVIT DOCTRINE.

Despite their assertion that the “competing” or “sham” affidavit doctrine is inapplicable to S. Keith Colonna’s second affidavit dated April 25, 2007, Respondents fail to provide any explanation for the key inconsistencies between the two versions of Colonna’s testimony. If the issue to be determined is whether Bayshore SC was performing Bayshore Corp.’s work, then Colonna’s testimony in his first affidavit that “[o]nly [Bayshore SC] had anything to do with this accident and the activities at the Horry County site” goes straight to the heart of that inquiry. (Colonna Aff. R. p. 839, ¶ 5). In fact, the allegations in Colonna’s first affidavit intentionally attempt to demonstrate that the only entity’s work that was being done at the site was that of Bayshore SC.

In the first affidavit, Colonna represents that the work being done at the South Carolina site was essential to Bayshore SC, but makes no mention of Bayshore Corp. in that

regard. (Colonna Aff. R. p. 839, ¶ 5). Rather, he stresses that Bayshore Corp.'s work is to make precast concrete "in Virginia. . . ." (Colonna Aff. R. p. 838, ¶ 3). Otherwise, the references to Bayshore Corp. in the first affidavit are solely in regard to its status as Bayshore SC's parent corporation or to its part ownership by Tidewater Skanska Group, Inc., Bayshore SC's principal customer. (Colonna Aff. R. pp. 838-841, ¶¶ 3, 11, 12). In this first affidavit, Colonna thus, makes every effort to demonstrate that it was **not** Bayshore Corp.'s work being done at the site, but rather solely that of Bayshore SC. In contrast, the second Colonna affidavit was submitted after Respondents had developed their legal theories and determined that it was in their best interests to blur the distinction between the two corporations in an attempt to demonstrate just the opposite conclusion. It is exactly this type competing or sham testimony that the Supreme Court meant to address when it allowed the trial court to disregard a subsequent contradictory affidavit. *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629 (2004).

V. THIS COURT SHOULD EXCLUDE THE AFFIDAVIT OF LARRY LENART BECAUSE APPELLANTS WERE DENIED ANY OPPORTUNITY TO QUESTION THE WITNESS.

In arguing that this Court should consider the evidence offered in the affidavit of Larry Lenart, Respondents make much of the fact that some of the cases cited by Appellants involve situations where affidavits were excluded when evidence was presented at the hearing by live witnesses. This misses the point, however. While the parties agreed that live witness testimony would not be taken at the hearing on Respondents' summary judgment motion, in every other instance where testimony of a fact witness was submitted via affidavit, the opposing party had been presented with the opportunity to cross-examine the witness via

deposition, which testimony, if Appellants so chose, was then also available to be provided to the trial court. Appellants, in fact, took full advantage of this opportunity in nearly all instances, but were denied such access to Mr. Lenart.

Lenart was clearly cooperative enough to have signed the affidavit submitted on his behalf for Respondents, but then unavailable for his deposition despite being properly served with the notice by counsel for Appellants. Thus, as Appellants were denied the fundamental right of examination by Lenart's disappearance, the proper remedy in this instance is to exclude Lenart's affidavit and disregard the testimony contained therein for all purposes in conjunction with Respondents' Motion, as was done by the court in *Glen III v. Charlotte-Mecklenburg Bd. of Educ*, 903 F. Supp. 918, 937 (W.D. N.C. 1995).

CONCLUSION

For the reasons stated above and in Appellant's Initial Brief, the Court should reverse the decision of the trial court dismissing Respondents Bayshore Corp. and Bayshore SC and should further find that the preponderance of the evidence demonstrates that, as a matter of law, neither Bayshore Corp. nor Bayshore SC are shielded by the Workers' Compensation statutory immunity from liability for Appellants' claims. The Court should then remand this case back to the trial court for a full trial on the merits against all Respondents.

Respectfully submitted by,

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ATTORNEYS FOR APPELLANTS

Charleston, South Carolina

August 7, 2008

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Judge Paul M. Burch

Case Nos.

2006-CP-26-3194R

2006-CP-26-3195R

2006-CP-26-3196R

THELMA M. POCH, as the 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.

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

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.,

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,

Appellants,

v.

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

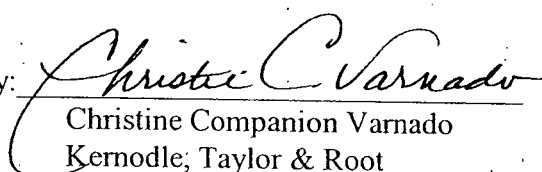
of whom BAYSHORE CONCRETE PRODUCTS/
SOUTH CAROLINA, INC., and BAYSHORE
CONCRETE PRODUCTS CORPORATION are

Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule
211(b), SCACR.

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August 7, 2008

ATTORNEYS FOR APPELLANTS

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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.

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

A- 1055

o. 4617

Heard April 22, 2009 – Filed September 9, 2009

AFFIRMED

Christine Companion Varnado, John Kuhn, and Frank X. Duff, all of Charleston, and Gerald E. Loftstead, III, of Wheeling, West Virginia, for Appellants.

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

LOCKEMY, J.: 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 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 pre-cast 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. After the accident, Poch's Estate and Key received workers' compensation benefits through Job Place.

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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 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 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' 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

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 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, 538 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

"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." 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 exclude 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:

(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[1]

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

A. Statutory Employer Status

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. Owens, 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 1 (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 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.

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 which he would have been liable to pay if the workman had been immediately employed by him.

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 Bailey, we find Bayshore SC satisfies all three tests. [2] Id.

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 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

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).

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 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.[3]

Bayshore maintains it is immune as an upstream employer because Appellants were performing 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 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 upstream 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 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 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.

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

III. Affidavits as Evidence

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 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

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

Appellants argue the circuit court erred in considering the evidence offered in the second affidavit of Colonna 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.

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, SCRPC, 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 petition 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 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.

[1] 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.

[2] 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.'"

[3] 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.

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SEP 24 2009

SC Court of Appeals

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Judge Paul M. Burch

Case Nos.

2006-CP-26-3194R

2006-CP-26-3195R

2006-CP-26-3196R

THELMA M. POCH, as the 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.

