

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

Petitioner,

v.

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

Defendants,

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

Respondents.

The Honorable Paul M. Burch
Horry County
Trial Court Case No. 2006-CP-26-3194R
2006-CP-26-3195R; 2006-CP-26-3196R

ORDER

For good cause having been shown, the time for serving and filing the
Brief of Petitioner in the above entitled matter is hereby extended until May
7, 2012.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

April 3, 2012

cc: Christine C. Varnado, Esquire
Jason S. Luck, Esquire
John R. Kuhn, Esquire
Barrett Ray-Brewer, Esquire

**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)**

MOTION FOR EXTENSION

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

v.

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

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

and

Kevin Key and Sandra Key,Petitioners,

v.

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

**RECEIVED
MAR 30 2012
S.C. SUPREME COURT**

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

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

and

**Thelma M. Poch, as Personal
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 theRespondents.**

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the undersigned attorney, counsel for the Petitioners, files this motion for an extension of the deadline for serving and filing its Brief. This submission currently must be served and filed by April 6, 2012, and if the requested thirty day extension is granted, this deadline would become May 7, 2012.

The grounds for this motion are: (1) long-standing family vacation plans have interrupted the time to prepare these filings, (2) additional time is needed to research changes in the relevant law since the 2010 Petition for *Certiorari*, and (3) no party would be prejudiced by the grant of this extension.

Petitioners respectfully request that this Court hold any briefing time in abeyance pending the consideration of this motion.

Petitioners have conferred with counsel for the Respondents, who consent to the requested relief.



Christine Companion Varnado
Jason Scott Luck
SEIBELS LAW FIRM, P.A.
127 King Street, Suite 100
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)

and

John R. Kuhn
Kuhn & Kuhn, LLC
39 Broad St., Suite 301
Charleston, SC 29401
843.577.3700 (phone)

Attorneys for Petitioners

March 29, 2012

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

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

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

**CERTIFICATE OF SERVICE
(MOTION FOR EXTENSION)**

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

v.

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

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

and

Kevin Key and Sandra Key,Petitioners,

v.

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

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

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

and

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

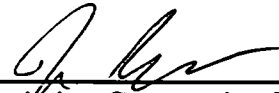
v.

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 theRespondents.

I certify that I have served the Motion for Extension on the Clerk of the Supreme Court and on counsel for the Respondents by serving copies of the same via U.S. Mail on 29 March 2012 to the following:

**Barrett R. Brewer
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
843.577.2026
Attorneys for Respondents**



**Christine Companion Varnado
Jason Scott Luck
SEIBELS LAW FIRM, P.A.
127 King Street, Suite 100
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)**

and

**John R. Kuhn
Kuhn & Kuhn, LLC
39 Broad St., Suite 301
Charleston, SC 29401
843.577.3700 (phone)**

March 29, 2012

Attorneys for Petitioners

THE
SEIBELS
LAW FIRM, P.A.

127 KING STREET, SUITE 100
CHARLESTON, SOUTH CAROLINA 29401

843.722.6777
fax 843.722.6781

March 29, 2012

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

RE: **Supreme Court Tracking No.: 2010-149288**
Thelma M. Poch, as the Personal Representative for the Estate of Kenneth O.
Poch v. Bayshore Concrete Products/South Carolina, Inc., *et al.*, 2006-CP-26-3194R
Kevin Key and Sandra Key v. Bayshore Concrete Products/South Carolina, Inc.,
et al., 2006-CP-26-3195R
Thelma M. Poch, individually and as Personal Representative for the Estate of
Kenneth O. Poch, and Julius Poch v. Bayshore Concrete Products/South Carolina,
Inc., *et al.*, 2006-CP-26-3196R
Our File No.: 7000-1

Dear Mr. Shearouse:

Enclosed please find an original and seven copies of a Motion for Extension in the above-referenced matters. In addition, please find enclosed this firm's check in the amount of \$25.00 representing the required filing fee. We would appreciate your filing the original and returning a filed-stamped copy to us in the postage-paid enclosed envelope.

If you have any questions, please give us a call.

With kind regards, I remain

Sincerely yours,

SEIBELS LAW FIRM, P.A.

Sharon Harris

Sharon Harris
Legal Assistant

/sdh
Enclosures

cc: John R. Kuhn, Esquire (w/enc)
Barrett R. Brewer, Esquire (w/enc)

RECEIVED

MAR 30 2012

S.C. SUPREME COURT
pm 3-29-12

check # 8668
\$25.00

THE
SEIBELS
LAW FIRM, P.A.

127 KING STREET, SUITE 100
CHARLESTON, SOUTH CAROLINA 29401

843.722.6777
fax 843.722.6781

March 22, 2012

RECEIVED

MAR 22 2012

S.C. Supreme Court

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
P.O. Box 11330
Columbia, SC 29211

RE: **Supreme Court Tracking No.: 2010-149288**
Thelma M. Poch, as the Personal Representative for the Estate of Kenneth O.
Poch v. Bayshore Concrete Products/South Carolina, Inc., *et al.*, 2006-CP-26-3194R
Kevin Key and Sandra Key v. Bayshore Concrete Products/South Carolina, Inc.,
et al., 2006-CP-26-3195R
Thelma M. Poch, individually and as Personal Representative for the Estate of
Kenneth O. Poch, and Julius Poch v. Bayshore Concrete Products/South Carolina,
Inc., *et al.*, 2006-CP-26-3196R
Our File No.: 7000-1

Dear Mr. Shearouse:

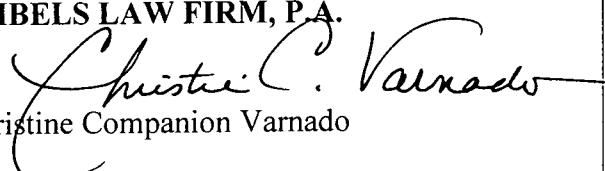
Enclosed please find an original (unbound) and fourteen copies of the Appendix in this matter. We would ask you destroy the copies of the Appendix currently in your possession and replace them with these, which are fully redacted and reflect a cover and caption approved by Debbie Hopkins.