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

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.,

of whom BAYSHORE CONCRETE PRODUCTS/
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THELMA M. POCH, individually and as
Personal Representative for the ESTATE
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Appellants,

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APPELLANTS' PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Appellants respectfully submit this Petition for Rehearing concerning this Court's Opinion No. 4617, filed September 9, 2009, in which the Court affirmed the decision of the circuit court. Appellants request that the Court rehear this matter to correct the following matters overlooked or misapprehended by the Court:

- a) The Court's incorrect characterization of Larry Lenart as a Bayshore SC employee leads directly to its incorrect findings of law concerning the immunity afforded to Bayshore Corp. Larry Lenart was an employee of Bayshore Corp. To the extent the Court's opinions relied in any part on a finding that Lenart was an employee of Bayshore SC, this incorrect finding constitutes reversible error.
- b) The Court erred in adopting the circuit court's finding that S.C. Code Ann. §42-5-40 only concerns the ability of an upstream employer to shift the burden of workers' compensation coverage onto the state Uninsured Employer Fund and cannot be applied to prevent an employer from benefitting from workers' compensation exclusivity if they did not meet the Code's requirements. Rather, each entity that 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. Neither Bayshore SC nor Bayshore Corp. can demonstrate that they secured workers' compensation benefits for Appellants.

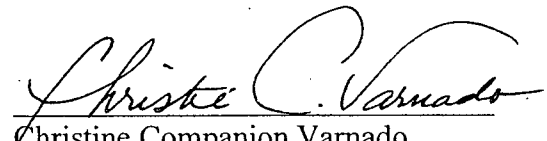
- c) The Court erred in finding that Poch and Key were statutory employees of Bayshore Corp. In making this finding, the Court erroneously relied on an analysis under *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997) and *Ost v. Integrated Products, Inc.* 296 S.C. 241, 371 S.E.2d 796 (1988) to determine that Poch's and Key's work was an essential part of Bayshore Corp.'s business. It further erred in finding that Bayshore Corp.'s ownership of Bayshore SC entitled it to immunity because it was financially beneficial to Bayshore Corp. as a parent company of Bayshore SC for its subsidiary to be profitable.
- d) This Court erred in failing to find that Bayshore Corp.'s employees at the site were subcontractors to Bayshore SC, the owner of the project. In that position, the Bayshore Corp. employees, such as Lenart, stood in the position of co-subcontractors to Poch and Key. As it was Bayshore Corp.'s employee Larry Lenart who dug the trench that injured Poch and Key, Bayshore Corp. is liable in tort to Appellants.
- e) This Court erred in finding that the competing affidavit exception argument in support of Appellants' motion to exclude Colonna's second affidavit was not preserved for the Court's review. While it is true that the terms "sham" or "competing" did not appear in Appellant's briefing until the Rule 59(e) Motion, the issue encompassed by the sham or competing affidavit exception in conjunction with judicial estoppel was brought forth in Appellants' initial Motion seeking to exclude this affidavit from the trial court's consideration.

- f) This Court erred in relying on evidence submitted in the second Colonna affidavit in its independent consideration of the record.
- g) The Court erred in finding that Appellants did not carry their burden of proving prejudice resulting from the admission of testimony from Lenart's affidavit.
- h) This Court failed to address Appellants' assertion that Bayshore Corp. as the lessee of the property which contained a dangerous condition was liable to Poch and Key.

For the reasons stated and those set forth in its Memorandum of Law in Support of the Petition for Rehearing, the Court should reverse its decision of September 9, 2009, and should further find that the preponderance of the evidence demonstrates that, as a matter of law, neither Bayshore Corp. nor Bayshore SC are shielded by the Workers' Compensation statutory immunity from liability for Appellants' claims. The Court should then remand this case back to the trial court for a full trial on the merits against all Respondents.

Respectfully submitted by,

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Charleston, South Carolina

September 24, 2009

STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED
SEP 24 2009
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Judge Paul M. Burch

Case Nos.

2006-CP-26-3194R

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APPELLANTS' MEMORANDUM OF LAW
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In addition to its previously submitted briefs in this matter, which it incorporates herein, Appellants respectfully submit this Memorandum of Law in support of their Petition for Rehearing concerning this Court's Opinion No. 4617, filed September 9, 2009, in which the Court affirmed the decision of the circuit court.

INCORRECT AND INCONSISTENT FINDING OF FACT

A correct understanding of Larry Lenart's employment status is important in evaluating this case, as evidenced by how frequently this Court referenced his employment in articulating key points in its decision. The Court's incorrect characterization of Larry Lenart as a Bayshore SC employee leads directly to its incorrect findings of law concerning the immunity afforded to Bayshore Corp. In its summary of the facts of the case, the Court identifies Lenart as "a Bayshore SC supervisor." Likewise in evaluating whether Bayshore SC is entitled to immunity as a statutory employer of Poch and Key, a significant portion of the Court's analysis is based on the understanding that Bayshore SC's "own employees, including Lenart, assisted in the same type of removal work as Poch and Key." On the other hand, in the section analyzing whether Bayshore Corp. is an upstream statutory employer of Poch and Key, the Court notes that "Bayshore Corp's salaried employees, including but not limited to Lenart, exercised control over the hourly employees of Bayshore SC."

At all times relevant to this case, Lenart was employed by Bayshore Corp., not Bayshore SC. Lenart's employment status with Bayshore Corp. is clearly established by the documents produced by Respondents during discovery. Looking first at the Bayshore Corp. letter sent to Lenart on February 1, 2001, a year and a half prior to this June 6, 2002 accident, this offer of employment as one of the company's salaried staff is written on Bayshore Corp.

letterhead and signed by Bayshore Corp. president W. Vincent Campbell. (R. p. 924). Bayshore Corp. paid his salary and benefits. (R. p. 923; p. 601, line 7 - p. 602, line 4). When Lenart had a change of address in January of 2001, he submitted paperwork to the Tidewater Construction Corporation Employee Health Benefit Plan indicating that he was a salaried employee of Bayshore Corp. (R. p. 925). This form sets Lenart's initial date of employment with Bayshore Corp. as September 25, 2000. Lenart was not terminated from his employment with Bayshore Corp. until December 31, 2004. (R. p. 926).

It is undisputed that Lenart performed work at the accident site. In fact, Lenart dug the trench that later collapsed trapping Key and killing Poch. (R. pp. 790-791, 794-795, 820-821). Bayshore SC president S. Keith Colonna ("Colonna") testified that *at the time of the accident* Lenart was a salaried employee and, like all salaried Bayshore Corp. employees, was paid his salary and benefits by Bayshore Corp. (R. pp. 598-599, 602, 604, 669). This is in contrast to hourly employees on the site who were paid by Bayshore SC, via its South Carolina payroll service. (R. pp. 609, 672). As a Bayshore Corp. employee at the Bayshore SC location, Lenart acted as a subcontractor to Bayshore SC aiding in Bayshore SC's work at the site. (See R. p. 601, line 7 - p. 602, line 5 (Colonna testifying that Lenart was expensed to Bayshore SC, but Bayshore Corp. paid Lenart's salary)).

Despite presumably having Mr. Lenart's employment file at their disposal and thus access to documents to prove an assertion that Lenart was a Bayshore SC employee if that were true, Respondents have never produced any records that would support such a finding. In fact, the only evidence brought forth that would indicate that Lenart was an employee of Bayshore SC rather than of Bayshore Corp. is Lenart's affidavit in which he attested that he

was "employed by Bayshore Concrete Products/South Carolina, Inc. (hereafter, "Bayshore")." (R. p. 877). First, it directly contradicts the actual records, Second, as argued by Appellants, consideration of this affidavit from a witness whom Appellants were not able to depose and were thus denied an opportunity to cross-examine should not be considered by the Court. Further, as contradictory to all other evidence in the case, this testimony should not be afforded any weight.

Respondents note that Colonna testified that Lenart was hired while in South Carolina, but Colonna's testimony is clear that all salaried workers in South Carolina, of which Lenart was one, received their paychecks directly from Bayshore Corp. (R. p. 600, lines 6-10; R. p. 601, line 18 - p. 602, line 5).¹ In short, all credible evidence indicates that although he performed work at the site in South Carolina, Lenart was employed by Bayshore Corp. at the time of the accident. To the extent the Court's opinions, as discussed below, relied in part on a finding that Lenart was an employee of Bayshore SC, this incorrect finding constitutes reversible error.

**THE ROLE OF S. C. CODE ANN. § 42-5-40 AND § 4-1-415(B)
AND THEIR PRECLUSIVE EFFECTS ON RESPONDENTS'**

¹Colonna testified as follows:

- Q Mr. Lenart, he was there at the time of the trench collapse; is that correct?
A He was the last salary person on site. (R. p. 600, lines 6-10).
- Q . . . These individuals while they were working at the South Carolina site, who was writing their paychecks?
A All salaried payroll came out of Cape Charles, Bayshore Concrete Products Corporation and then the salary payroll, the costing, was divided into the corporations.
- Q They received a paycheck, then, directly from Bayshore Concrete Products Corp.; is that correct? . . .
A Yes. (R. p. 601, line 18 - p. 602, line 5).

**CLAIMS THAT THEY ARE ENTITLED TO BENEFIT FROM
WORKERS' COMPENSATION EXCLUSIVITY**

The Court erred in adopting the circuit court's finding that S.C. Code Ann. §42-5-40 only concerns the ability of an upstream employer to shift the burden of workers' compensation coverage onto the state Uninsured Employer Fund and cannot be applied to prevent an employer from benefitting from workers' compensation exclusivity if they did not meet the Code's requirements. This is an incorrect reading of the law. Section 42-5-40 explicitly states:

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 (1976)(emphasis added). It is in reliance on this section that the Supreme Court found 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. *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 327, 523 S.E.2d 766, 773 (1999).

The Court is correct in noting that § 42-1-415(B) concerns the documentation a higher tier employer must submit in order to qualify for reimbursement from the Uninsured Employer's Fund. It has never been Appellants' contention, however, that this section *alone*

provides the foundation for a finding as to whether Bayshore SC or Bayshore Corp. can take advantage of the statutory employer status. Rather the role of §42-1-514(B) in this analysis is only to demonstrate how a higher tier employer can prove that they have properly secured compensation benefits for the statutory employee as required by §42-5-40. This is the roadmap set forth by the Supreme Court in *Harrell* when it found, in a situation similar to that in the case at bar, that a statutory employer need not directly secure compensation for a statutory employee as required by §42-5-40 if the employer satisfied the requirements of § 42-1-415. 337 S.C. at 330. Neither Bayshore Corp. nor Bayshore SC secured compensation directly or indirectly for Poch and Key, nor did they meet the requirements of § 42-1-415. Thus, neither entity can claim benefit of the workers' compensation exclusivity even if they are deemed a statutory employer.

In short, both Bayshore Corp. and Bayshore SC were self-insured. (R. p. 612, lines 8-19). Respondents did not submit to the trial court an insurance policy of these entities that provided coverage for Appellants. Failing the entity's demonstration in this regard, "nothing in the Act prohibits an employee from recovering both workers' compensation benefits from one employer and tort damages from an upstream employer who failed to secure compensation." *Harrell*, 337 S.C. at 330.

As explained in the Supreme Court's decision in *Harrell*, in order to demonstrate that it has secured workers' compensation benefits for a claimed statutory employee, a statutory employer can show that it satisfied the requirements of S.C. Code Ann. § 42-1-415(B) (Supp. 2007), which provides that the employer "must collect documentation of insurance . . . on a standard form acceptable to the commission. The documentation must be collected *at the*

time the contractor or subcontractor is engaged to perform work. . . .” (Emphasis added). See, e.g., *Harrell*, 337 S.C. at 330 (stating that a statutory employer need not directly secure compensation for a statutory employee if § 42-1-415 is satisfied); *Hardee v. W.D. McDowell*, 381 S.C. 445, 673 S.E.2d 813 (2009) (holding that a general contractor’s failure to secure the documentation required under § 42-1-415 when the subcontractor was engaged to perform work rendered the section inapplicable). Here, it is undisputed Respondents did not secure the proper documentation until after the accident took place. (R. p. 927 (“When the accident happened on Thursday we searched the job file and noted that we did not have a current insurance certificate for your company.”)). Because Respondents cannot demonstrate that Bayshore SC and Bayshore Corp. either directly provided workers’ compensation coverage for Appellants or collected a certificate of insurance documenting that Poch and Key were covered by Job Place or PRI’s workers’ compensation insurance policy at the time the workers began work at the site, this Court should find that as alleged “upstream” employers Bayshore Corp. and Bayshore SC failed to secure compensation benefits for Appellants in a manner sufficient for them to claim statutory immunity from this action pursuant to S.C. Code Ann. §42-5-40.

**THIS COURT ERRED IN FINDING THAT BAYSHORE CORP.
WAS AN UPSTREAM EMPLOYER OF APPELLANTS**

The Court erred in finding that Poch and Key were statutory employees of Bayshore Corp. In making this finding, the Court erroneously relied on an analysis under *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997) and *Ost v. Integrated Products, Inc.* 296 S.C. 241, 371 S.E.2d 796 (1988) to determine that Poch’s and Key’s work was an

essential part of Bayshore Corp.'s business. It further erred in finding that Bayshore Corp.'s ownership of Bayshore SC entitled it to immunity because it was financially beneficial to Bayshore Corp. as a parent company of Bayshore SC for its subsidiary to be profitable.²

Although it is understandable that the Court declined to follow *Monroe v. Monsanto Company*, 531 F. Supp. 426 (D.S.C. 1982), in large part because it is a federal district court decision and therefore not controlling, the Court, nonetheless, should have then looked to *Brown v. Moorhead Oil Co.*, 239 S.C. 604, 124 S.E.2d 47 (1962), the South Carolina case which was the basis for the *Monroe* decision and is controlling. Unlike the opinions in *Voss* and *Ost*, which the Court acknowledged involved a contractor/subcontractor relationship, *Brown* concerns the same type of parent/subsidiary relationship as the case at bar, which is an important distinction. *Brown* makes clear that the court should not "disregard the corporate entity" in seeking to evaluate statutory employer status unless required in "the furtherance of justice." *Id.* at 610.³ In making its findings, this Court inappropriately disregarded the corporate entity to extend statutory employer status of Bayshore SC to its

² Under such an analysis, all parent companies would automatically be statutory employers of employees of their subsidiaries as it is axiomatic that it is financially beneficial to parent entities that subsidiary companies are profitable. South Carolina courts have long held that employees of a subsidiary corporation are not deemed to be the employees of the parent corporation by virtue of the parent-subsidiary relationship. *Carroll v. Smith-Henry, Inc.*, 281 S.C. 104, 104, 313 S.E.2d 649 (Ct. App. 1984).