Please do not hesitate to contact me if you have any questions.

With kind regards, I remain

Sincerely,

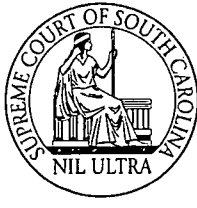
SEIBELS LAW FIRM, P.A.


Christine Companion Varnado

CCV/kfg

Enclosures

cc: John R. Kuhn, Esquire (w/o enc)
Barrett R. Brewer, Esquire (w/o enc)



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 7, 2012

Christine C. Varnado, Esquire
Seibels Law Firm, P.A.
127 King Street
Suite 100
Charleston, SC 29401

Re: Poch & Key v. Bayshore Concrete

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before April 6, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,

Daniel E. Shearouse
85

CLERK

DES/lda

Enclosure

cc: John R. Kuhn, Esquire
Barrett Ray Brewer, Esquire
The Honorable Tanya Gee

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

and

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

v.

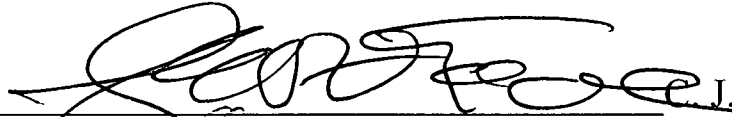
Bayshore Concrete
Products/South Carolina, Inc.,
Bayshore Concrete Products
Corporation, Tidewater
Skanska Group, Inc., and
Tidewater Skanska, Inc., Defendants,

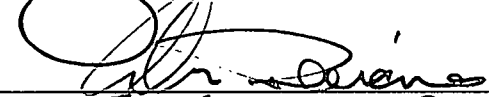
of whom Bayshore Concrete
Products/South Carolina, Inc.,
and Bayshore Concrete
Products Corporation are the Respondents.


ORDER

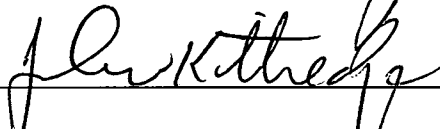
Petitioners seek a writ of certiorari to review the Court of Appeals' decision in *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13,

686 S.E.2d 689 (Ct. App. 2009). We grant the petition on petitioners' Questions I and II and deny the petition on petitioners' Question III. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.









Hearn, J., not participating

Columbia, South Carolina

March 7, 2012

STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Judge Paul M. Burch

RECEIVED

JAN 06 2010

S.C. SUPREME COURT

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,

Petitioner,

v.

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

Respondents.

KEVIN KEY and SANDRA KEY,

Petitioners,

v.

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

Respondents.

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

Petitioners,

v.

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

Respondents.

PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT

Pursuant to Rule 242, SCACR, Appellants respectfully submit this Petition for a Writ of Certiorari to the Supreme Court to address errors in the decision issued by the Court of Appeals in its Opinion No. 4617, filed September 9, 2009, in which the Court's decision is in conflict with prior Supreme Court decisions.

CERTIFICATION BY COUNSEL

Undersigned counsel hereby certifies, pursuant to Rule 242(d)(1), SCACR, that a timely petition for rehearing was made to the Court of Appeals and finally decided by the Court of Appeals on December 7, 2009.

QUESTIONS PRESENTED FOR REVIEW

- I. DID COURT OF APPEALS ERR IN DETERMINING THAT BAYSHORE CORP. WAS ENTITLED TO WORKERS' COMPENSATION IMMUNITY AS AN UPSTREAM, STATUTORY EMPLOYER OF APPELLANTS?**
- II. DID THE COURT OF APPEALS ERR IN DETERMINING THAT BAYSHORE CORP. AND BAYSHORE SC COULD TAKE ADVANTAGE OF IMMUNITY FROM TORT ACTIONS EVEN THOUGH THEY FAILED TO SECURE WORKER'S COMPENSATION BENEFITS FOR APPELLANTS IN VIOLATION OF THE CODE AND IN CONFLICT WITH THIS COURT'S DECISION IN *HARRELL V. PINELAND PLANTATION, LTD.*?**
- III. DID THE COURT OF APPEALS ERR WHEN IT FAILED TO EXCLUDE CERTAIN AFFIDAVITS FROM CONSIDERATION?**

STATEMENT OF THE CASE

This appeal concerns three cases arising out of a tragic accident that occurred on June 6, 2002: a wrongful death action filed by the heirs of Appellant Kenneth Poch, a survival action filed on behalf of Poch's estate, and personal injury and loss of consortium claims brought by Appellants Kevin and Sandra Key. Kenny Poch was killed and 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 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).

The trench was located in Little River, South Carolina, on a site that was leased by Virginia corporation, Respondent Bayshore Concrete Products Corporation ("Bayshore Corp."). (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. (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 later 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). Bayshore SC separately employed numerous employees at the site whose wages and benefits it directly paid. (R. pp. 606-609, 670). In addition, Respondent Bayshore Corp. assigned some of its own employees to the South Carolina site to work as subcontractors to Bayshore SC. (R. pp. 597-599). Included among the Bayshore Corp. employees working as subcontractors to Bayshore SC at the site was Larry Lenart, who dug the trench that later collapsed. (R. pp. 598-599, 602, 604, 669, 790-791, 794-795, 820-821).