³ Likewise, the *Brown* court noted that "the mere fact that the entire stock in the two corporations was owned by the same person does not operate to create an identity of corporate interest between the companies, or create the relationship of principal and agent, or representative, or *alter ego* between the two." 239 S.C. at 609, 124 S.E.2d at ____.

parent company, Bayshore Corp., which was a separate and distinct corporate entity at the time of the accident.

In finding that Poch and Key were statutory employees of Bayshore Corp. the Court looked to three factors articulated in *Ost* : (1) the general contractor's control over the subcontractor and the importance of the subcontractor's work in relation to the general contractor's product (2) the companies' intertwined operations; and (3) the similarities of the companies' business activities and shared employees. *Ost v. Integrated Products, Inc.* 296 S.C. 241, 245-47, 371 S.E.2d 796, 798-800 (1988). Under this analysis, an employee of a subcontractor is deemed to be the employee of the general contractor if the employee was injured while performing the work or activity of the general contractor. To make such a finding as to Poch and Key, the Court erroneously substituted parent for general contractor and subsidiary for subcontractor in this analysis. This substitution simply does not apply based on the facts of this case because Bayshore Corp. was not the owner of the project.⁴ Bayshore SC owned the job on the Carolina Bays project. As Colonna asserted. "[o]nly [Bayshore SC] had anything to do with this accident and the activities at the Horry County site." (Colonna Aff. R. p. 841, ¶ 11). And it was Bayshore SC, not the parent company, that was cited by OSHA for safety regulation violations in conjunction with the accident. (R. p. 742, lines 10-15; p. 630, lines 1-10; pp. 889-891). In short, Respondents have never

⁴ "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 of the work is part of the owner's business." *Miller v. Lawrence Robinson Trucking*, 333 S.C. 576, 580, 510 S.E.2d 431 (Ct. App. 1998)(citing *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980)).

produced any document or other credible evidence demonstrating that Bayshore Corp. was the "owner" of the project or that it had "hired" Bayshore SC to be its sub-contractor on the job. Rather, the job in question was the sole purpose of Bayshore SC's existence. (Colonna Aff. R. p. 838, ¶ 4). Thus, if the Court continues to follow the *Ost* analysis, it must do so based on a finding that Bayshore SC was the owner or the general contractor, not the subcontractor to Bayshore Corp.

Moreover, the Court's analysis under *Ost* overlooked the prerequisite that Respondents would need to demonstrate that Bayshore Corp. retained the services of Bayshore SC, who in turn retained Appellants, to perform work on Bayshore Corp's behalf. The record simply does not support such a finding. Unfortunately, the Court fell into the same trap as the trial court in that it failed to distinguish between the parent corporation and its subsidiary despite the fact that the entities took full advantage of those distinctions themselves when it suited their purposes. Bayshore Corp. set Bayshore SC up as a separate entity to independently perform work in South Carolina. Thus, the work being done on the site may have been part of the business of Bayshore SC, but not that of Bayshore Corp. There is no evidence that Bayshore SC was working as a contractor for Bayshore Corp. on this project. Rather as Respondents asserted, "[o]nly [Bayshore SC] had anything to do with this accident and the activities at the Horry County site." (Colonna Aff. R. p. 841, ¶ 11). Bayshore Corp. was not in the demolition business and its employees had never performed excavation or trench work before. (R. pp. 758, 759-760, 763, 765; pp. 639-640, 644). According to Donald Kellam, the Bayshore Corp. safety director of over 15 years, he never provided safety training concerning digging or working in trenches to Bayshore Corp.

employees. (R. pp. 758, 759-760). He testified that Bayshore Corp. does not normally do work that requires trenches. (R. p. 760, lines 2-6). He explained that there was no need for him to have experience or training in excavation because Bayshore Corp. had never needed that skill before and it was not foreseeable to him that work would be needed at its job sites. (R. p. 763, lines 2-16). While it was not unusual for Bayshore Corp. employees to remove casting forms in the course and scope of their business, such work did not usually involve excavation or digging. (R. p. 765, lines 10-12). Likewise, Colonna testified that Bayshore Corp. was not in the demolition business. (R. p. 639, line 19-p. 640, line 2). Rather Colonna distinguished removal of stressing bed abutments as was done by Appellants on the day of the accident from the "normal facility work" performed by Bayshore Corp. in putting up and taking down casting forms. (R. p. 644, lines 8-24).

Thus, rather than look to contractor/subcontractor analysis under *Ost* to evaluate the status of Bayshore Corp., this Court should follow the precedent handed down by the *Brown* court which considered many of the same factors identified in *Monroe* in determining whether to disregard the corporate entity in order to find a parent company was a statutory employer of the subsidiary's employee. But even following the *Ost* analysis, the evidence indicates that Bayshore Corp. was not Poch and Key's statutory employer.

First and foremost, company president Keith Colonna admitted that the "South Carolina company [Bayshore SC] was run as a separate entity." (Colonna Aff. R. p. 841, ¶ 11). At the time of the incident, Bayshore SC and Bayshore Corp. maintained separate corporate identities. (Colonna Aff. R. p. 841, ¶ 11; p. 592, lines 15-19; p. 746, lines 2-7; p. 731, lines 7-12; p. 732, lines 4-14). Bayshore Corp., a Virginia corporation, formed

Bayshore SC as its wholly owned subsidiary on April 21, 2000, to produce prestressed, precast concrete for construction projects in South Carolina. (R p. 892; Colonna Aff. p. 838, ¶ 4; pp. 738, 740, 743, 751-757). The officers consciously entered into separate contracts on behalf of the distinct corporations and differentiated between the two corporations when charging expenses. (R. p. 650, lines 11-16; p. 738, lines 3-11; p. 764, lines 22-25).

The parent company treated its subsidiary as a separate entity. As Colonna testified, Bayshore Corp. would submit and accept bids from its "subsidiary companies as customers, just like we did their competitors." (R. p. 621, lines 22-24). Further, while the companies would eventually merge in December of 2006, Bayshore Corp. and Bayshore SC were formally recorded as being separate corporate entities at the time of the accident. (R. p. 892; p. 893).

While several persons served as members of the Boards of Directors of both companies, the Boards were not identical. (R. pp. 591-593). In addition, the entities kept separate corporate minutes. *See, e.g.*, (R. p. 917; p. 918).

The corporations were headquartered and transacted the main part of their business from separate locations. (R. p. 892; p. 893). Bayshore Corp. operated out of Cape Charles, Virginia, while Bayshore SC primarily operated from Myrtle Beach, South Carolina. (R. p. 609, lines 2-14).

The businesses each hired and paid their own employees separately. (R. pp. 608-609, p. 670, lines 1-4). Although for about a week at the inception of the project, employees of Bayshore Corp. helped sign up employees of Bayshore SC, Bayshore SC then hired staff for its own operations in South Carolina. (R. pp. 608-609). All of Bayshore SC employees

were paid by the South Carolina corporation using a South Carolina payroll service. (R. pp. 608-609, p. 670, lines 1-4): When an employee of the parent company did work on a Bayshore SC project, his wages were paid to him by Bayshore Corp., which then charged Bayshore SC for the expense like any other subcontractor. (R. p. 601, line 18-p. 602, line 5; p. 604, lines 2-12).

The employees were aware of the distinction between the two corporations. (R. p. 731, lines 7-12; p. 732, lines 4-14). Only Bayshore Corp. had the authority to hire and fire the salaried Bayshore Corp. employees. (R. p. 622, lines 3-16). Bayshore Corp. employees were paid by Bayshore Corp. with Bayshore Corp. checks. (R. p. 923). On the other hand, as Bayshore SC employees were hired they were required to fill out Bayshore SC job applications and were paid with Bayshore SC checks by a South Carolina payroll service. (R. pp. 606, p. 609, lines 2-14). Finally, Bayshore SC acted alone in hiring the temporary workers, including Appellants Poch and Key, to assist on the site. (Colonna Aff. R. p. 841, ¶ 6). Bayshore Corp. had no hand in hiring the Poch and Key.

Finally, while the two corporations may have engaged in similar business activities in general, Bayshore SC's operations were limited to the South Carolina site, while Bayshore Corp. had varied operations in several locations. (Colonna Aff. R. p. 838, ¶ 4). The two corporations strictly maintained separate books, account records, and bank accounts. (R. pp. 610, 613, 665; Colonna Aff. p. 841, ¶ 11). Each corporation maintained separate self-insured reserves. (R. p. 613, lines 6-22). Likewise, both entities had separate federal tax identification numbers, and were required to file separate tax reports. (R. p. 607, lines 20-22).

Accordingly, just like the corporate entities the court analyzed in *Brown*, it is clear that Bayshore SC, the entity that retained Poch and Key for work at the project, was a separate and distinct corporate unit from Bayshore Corp., and there is insufficient evidence to justify a conclusion that either corporation was a mere instrumentality of the other. Thus, the Court should have found that Bayshore Corp. was not Appellants' statutory employer under the Act.

BAYSHORE CORP.'S POSITION AS A CO-SUBCONTRACTOR TO APPELLANTS

This Court should have found that Bayshore Corp.'s employees at the site were subcontractors to Bayshore SC, the owner of the project. In that position, the Bayshore Corp. employees, such as Lenart, stood in the position of co-subcontractors to Poch and Key. As it was Bayshore Corp.'s employee Larry Lenart who dug the trench that injured Poch and Key, Bayshore Corp. is liable in tort to Appellants. Workers' Compensation immunity does "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 (1976).

The Supreme Court directly addressed this issue in *Boone v. Huntington & Guerry Elec. Co.*, 311 S.C. 550, 430 S.E.2d 507 (1993) (stating that the issue before the court was "[w]hether the exclusivity provisions of §§ 42-1-540 and -5-10 extend immunity to a subcontractor sued for negligence by an owner's employee"). In that case, Boone, an employee of J.P. Stevens, was injured when she tripped over a power cord that had been

placed over a roadway by Huntington & Guerry Elec. Co. (the "Electric Company"), a subcontractor of J.P. Stevens. *Id.* at 551. In seeking the benefit of immunity from suit, the Electric Company claimed to be the statutory employee of J.P. Stevens, and consequently, a co-employee of Ms. Boone. *Id.* at 552. The Supreme Court rejected this argument, however, finding that while a subcontractor may be classified as a "statutory employee" of the owner for the purposes of workers compensation liability, that classification does not render the subcontractor a "statutory co-employee" of the owner's employee. *Id.* at 553. Moreover, it stated that whether a subcontractor qualifies as a statutory employee is not relevant to determine the subcontractor's immunity. *Id.* Rather, "[t]he exception to immunity in §42-1-540 applies to a subcontractor hired by the injured employee's employer whether or not that subcontractor qualified as a statutory employee." *Id.*

Likewise, on facts nearly identical to the case at bar, the Court of Appeals found that an injured Talent Tree, Inc. temporary employee who was leased to the Milliken-Magnolia Plant could bring suit against Sanders Brothers, Inc., whose employee was also leased to Milliken. *Day v. Sanders Brothers, Inc.*, 315 S.C. 95, 431 S.E.2d 629 (Ct. App. 1993). The court held that "the subcontractor sued by the plaintiff was not the plaintiff's employer and one who had any worker's compensation liability to the plaintiff." *Id.* at 96. Indeed, the court classified both the Talent Tree temporary worker and the Sanders Brothers employee as subcontractors hired by a common employer, Milliken. *Id.* As such, Sanders Brothers was not entitled to immunity from suit by the injured temporary worker.

Larry Lenart dug the trench that later collapsed trapping Key and killing Poch. (R. pp. 790-791, 794-795, 820-821). As discussed above, Lenart was an employee of Bayshore

Corp., not Bayshore SC at the time of the accident. Therefore, as the employer of the subcontractor to Bayshore SC whose negligence injured Plaintiffs, Bayshore Corp. is not entitled to immunity from suit under the Workers' Compensation Act towards Poch and Key. Rather, like the employees in *Day*, Appellants and Lenart were co-subcontractors hired by a common employer. As such, Lenart's employer Bayshore Corp. is not entitled to immunity from suit by Appellants, the injured temporary workers. Thus, the Court should have reversed the trial court's findings on this point.

CONSIDERATION OF DISPUTED AFFIDAVITS

Counsel for Appellants apologizes for the confusion caused by their manner of phrasing the issues presented concerning the evidence offered in the affidavits of Dunbar and Lenart and in the second affidavit of Colonna. The wording was intending to convey the understanding that because the existence of the employer-employee relationship is a jurisdictional question that involves a question of law, the appellate court has both the power and the duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence regardless of the factual findings made by the trial court. *Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 443 S.E.2d 803 (1994). In so doing, Appellants contend that this Court should not consider the improper evidence presented in the disputed affidavits. Appellants likewise contend that the trial court erred in so doing. While Appellants' preferred course of action would have been to exclude the disputed affidavits from the Record on Appeal, per Rule 210(c), counsel must include the matter designated by Respondents in the Record, as well. See Exhibit A, attached hereto, (Respondents' Designation of Record on Appeal, p. 4).