Respondents agree that neither 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 for Poch or Key, including the payment of workers' compensation. (R. pp. 588, 589-590; p. 625; pp. 747-748; pp. 833-834). Rather, PRI/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). Nonetheless, Bayshore Corp. and Bayshore SC sought dismissal of this suit based on the exclusive jurisdiction of the worker's compensation

scheme asserting that they were entitled to immunity under varying theories as indirect employers of Appellants.

In advance of the hearing on the summary judgment motion, Appellants filed motions asking the trial court to disregard the testimony contained in three affidavits submitted by Respondents. Relevant here, 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, and the affidavit of Larry Lenart, because Lenart 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 finding that Respondent Bayshore Corp. and Bayshore SC were protected by workers' compensation exclusivity on the basis that both entities were upstream, statutory employers of Poch and Key and denying Appellants' motions to exclude the affidavits. Appellants timely filed an appeal. On September 9, 2009, the Court of Appeals issued a decision affirming the lower court's ultimate dispositions, with the exception of its finding as to exclusion of the affidavit of Vernon Dunbar, which the Court found was harmless error. Thereafter, Appellants timely filed a Petition for Rehearing asserting that the Court of Appeals erred (a) in mischaracterizing Larry Lenart, a Bayshore Corp. employee, as a Bayshore SC employee, which led directly to its incorrect findings of law concerning the immunity afforded to Bayshore Corp.; (b) 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 it did not meet the Code's requirements; (c) in finding that Poch and Key were statutory employees of Bayshore Corp. by erroneously relying on a subcontractor/contractor analysis rather than established precedent concerning parent and subsidiary entities to determine whether Appellants' work was an essential part of Bayshore Corp.'s business; (d) 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; (e) in failing to find that Bayshore Corp.'s employees at the site were subcontractors to Bayshore SC, the owner of the project, and as such stood in the position of co-subcontractors to Poch and Key; (f) 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 and in relying on evidence submitted in the second Colonna affidavit; and (g) in finding that Appellants did not carry their burden of proving prejudice resulting from the admission of testimony from Lenart's affidavit. The Court of Appeals denied the Petition in an Order issued on December 7, 2009.

ARGUMENTS IN SUPPORT OF THE PETITION

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, the Court of Appeals and this Court, should it accept certiorari, have 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 neither Bayshore Corp. nor Bayshore SC are shielded by the Workers' Compensation Act's statutory immunity from liability for Appellants' claims. A significant portion of both the trial court's and the Court of Appeals' opinions were 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 courts 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. In addition, the Court ignored precedent set by the Supreme Court in *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 327, 523 S.E.2d 766, 773 (1999) and *Hardee v. W.D. McDowell*, 381 S.C. 445, 673 S.E.2d 813 (2009), which require that each entity seeking to take advantage of workers' compensation immunity must demonstrate that it secured workers' compensation benefits for the statutory employee before the employment began even if the statutory employee's immediate employer has already secured those benefits.

1. THE COURT OF APPEALS ERRED IN DETERMINING THAT BAYSHORE CORP. WAS ENTITLED TO WORKERS' COMPENSATION IMMUNITY.

A. THE COURT OF APPEALS 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 parent company Bayshore Corp. In making this finding, the Court erroneously relied on an analysis of a contractor/subcontractor relationship, based on *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997) and *Ost v. Integrated Products, Inc.* 296 S.C. 241, 371 S.E.2d 796 (1988), to determine that Poch's and Key's work was an essential part of Bayshore

Corp.'s business. This analysis is inapplicable where, as here, the Respondents are a parent and its subsidiary. Thus, the Court should have relied on *Brown v. Moorhead Oil Co.*, 239 S.C. 604, 124 S.E.2d 47 (1962),¹ which concerns the same type of parent/subsidiary relationship as the case at bar and 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 610.² In making its findings, this Court inappropriately disregarded the corporate entity to extend statutory employer status of Bayshore SC to its parent company, Bayshore Corp., which was a separate and distinct corporate entity at the time of the accident. It further erred in finding that Bayshore Corp's ownership of Bayshore SC entitled it to immunity simply because it was financially beneficial to Bayshore Corp. as a parent company of Bayshore SC for its subsidiary to be profitable.³

¹ In following *Brown*, Appellants suggest that the Court should also look to *Monroe v. Monsanto Company*, 531 F. Supp. 426 (D.S.C. 1982) even though it is a federal district court decision and therefore not controlling. The *Monroe* Court based its decision in large part on *Brown*.

² 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 ____.

³ 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-subsubsidiary relationship. *Carroll v. Smith-Henry, Inc.*, 281 S.C. 104, 104, 313 S.E.2d 649 (Ct. App. 1984).

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. 296 S.C. at 245-47, 371 S.E.2d at 798-800. 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 parent-company Bayshore Corp. was not the owner of the project and could not stand in the same shoes as a "general contractor" on this job. Rather the subsidiary company 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." (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 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. (R. p. 838, ¶ 4).

Unfortunately, the Court of Appeals 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.” (R. p. 841, ¶ 11).

Thus, rather than look to contractor/subcontractor analysis under *Ost* to evaluate the status of Bayshore Corp., the Court of Appeals should have followed the precedent handed down by the *Brown* court 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.” (R. p. 841, ¶ 11). At the time of the incident, Bayshore SC and Bayshore Corp. maintained separate corporate identities. (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; 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. (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. (R. p. 838, ¶ 4). The two corporations strictly maintained separate books, account records, and bank accounts. (R. pp. 610, 613, 665; 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.

B. THE COURT OF APPEALS ERRED IN FINDING THAT LARRY

**LENART WAS A DIRECT EMPLOYEE OF BAYSHORE SC
RATHER THAN OF BAYSHORE CORP.**

A correct understanding of Larry Lenart's employment status is important in evaluating this case, as evidenced by how frequently the Court of Appeals referenced his employment in articulating key points in its decision. The Court's incorrect characterization of Larry Lenart as a Bayshore SC employee led 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 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).

Bayshore SC president 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." (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. 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.

C. THE COURT ERRED IN FAILING TO FIND THAT THE BAYSHORE CORP. EMPLOYEE WHO CAUSED THE INJURIES WAS A CO-SUBCONTRACTOR TO APPELLANTS AND, THEREFORE, BAYSHORE CORP. WAS NOT IMMUNE FROM SUIT.

The Court of Appeals 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). 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 of Appeals should have reversed the trial court's findings on this point.

II. THE COURT OF APPEALS ERRED IN DETERMINING THAT BAYSHORE CORP. AND BAYSHORE SC COULD TAKE ADVANTAGE OF IMMUNITY FROM TORT ACTIONS EVEN THOUGH THEY FAILED TO SECURE WORKER'S COMPENSATION BENEFITS FOR APPELLANTS IN VIOLATION OF THE CODE AND IN CONFLICT WITH THIS COURT'S DECISION IN *HARRELL V. PINELAND PLANTATION, LTD.*

The Court of Appeals' determination that S.C. Code Ann. §42-5-40 has no role in determining whether Bayshore Corp. or Bayshore SC as alleged upstream employers can benefit from workers' compensation jurisdictional exclusivity is in direct conflict with this court's ruling in *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 327, 523 S.E.2d 766, 773 (1999). It is long settled that 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. "An employer who refuses or neglects to secure such compensation becomes liable either under the Act or in an action at law." *Harrell*, 337 S.C. at 327 (citing S.C. Code Ann. § 42-5-40 (1985)). 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.*

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*, 337 S.C. at 327, 523 S.E.2d at 773.

The Court of Appeals was 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. Here, 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.

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). 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.

As explained in this 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 failed to 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.

III. THE COURT OF APPEALS ERRED WHEN IT FAILED TO EXCLUDE CERTAIN AFFIDAVITS FROM CONSIDERATION.

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 the Court of Appeals, as well as the trial court, erroneously considered the improper evidence presented in the disputed affidavits.

A. THE COURT OF APPEALS ERRED IN FAILING TO EXCLUDE EVIDENCE FROM COMPANY PRESIDENT KEITH COLONNA’S

**SECOND AFFIDAVIT, IN WHICH COLONNA SOUGHT TO
CHANGE FACTS PREVIOUSLY ASSERTED.**

The Court of Appeals erred in failing to find that the evidence offered in the second affidavit of company president S. Keith Colonna dated April 25, 2007, should have been excluded. (R. pp. 851-876). Respondents initially submitted an affidavit executed by Colonna dated April 18, 2005. (R. pp. 836-843). In this first affidavit, Colonna testified 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. (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. (Compare R. pp. 851-876 with pp. 591-594, 607, 610, 613, 665). Likewise, the second Colonna affidavit contradicted the sworn testimony rendered by Respondents' other witnesses on this issue. (Compare R. pp. 851-876 with p. 746 (Eastwood) and pp. 731, 732 (Dickens)).

Appellants raised their objection to this use of the second, competing affidavit via motion submitted to the trial court prior to its consideration of the summary judgment motion, and repeatedly renewed its objections throughout the appeal process. Nonetheless, the Court of Appeals incorrectly found that Appellants' arguments in support of their motion to exclude Colonna's second affidavit were 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 *Cothran 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 the Court of Appeals 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. (R. p. 839, ¶ 5). Rather, he stresses that Bayshore Corp.'s work is to make precast concrete "in Virginia. . . ." (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. (R. pp. 838-841, ¶¶ 3, 11, 12). In this first affidavit, Colonna 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.

B. THE COURT OF APPEALS ERRED IN FAILING TO EXCLUDE LARRY LENART'S AFFIDAVIT.

The Court of Appeals erred in finding that Appellants did not carry their burden of proving prejudice resulting from the admission of testimony from Larry Lenart's affidavit. Lenart is a key figure in this matter. As discussed above, his employment status is important to the determination of the Respondents' 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, because he failed to appear for his properly notice deposition under suspicious circumstances and thereafter made himself unavailable.

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 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.

CONCLUSION

The Supreme Court should grant certiorari to review the Court of Appeal's decision of September 9, 2009, to correct the Court of Appeals' errors of law and findings in contradiction to established Supreme Court precedent.

Respectfully submitted by,

By: 
Christine Companion Varnado
The Seibels Law Firm, P.A.
127 King Street, Suite 100
Charleston, SC 29401
(843) 722-6777

John R. Kuhn
Kuhn & Kuhn, LLC
39 Broad St., Suite 301
Charleston, SC 29401
(843)577-3700

ATTORNEYS FOR PETITIONERS

Charleston, South Carolina

January 5, 2010

STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

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,

Petitioner,

v.

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

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

Respondents.

KEVIN KEY and SANDRA KEY,

Petitioners,

v.

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

of whom BAYSHORE CONCRETE PRODUCTS/

SOUTH CAROLINA, INC., and BAYSHORE
CONCRETE PRODUCTS CORPORATION are

Respondents.

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

Petitioners,

v.

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

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

Respondents.