Company President Keith Colonna's Second Affidavit

This Court erred in finding that the competing affidavit exception argument in support of Appellants' motion to exclude Colonna's second affidavit was not preserved for the Court's review. While it is true that the terms "sham" or "competing" did not appear in Appellant's briefing until the Rule 59(e) Motion, the issue encompassed by the sham or competing affidavit exception in conjunction with judicial estoppel was brought forth in Appellants' initial Motion seeking to exclude this affidavit from the trial court's consideration.

The concept of the "competing" or "sham" affidavit was first articulated by the Supreme Court in *Cóthran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629 (2004), in which the Court set forth a list of considerations to be used as guidance in determining when a court may disregard a subsequent affidavit that contradicts a party's own prior sworn testimony. In other instances, the concept had not been formally addressed by those terms, but the concept was nonetheless explored in cases such as *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 251-252, 489 S.E.2d 472 (1997), in which the court held that in order to protect the integrity of the courts, "[w]hen a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him."

In their initial Motion seeking to exclude the second Colonna affidavit, Appellants cited *Hayne* in asserting that Colonna's second affidavit contradicted testimony Colonna rendered during his deposition and in his April 18, 2005 affidavit, and asserted that it was introduced in an attempt to alter Respondents' previously stated position in order to gain

advantage. (R. p. 477). This argument, which is encompassed by the sham/competing affidavit concept, was articulated by Appellants from the beginning even though they did not cite *Cothran* in the initial brief or use the terms “sham” or “competing.” Rather, Appellants described the second affidavit using terms such as “switching positions,” “contradiction,” and “conflict” which are in essence the same as “competing” in this context. (R. p. 476-477).

The trial court cited *Cothran* in its initial Order denying Appellants motion, which then prompted a more detailed discussion of that case in the Rule 59(e) Motion. (R. p. 19-20). Appellants’ focus on the terms “sham” or “competing” in its Rule 59(e) brief, therefore, was not bringing forth a new issue, but rather expounding upon an issue that was considered by the trial court in its initial order. Therefore, this issue was properly preserved.

Moreover, Appellants asked that this Court exclude this affidavit in its independent consideration of the record in order to avoid reversible error. In his first affidavit, Colonna represents that the work being done at the South Carolina site was essential to Bayshore SC, but makes no mention of Bayshore Corp. in that regard. (Colonna Aff. R. p. 839, ¶ 5). Rather, he stresses that Bayshore Corp.’s work is to make precast concrete “in Virginia. . . .” (Colonna Aff. R. p. 838, ¶ 3). Otherwise, the references to Bayshore Corp. in the first affidavit are solely in regard to its status as Bayshore SC’s parent corporation or to its part ownership by Tidewater Skanska Group, Inc., Bayshore SC’s principal customer. (Colonna Aff. R. pp. 838-841, ¶¶ 3, 11, 12). In this first affidavit, Colonna thus, makes every effort to demonstrate that it was **not** Bayshore Corp.’s work being done at the site, but rather solely that of Bayshore SC. In contrast, the second Colonna affidavit was submitted after Respondents had developed their legal theories and determined that it was in their best

interests to blur the distinction between the two corporations in an attempt to demonstrate just the opposite conclusion. It is exactly this type of contradictory testimony that a party should be estopped from putting forth in order to gain an unfair advantage regardless of whether the affidavit is termed sham, competing or contradictory.

Larry Lenart's Affidavit

The Court erred in finding that Appellants did not carry their burden of proving prejudice resulting from the admission of testimony from Lenart's affidavit. Lenart is a key figure in this matter and, as discussed above, his employment status is important to the determination of the Respondent entities' roles in this case. His affidavit contains the only evidence that Lenart was an employee of Bayshore SC rather than of Bayshore Corp. (R. p. 877). Thus, while the parties agreed that live witness testimony would not be taken at the hearing on Respondents' summary judgment motion, in every other instance where testimony of a fact witness was submitted via affidavit, the opposing party had been presented with the opportunity to cross-examine the witness via deposition, which testimony, if Appellants so chose, was then also available to be provided to the trial court. Appellants, in fact, took full advantage of this opportunity in nearly all instances, but were denied such access to Mr. Lenart, as discussed in the previously submitted briefs.

The denial of the ability to cross-examine Lenart was prejudicial to Appellants because the testimony in his affidavit is contradictory to that offered not only by Appellants but even of that of Respondents' witnesses via their depositions and/or affidavits, and Appellants were denied the opportunity to correct or explore Lenart's statements. In addition, Lenart has a significant criminal record. (R. pp. 928-929; pp. 930-931).

Accordingly, Lenart's credibility is highly suspect and rendered crucial Appellants' opportunity to cross-examine him.

The right to the cross-examination of witnesses is "a most valuable right." *Goolsby v. Goolsby*, 229 S.C. 101, 92 S.E.2d 57 (1956); see *State of S.C. v. Nest Egg Society Today*, 290 S.C. 124, 131, 348 S.E.2d 381 (Ct. App. 1986); *Montgomery v. Robinson*, 93 S.C. 247, 76 S.E. 188 (1912)(recognizing a party's Constitutional and statutory right to cross-examine witnesses against them). "The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth." *Goolsby*, 229 S.C. at 112. The Supreme Court has recognized that fundamental fairness requires the exclusion of the affidavit of a witness that a party had no opportunity to cross-examine, where, as here, the party challenged the credibility of the witness, who was "an unsavory character with a long criminal record." *City of Spartanburg v. Parris*, 251 S.C. 187, 191, 161 S.E.2d 228 (1968). At minimum, the prejudice to Appellants resulting from their inability to cross-examine Lenart should have been recognized by this Court and it, as well as the trial court, should have excluded Lenart's affidavit from consideration.