PROOF OF SERVICE

I certify that I served the Petition for Writ of Certiorari by depositing a copy in the United States mail, postage prepaid, on the 5th day of January, 2010, to counsel for Respondents:

Barrett R. Brewer, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-7595

Richard H. Ottinger, Esquire
Vendevanter Black, LLP
500 World Trace Center
Norfolk, VA 23510

By:



Christine Companion Varnado
The Seibels Law Firm, P.A.
127 King Street, Suite 100
Charleston, SC 29401
(843)722-6777

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM THE COURT OF APPEALS

Honorable Judges J. Lockemy, C.J. Hearn and J. Pieper

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

RECEIVED

MAR 29 2010

S.C. SUPREME COURT

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

Petitioner

v.

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

of whom BAYSHORE CONCRETE
PRODUCTS/SOUTH CAROLINA INC.,
BAYSHORE PRODUCTS CORPORATION ARE THE

Respondents.

KEVIN KEY and SANDRA KEY,

Petitioners

v.

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

Respondents.

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

Petitioners,

v.

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

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

Respondents.

**RESPONDENTS' RETURN TO
APPELLANTS' PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT**

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

STATEMENT OF ISSUES ON APPEAL 1

FACTS 1

STANDARD OF REVIEW 3

ARGUMENT 4

I. BAYSHORE CORP. IS A STATUTORY EMPLOYER ENTITLED TO WORKERS' COMPENSATION IMMUNITY 5

 A. Bayshore Corp. Is An Upstream Employer, Or Owner, of the Project Appellants Were Working On 6

 B. Lenart Was a Bayshore SC Supervisor, Not A Bayshore Corp. Employee, Therefore Bayshore Corp. Is Not a Co-Subcontractor of Appellants 14

II. BAYSHORE CORP. AND BAYSHORE SC HAD WORKERS COMPENSATION COVERAGE AND COMPLIED WITH THE ACT'S PROVISIONS 16

 A. Bayshore Corp. and Bayshore SC Did Have Workers' Compensation Insurance Coverage 17

 B. Bayshore Corp. and Bayshore SC Complied with the Act 18

III. THE AFFIDAVITS OF COLONNA, LENART, AND DUNBAR, HAVE NO BEARING ON WHETHER BAYSHORE CORP. AND BAYSHORE SC ARE IMMUNE FROM TORT LIABILITY AS STATUTORY EMPLOYERS 19

 A. Whether Colonna's Affidavit Was a "Sham" Was Not Preserved 19

 B. Lenart's Affidavit Has No Bearing on Whether Bayshore Corp. and Bayshore SC are Immune Under Workers Compensation Exclusivity 21

C. Dunbar's Affidavit Has No Bearing on Whether Bayshore Corp. and Bayshore SC are Immune Under Workers Compensation Exclusivity23

CONCLUSION23

TABLE OF AUTHORITIES

Bailey v. Owen, 298 S.C. 36, 39, 378 S.E.2d 63, 65 (S.C. App. 1989)6, 7, 9

Bailey v. Owen, 301 S.C. 399, 392 S.E.2d 186 (S.C. 1990).6

Blue Ridge Rural Electric Co-Op v. Byrd, 238 F.2d 346 (4th Cir. 1956)5

Brittingham v. Williams Sign Erectors, Inc., 299 S.C. 259,
384 S.E.2d 319 (S.C. App. 1989) 5, 6

Brown v. Moorhead Oil Co., 239 S.C. 604, 124 S.E.2d 47 (S.C. 1962)8, 9

Byrd v. Blue Ridge Rural Electric Co-Op, 356 U.S. 525, 78 S.Ct. 893; 2L. Ed 2d 953;
(1958)5

City of Spartanburg v. Parris, 251 S.C. 101, 161 S.E.2d 228 (S.C. 1968)22

Cooke v. Palmetto Health Alliance, 367 S.C. 167,
624 S.E.2d 439 (S.C. App. 2005)4

Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (S.C. 2004)19, 20, 21

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2003)23

Edens v. Bellini, 359 S.C. 433, 597 S.E.2d 863 (S.C. App. 2004)6

Goolsby v. Goolsby, 229 S.C. 101, 92 S.E.2d 57 (S.C. 1956) 22

Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 327
523 S.E.2d 766, 773 (S.C. 1999)17, 18

Hopkins v. Darlington Veneer Co., 208 S.C. 307, 38 S.E.2d 4,(S.C. 1946)6

McCaskey v. Daniel Internatinal Corp., 442 F.Supp.1360 (D.S.C. 1977)5

Miller v. Lawrence Robinson Trucking, 333 S.C. 576, 582-583 (S.C. Ct. App. 1998)
.8

Ost v. Integrated Products, Inc., 296 S.C. 241,
371 S.E.2d 796 (S.C. 1988)7, 8, 9, 11, 12, 16

<u>Parker v. Williams and Madjanik, Inc.</u> , 275 S.C. 65, 267 S.E.2d 524 (S.C. 1980)	6
<u>Parker v. Williams and Madjanik, Inc.</u> , 275 S.C. 65, 70-73 267 S.E.2d 524, 526-528 (S.C. 1980)	7
<u>Smith v. Fulmer</u> , 198 S.C. 91, 15 S.E.2d 681, 683 (S.C. 1941)	4
<u>Voss v. Ramco, Inc.</u> , 325 S.C. 560, 482 S.E.2d 582 (S.C.App. 1997) ..	8, 11, 13, 16
<u>Wright v. Craft</u> , 372 S.C. 1, 33 640 S.E.2d 486, 503 (S.C. App. 2006)	4, 19, 21

STATUTES

South Carolina Code of Laws § 42-1-415	19
South Carolina Code of Laws § 42-1-540	4, 5
South Carolina Code of Laws § 42-5-40	18