**BAYSHORE CORP. IS INDEPENDENTLY LIABLE
TO APPELLANTS AS THE LESSEE OF THE PROPERTY WHICH
CONTAINED A DANGEROUS CONDITION**

This Court failed to address Appellants' assertion that Bayshore Corp. as the lessee of the property which contained a dangerous condition was liable to Poch and Key. In addition to supplying subcontractors to work at the site, Bayshore Corp. maintained the leasehold on the facility on which Plaintiffs were injured. (R. pp. 894-901). When Bayshore

Corp.'s employee, Lenart, dug the un-shored trench that injured Appellants, he was, or should have been, aware of the dangerous condition of the trench, yet he allowed Appellants to enter it. "The owner [or lessee] of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." *Sims v. Giles*, 343 S.C. 708, 718, 541 S.E.2d 857 (Ct. App. 2001)(citing *Larimore v. Carolina Power & Light*, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000)). The possessor of land owes an "active or affirmative duty" to protect business visitors even from a condition on the land whose danger is known or obvious where the possessor should anticipate harm despite such knowledge or obviousness. *Sims*, 343 S.C. at 716 (quoting the Restatement (Second) of Torts §343A (1965) expressly adopted by the Supreme Court in *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991)). Business visitors may include employees of co-subcontractors engaged in a common enterprise. *Sims*, 343 S.C. at 731. Bayshore Corp. owed Appellants as business visitors to its leased facility the affirmative duty of care to provide a safe environment. (R. p. 626; lines 16-17 ("[I]t was our location and we had a responsibility to provide a safe workplace.")). By virtue of Bayshore Corp. employee Lenart allowing Appellants to enter the unsafe trench he created, Bayshore Corp. breached that duty thus rendering this matter inappropriate for determination in Bayshore Corp.'s favor.

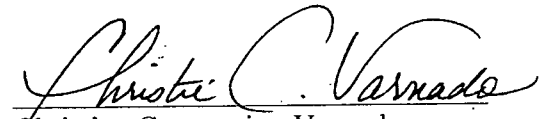
CONCLUSION

For the reasons stated, the Court should reverse its decision of September 9, 2009, and should further find that the preponderance of the evidence demonstrates that, as a matter of law, neither Bayshore Corp. nor Bayshore SC are shielded by the Workers' Compensation

statutory immunity from liability for Appellants' claims. The Court should then remand this case back to the trial court for a full trial on the merits against all Respondents.

Respectfully submitted by,

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Charleston, South Carolina

September 24, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Judge Paul M. Burch

Case Nos.
2006-CP-26-3194R
2006-CP-26-3195R
2006-CP-26-3196R

THELMA M. POCH, as the 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.,
BAYSHORE 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.,

A- 1095



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,

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

Respondents.

DESIGNATION OF MATTERS
TO BE INCLUDED IN RECORD ON APPEAL

Pursuant to Rule 208 of the South Carolina Appellate Court Rules, Respondents
propose the following to be included in the Record on Appeal:

ORDERS ISSUED BY JUDGE BURCH:

1. Order of April 19, 2007;
2. Order of August 6, 2007;
3. Order Granting Defendants' Motion to Dismiss, or Alternatively, to Determine
Workers' Compensation Jurisdiction/Exclusivity, July 19, 2007;
4. Order Denying Plaintiffs' Motion to Exclude Affidavit of Keith Colonna, July
19, 2007;
5. Order Denying Plaintiffs' Motion to Exclude Affidavit of Vernon Dunbar, July
19, 2007;
6. Order Denying Plaintiffs' Motion to Exclude Affidavit of Larry Lenart, July 19,
2007;
7. Order Denying Plaintiffs' Motion to Reconsider, November 14, 2007;

PLEADINGS AND MOTIONS:

1. Summons and Complaints in 03-CP-26-6826, 03-CP-26-6824, and 03-CP-26-6825;
2. Answers in 03-CP-26-6826, 03-CP-26-6825, and 03-CP-26-6824;
3. Amended Complaints in 2006-CP-26-3914R, 2006-CP-26-3195R and 2006-CP-26-3196R;
4. Answers to Amended Complaints;
5. Defendants' Motion for Summary Judgment or, Alternatively, for a Hearing to Determine Worker's Compensation Exclusivity Jurisdiction, or Alternatively Motion to Dismiss for Lack of Subject Matter Jurisdiction;
6. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment;
7. Defendants' Memorandum in Support of Motion to Dismiss, or Alternatively, to Determine Workers' Compensation Jurisdiction/Exclusivity;
8. Plaintiffs' Motion to Exclude Affidavit of Keith Colonna and supporting memorandum;
9. Plaintiffs' Motion to Exclude Affidavit of Vernon Dunbar and supporting memorandum;
10. Plaintiffs' Motion to Exclude Affidavit of Larry Lenart and supporting memorandum;
11. Plaintiffs' Motion to Reconsider Order of August 6, 2007 and supporting memorandum;
12. Plaintiffs' Motion to Reconsider Order Denying Motion to Exclude Affidavit of Keith Colonna and supporting memorandum;
13. Plaintiffs' Motion to Reconsider Order Denying Motion to Exclude Affidavit of Vernon Dunbar and supporting memorandum;
14. Plaintiffs' Motion to Reconsider Order Denying Motion to Exclude Affidavit of Larry Lenart and supporting memorandum;

DEPOSITION EXCERPTS:

1. Cason: pp. 12, 21-25, 32, 34-35;
2. Colonna: pp. 6-35, 39, 46, 51-90, 105-119;
3. Coyle: pp. 1-30, 77, 83-85, 87-88, 95-96, 106-107, 122, 134-138;
4. Cutchin: pp. 18-21, 39, 66;
5. Dickens: pp. 12, 18, 27, 29, 33, 56;
6. Eastwood: pp. 10, 12, 13, 15, 17, 35, 60-63, 69-70, 85-86, 89-95;
7. Kellam: pp. 6, 11-12, 53-54, 57, 61, 65;
8. Key: pp. 38-42, 44-45, 47-49, 52, 54-59, 62-63, 100-150;

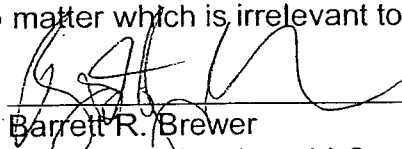
AFFIDAVITS:

1. S. Keith Colonna, dated April 18, 2005;
2. Richard Stadler;
3. Vernon F. Dunbar, Esquire;
4. Second Keith Colonna affidavit, dated April 25, 2007;
5. Larry Lenart;
6. Tara Cason;
7. Jolene Coyle;
8. Braxton Cutchin;

DOCUMENTS:

1. S.C. Department of Labor, Licensing & Regulations, Citations and Notification of Penalty;
2. S. C. Secretary of State's Business Filing Record (Bayshore SC);
3. Commonwealth of Virginia State Corporation Commission record (Bayshore SC);
4. Lease Agreement
5. Job Order, May 2, 2002;
6. Job Order, May 8, 2002;
7. Job Order, May 20, 2002;
8. Job Place General Agreement;
9. Personnel Resources of Georgia, Inc. Agreement for Services;
10. Bayshore Corporation Board Minutes, April 21, 2000;
11. Bayshore SC Board Minutes, April 21, 2000;
12. Bayshore Corp. Board Minutes, January 22, 2000;
13. Bayshore Corp. and Bayshore SC List of Board Members, 2002;
14. Bayshore Corporation payment voucher to Lenart, 8/1/02;
15. Bayshore Corporation letter to Lenart, 2/1/01;
16. Administrative Solutions, Inc., "Enrollment and Change Form", for Lenart;
17. Letter from Bayshore Corporation Office Manager to Wystar Retirement Service;
18. June 8, 2002 letter from Henry Bouffard on behalf of Bayshore SC to Job Place;
19. SLED arrest record of Lenart;
20. SC 10 year Driving Record of Lenart;
21. Subpoena, Receipt of Service by Northampton County Sheriff's Office, and Notice of Deposition of Lenart.

I certify that this designation contains no matter which is irrelevant to this appeal.


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Charleston, South Carolina

June 2, 2008.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Honorable Judge Paul M. Burch

Case Nos.
2006-CP-26-3194R
2006-CP-26-3195R
2006-CP-26-3196R

THELMA M. POCH, as the 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.,
BAYSHORE 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.,
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,

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

Respondents.

RESPONDENTS' REPLY TO APPELLANTS PETITION FOR REHEARING

Barrett R. Brewer
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(843) 577-2026

Attorneys for Respondents

REPLY TO APPELLANTS PETITION FOR REHEARING

Respondents respectfully submit this Reply in opposition to Appellants Petition for Rehearing. This Court should Deny Appellant's Motion for Rehearing since there were no new matters submitted by the Appellants for review by this Court and since this Court did not overlook or misapprehend any matters raised by the Appellants. The Appellants have simply attempted to re-package the same arguments initially raised to the Court of Appeals. While the Respondents do not believe there are any matters raised by Appellants entitled to a rehearing, the Respondents submit the following in response to their Petition:

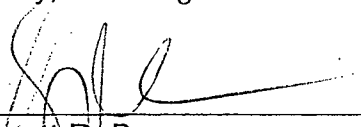
- a. Larry Lenart was a Bayshore SC employee at the time of the incident underlying this action. The record clearly shows through testimony, affidavits, and Bayshore SC records that Lenart was hired in South Carolina to work for Bayshore SC. To the extent the Court's opinion relied on this fact it was a correct finding. Furthermore, this Court was correct in finding that Bayshore Corp. shared salaried employees, including Colonna and Kellam, with Bayshore SC.

However, whether Lenart was Bayshore Corp. at the time of the accident is immaterial to the ultimate conclusion of the Court that Bayshore Corp. is immune from civil liability pursuant to workers compensation exclusivity. Pursuant to the facts in the record, Bayshore Corp. Satisfies the Voss and Ost tests and is the upstream statutory employer of Appellants.

- b. The Court of Appeals correctly found that S.C. Code 421-415 only applies to whether an upstream contractor can qualify for reimbursement. S.C. Code 42-5-40 does not apply to this case since Bayshore SC and Bayshore Corp. had workers compensation insurance coverage as demonstrated by the testimony of Keith Colonna and the affidavit of Richard Stadler.
- c. The Court of Appeals correctly found that Bayshore SC and Bayshore Corp were statutory employers of Poch and Key and correctly relied on the Voss and Ost decisions to support its opinion.
- d. The Court of Appeals correctly found that Larry Lenart was not a co-subcontractor to Appellants Poch and Key.
- e. The Court of Appeals correctly found that Appellants had failed to preserve the "sham" affidavit argument since it was not raised in the initial motion to the Court and was only first raised in Appellants' Rule 59(e) Motion to Reconsider. Judicial estoppel, as argued by the Appellants in their Motion to Exclude, is not the same as the sham affidavit rule, does not involve the same test, or the same factors.
- f. This court was free to consider the evidence in Colonna's second affidavit, as discussed above in section (e) of this Reply and there was no error in failing to exclude said affidavit. However, there is nothing in this Court's opinion that would

show the court relied on Colonna's second affidavit and the record is replete with other sources of information this Court could have relied upon in supporting its findings of fact and law.

- g. The Court of Appeals correctly ruled that the Appellants failed to prove they were burdened from not excluding Larry Lenart's affidavit.
- h. The Court of Appeals correctly ruled that Bayshore Corp. was immune from liability pursuant to workers' compensation exclusivity, including but not limited to any alleged civil liability for premises liability.



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October 16, 2009

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and TIDEWATER SKANSKA, INC.

Defendants.

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BAYSHORE PRODUCTS CORPORATION are the

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Appellants;

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TIDEWATER SKANSKA GROUP, INC.,
and TIDEWATER SKANSKA INC.,

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TIDEWATER SKANSKA GROUP, INC.,
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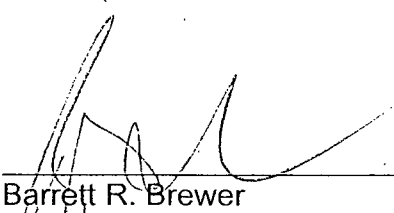
CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009, I have mailed, regular first class mail,
postage prepaid, a copy of Respondents' Reply to Appellant's Petition for Rehearing to:

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Charleston, South Carolina

October 16, 2009

The South Carolina Court of Appeals

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

Defendants,

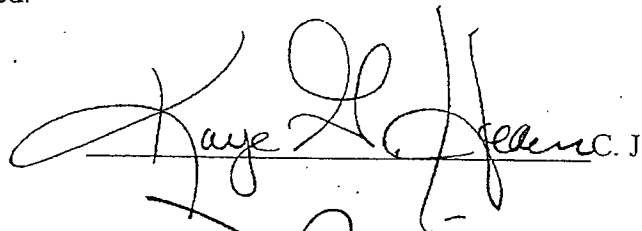
of whom Bayshore Concrete
Products/South Carolina, Inc., and
Bayshore Concrete Products
Corporation are the

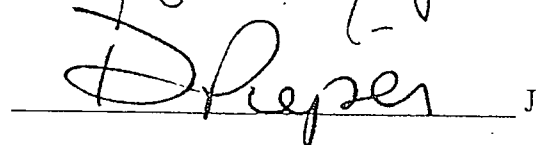
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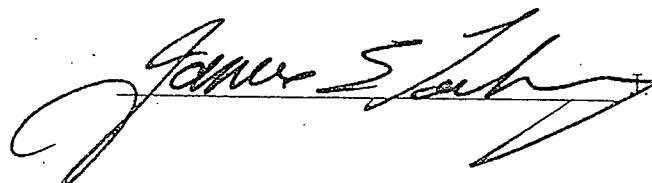
The Honorable Paul M. Burch
Horry County
Trial Court Case No. 2006-CP-26-3194R
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ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is
unable to discover that any material fact or principle of law has been either overlooked or
disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the
Petition for Rehearing be denied.


Kaye L. Hearn, J.


D. Reiser, J.


James S. [unclear]

Columbia, South Carolina

DEC 07 2009

cc: Christine Companion Varnado, Esquire
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