STATEMENT OF THE ISSUES ON APPEAL

- I. Whether the Court of Appeals was correct in holding that Bayshore Corp. is entitled to tort immunity as an upstream employer, pursuant to the exclusivity provisions of the Workers' Compensation Act, when Appellants were performing the work of Bayshore SC and Bayshore Corp.?
- II. Whether the Court of Appeals was correct in holding that Bayshore SC and Bayshore Corp. are entitled to tort immunity pursuant, to workers' compensation exclusivity, when both companies had workers' compensation insurance coverage that would have covered Appellants had Job Place failed to secure such coverage?
- II. Whether the Court of Appeals was correct in holding that:
 - A. The issue of whether Keith Colonna's Affidavit is a "sham affidavit" is not preserved on appeal?
 - B. The Affidavit of Larry Lenart does not affect the opinion that Bayshore Corp. and Bayshore SC are statutory employees of Appellants?
 - C. The Affidavit of Vernon Dunbar does not affect the opinion that Bayshore Corp. and Bayshore SC are statutory employees of Appellants?

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. (R. at 881-884).

Bayshore SC is a separately incorporated subsidiary and remote casting yard of Bayshore Concrete Products Corp., located in Cape Charles, Virginia. (R. at 851-876). Bayshore Corp. and Bayshore SC are both in the business of manufacturing pre-cast concrete products for use in construction projects. (R. 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 in Horry County, South Carolina, and incorporated Bayshore SC to act as a remote casting yard in order to fulfill the work order locally. (R. at 851-876; at 918). Bayshore Corp. executed a lease and purchased equipment on behalf of Bayshore SC. (R. 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 in order to return the site to its pre-lease condition. (R. 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. (R. at 669-673; at 836-843). These pillars and abutments were used to hold high tension steel wires in the pre-stressed concrete girders and forms. (R. at 669-673; 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. (R. at 669-673; 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. (R. 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. (R. 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. (R. 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. (R. at 790-796). Appellants would break down the equipment and pack up tools for shipment back to Bayshore Corp. (R. 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. (R. 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. (R. at 881-884). Both Bayshore SC and Bayshore Corp. had workers' compensation insurance which would have covered Appellants. (R. at 844-845).

Appellants then filed suit against Bayshore S.C. and Bayshore Corp. The trial court made a factual determination that Bayshore S.C. and Bayshore Corp. were the statutory employers of Appellants and dismissed the claims against them for lack of subject matter jurisdiction. The Court of Appeals of South Carolina upheld the decision. The Petition to this Court followed.

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). The admissibility of evidence by the trial court is within the sound discretion of the trial court and will not be reversed on appeal absent abuse of discretion or legal error prejudicing the defendant. See Wright v. Craft, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (S.C. App. 2006).

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 Since Appellants were performing the work of both Bayshore SC and Bayshore Corp., both companies would have been responsible for providing workers' compensation benefits to Appellants. Therefore, both Bayshore SC and Bayshore Corp. are immune from Appellants lawsuit pursuant to the exclusive remedy provision of the Workers' Compensation Act.

Appellants do not dispute that Bayshore SC is the statutory employer of the Appellants, pursuant to S.C. Code Ann. § 42-1-540 (1985).² Despite Appellant's arguments that Bayshore Corp. is not the statutory employee of Appellants, the

¹ The Supreme Court of South Carolina has held the true test to determine jurisdiction within the Workers' Compensation Act is whether the employee was performing work which bore some reasonably direct relation to the performance of the work undertaken by the upstream employer. See Smith v. Fulmer, 198 S.C. 91, 15 S.E.2d 681, 683 (S.C. 1941).

² Bayshore SC is the statutory employer of Appellants and Respondents refer this Court to, and incorporate herein by reference, the arguments raised in its brief to the Court of Appeals of South Carolina, should Appellants dispute this position in future briefs or argument.

evidence shows Bayshore Corp. is an upstream, statutory employer of Appellants, since Appellants' work was the work of Bayshore Corp. Moreover, both Bayshore S.C. and Bayshore Corp. had workers' compensation insurance and are entitled to immunity. Lastly, the Court of Appeals correctly ruled that the Affidavits of Colonna, Lenart, and Dunbar, do not effect whether Bayshore S.C. and Bayshore Corp. are entitled to workers' compensation exclusivity.

I. **BAYSHORE CORP. IS A STATUTORY EMPLOYER ENTITLED TO WORKERS' COMPENSATION IMMUNITY.**

Bayshore Corp. is entitled to tort immunity, pursuant to the exclusive remedy provision of the Worker's Compensation Act, S.C. Code of Laws §42-1-540 (1985).

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).

The purpose of the Workers' Compensation Act is to make the owner, the person who is interested in having the work done, liable to the injured employee. See Blue Ridge Rural Electric Co-Op v. Byrd, 238 F.2d 346, 353 (4th Cir. 1956)(*reversed on other grounds*, Byrd v. Blue Ridge Rural Electric Co-Op, 356 U.S. 525, 78 S.Ct. 893; 2 L. Ed. 2d. 953; (1958). If this Court finds Bayshore Corp. would have been responsible for providing workers' compensation benefits to Appellants, 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). "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).

Bayshore Corp. is Appellants' statutory employer if: 1) the activity performed by Appellants 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. 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). The concept of the statutory employer transcends the labels of employer/employee, independent or sub-contractor/general contractor, and even parent/subsidiary, and asks whose work the employee is doing.

A. Bayshore Corp. Is An Upstream Employer, Or Owner, of the Project Appellants Were Working On.

Bayshore Corp. is an upstream employer of Appellants since Appellants were performing the work of Bayshore Corp. through Bayshore S.C. 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, 70-73, 267 S.E.2d 524, 526-528 (S.C. 1980).

This Court has previously held that a statutory employer relationship can be established between sister companies where one was performing the work of the other. In Ost v. Integrated Products, Inc., 296 S.C. 241, 371 S.E.2d 796 (S.C. 1988), this Court held that the employees of National Sales Company, Inc. were the statutory employees of Integrated Products, Inc., even though National and Integrated were separately incorporated "sister" corporations. Ost, an Integrated employee, was killed on the job while selling National's products. See id. at 243, 371 S.E.2d at 797.

The Ost Court looked to the three Bailey tests to determine whether Integrated's employees were performing the work of National. First, it was determined that Ost's activities for National were important to the trade or business of Integrated since National's entire business was to sell the product of Integrated. See id. at 246, 371 S.E.2d at 799. Second, it was determined that National's business was necessary and integral to Integrated because of 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. Third, it was determined that Integrated had previously performed the work Ost and National performed since both National and Integrated shared the same employees to perform similar tasks. See id. at 247, 371 S.E.2d at 799.

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 the statutory employer of Ramco, since Voss' direct employer, Jones, was in the sole business of selling Ramco's equipment, an activity essential to Ramco's business, even though Ramco was neither involved with Voss nor had control over Voss' activities. Id. at 566-567, 482 S.E.2d at 587-588. See also Miller v. Lawrence Robinson Trucking, 333 S.C. 576, 582-583 (S.C. Ct. App. 1998) (holding that Voss stands for the proposition that "owner" is synonymous with "employer" within the Act). The Voss Court held that because Ramco manufactured equipment, which was Jones' and Voss' sole job to sell, that Voss' work was an essential part of Ramco's business. Id. at 568, 482 S.E.2d at 586. It was further significant that the Ramco still owned the equipment, which was then "consigned" to Jones and Voss for sale. See id.

Appellants argue that Bayshore Corp. cannot be an upstream employer of Appellants because Bayshore Corp. and Bayshore S.C. are in a parent/subsidiary relationship. However, Appellant's argument is based on the erroneous assumption that a subsidiary can't perform the work of its parent, as a servant or agent. Appellants mistakenly rely on Brown v. Moorhead Oil Co., 239 S.C. 604, 124 S.E.2d 47 (S.C.

1962), for the proposition that a parent company cannot be the upstream employer of its subsidiary and its employees. Brown involved two "sister" companies, Moorhead Oil and Crown, which had a common owner/stockholder. Id. at 608-609, 124 S.E.2d at 49-50. Brown was a Crown employee who injured himself on the job and claimed he was actually working for Moorhead Oil.

The Brown Court held there was no evidence, outside of the common stock ownership of the two companies, to indicate Crown was performing the work of Moorhead Oil.

The businesses had different business operations and neither acted as an agent for the other: Moorhead Oil sold and distributed wholesale and retail petroleum products; Crown was a tire recapping service. See id. at 608, 124 S.E.2d at 49. Brown's only argument that he was the statutory employee of Moorhead Oil was that the two businesses were closely intertwined through their sole stockholder. Brown never alleged he was performing the work of Moorhead Oil. See id. at 607, 124 S.E.2d at 49. This Court held, "there is insufficient evidence to justify a conclusion that either corporation was the instrumentality of the other. And the mere fact that the entire stock of the two corporations was owned by the same person does not operate to create an identity of corporate interest between the two companies, or create the relationship of principal and agent." See id. at 609, 124 S.E.2d at 50. Therefore, the question is not whether Bayshore Corp. is the parent of Bayshore SC, but whether Bayshore SC was performing the work of Bayshore Corp.

Just as in Ost and Voss, Bayshore Corp. is the statutory employer of Appellants

since the three Bailey tests are satisfied. First, Appellants and Bayshore SC performed an important part of Bayshore Corp.'s general trade or business. Bayshore SC was created by Bayshore Corp. for the sole purpose of fulfilling a South Carolina work bid procured by Bayshore Corp. (R. at 851-876). In his deposition, Colonna testified that Bayshore Corp. was successful in procuring the Carolina Bays project bid in South Carolina and a Bayshore Corp. board of directors meeting was held to decide on establishing a location in South Carolina, prior to ever forming Bayshore SC. (R. 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.

(R. at 917). Bayshore Corp. went on to sign a Lease in it's name for the South Carolina facility. (R. at 894-901). The Bayshore SC Board Minutes of that same date subsequently establish Bayshore SC as a new entity adopting a financial year "in keeping with the parent company". (R. 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. (R. at 665; at 851-876). Colonna testified that only the bottom line of Bayshore Corp. was reported to the Board of Directors. (R. at 665).

When the Carolina Bays project ended and it was time to shut down the South Carolina facility, Bayshore Corp. made the decision. The Bayshore Corp. Board

Minutes of January 22, 2002 (two years later) state:

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

(R. at 919-921). These board meeting minutes show that Bayshore SC was created by Bayshore Corp. as a temporary casting yard solely to perform Bayshore Corp.'s work. Therefore, the Appellants' work was important to the trade or business Bayshore Corp., like Ost and Voss were employed for the sole purpose of selling Integrated and Ramco's products.

Further evidence that Appellants work was an important part of Bayshore Corp.'s general business is that Bayshore Corp. was the leaseholder for the South Carolina facility and the terms of the Lease required Appellants to dismantle casting equipment to return the site to its pre-lease condition. (R. at 643; at 897-898). Bayshore Corp. Board Meeting Minutes, clearly show that Bayshore Corp. entered into the Lease and purchased equipment on behalf of Bayshore SC. (R. at 917-918; at 894-901). 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". (R. 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. Therefore, Bayshore Corp. is entitled to immunity as an

“owner”.

Second, as in Ost, the close and intertwined business relations between Bayshore Corp and Bayshore South Carolina shows that the work of Appellants and Bayshore South Carolina was necessary, essential and integral to Bayshore Corp. Bayshore Corp. was in the business of manufacturing pre-stressed concrete forms for construction projects and Bayshore SC was formed to expand the general business of Bayshore Corp. to establish a remote casting yard in South Carolina. (R. at 605-611; at 666-670; at 851-856). The term “Bayshore” was used interchangeably between Bayshore Corp. and Bayshore SC. “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.” (Deposition of Colonna, pg. 77).

Moreover, 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. (R. at 594; at 661-662). Colonna and Kellam actually traveled from Virginia to South Carolina to perform work for Bayshore SC. (R. 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. (R. at 601-604; at 611-612). Both Bayshore Corp. and

Bayshore SC also shared safety protocols and manuals. (R. at 663-664).

Lastly, Bayshore Corp. owned the equipment Appellants were dismantling, just as Ramco owned the equipment Voss was selling. Bayshore Corp. Board Minutes, April 21, 2000 show Bayshore Corp. purchased the equipment from Traylor Brothers. (R. at 917). Bayshore Corp. Board Minutes, January 22, 2007 show Bayshore Corp. decided to reuse the equipment Appellants were dismantling in other Bayshore Corp. locations. (R. at 919-920). By dismantling Bayshore Corp.'s equipment and returning that equipment back to Bayshore Corp., Appellants were further performing the work of Bayshore Corp. as an "owner".

Third, Bayshore Corp. is a statutory employer of Appellants since Bayshore Corp. has previously engaged in identical activities to those performed by Bayshore SC and Appellants. The initial construction of the concrete casting beds was routinely completed by regular, payroll employees at every Bayshore facility. (R. at 666-669). Dismantling the casting beds was also typically performed by Bayshore employees using the same methods Appellants were instructed to use; i.e. entering a trench to dig around steel girders with a hand shovel, so that Bayshore employees could use a blowtorch to cut the concrete abutments from the steel piles. (R. 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.

(R. at 668).

Colonna testified that the collapsed trench was dug in order for Appellants to dismantle a concrete casting bed. (Deposition of Colonna, ppg. 65-67). Colonna testified that dismantling casting beds was performed regularly by all Bayshore employees as a means of changing concrete forms, and typically involves Bayshore personnel digging trenches and clearing dirt from around steel girders with hand shovels so the girders could be cut away. (R. at 666-668). According to Colonna, it was a normal part of business at all the separate Bayshore facilities to dismantle casting bed sites as the Appellants did in the case at bar (R. at 666-668).

Bayshore Corp. is immune from liability since Appellants performed its work in dismantling the casting beds at the South Carolina facility. This work was necessary and essential to all Bayshore entities in that casting beds are typically dismantled as part of their general trade and business. Dismantling casting beds and site clean up was particularly important to both Bayshore Corp. and Bayshore SC since the South Carolina site was 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.

B. Lenart Was a Bayshore SC Supervisor, Not A Bayshore Corp. Employee, Therefore Bayshore Corp. Is Not A Co-Subcontractor of Appellants.

The record does not support Appellants' mistaken conclusion that Larry Lenart was a Bayshore Corp. employee who was loaned to Bayshore SC, thus making him a

co-subcontractor of Appellants. The preponderance of the evidence supports that Lenart was a Bayshore SC employee, performing the work of Bayshore Corp. First, Lenart was hired in South Carolina to be a Bayshore SC employee. Colonna testified in his 2005 affidavit that Lenart was a regular Bayshore SC employee paid by Bayshore SC. (R. at 839, 841). Lenart testified that he was an employee of Bayshore SC. (R. at 77-880).

Colonna further testified Lenart was hired in South Carolina, having previously worked at the plant that pre-existed Bayshore SC at the same site. (R. at 605). Lenart was not transferred to Bayshore SC from one of the other Bayshore facilities. "Q. And would the safety training that Mr. Lenart received, would that have been training he received while employed at Bayshore Concrete Products Corp.? Wasn't he one of the individuals that was transferred?/ A. No. He was hired down in South Carolina". (R. at 620).

Second, while employment applications filled out by Lenart may have contained the name of Bayshore Corp., Colonna testified in his deposition that separate and distinct applications were not developed for the South Carolina corporation, "/A . . . Because basically what happened, all of a sudden Monday morning we were in business in South Carolina . . . I would doubt that applications with a new letterhead were run over that weekend. They probably sent our standard application down there./Q. And that standard application would be a Bayshore Concrete Products Corp. application?/ A. Yes." (R. at 607-608).

Colonna testified that Lenart was transferred from Bayshore SC to Bayshore Corp. after this accident, at which time, "he began drawing a paycheck from Bayshore Concrete Products Corporation instead of Bayshore Concrete Products/South Carolina". (R. at 601). This testimony is consistent with the documentation relied upon by Appellants, showing Lenart was issued a Bayshore Corp. check on 8/1/02, two months after this incident. (R. at 923).

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 Appellants were solely performing the work of Bayshore SC and Bayshore Corp. and were not performing the work of Job Place, since Job Place's only business was to furnish leased employees. Moreover, Appellants characterization is not supported by any evidence of a co-subcontractor relationship. Appellants seek to show that Lenart was a Bayshore Corp. employee at the time of the incident but don't show how that translates into a co-subcontractor relationship. Such an analysis contradicts the clear language of the Bayshore Corp. Board Minutes, which indicates Bayshore Corp. formed Bayshore SC for the express purpose of performing work secured by Bayshore Corp. The more practical application of Appellants argument is to further support the intertwined business operations of Bayshore SC and Bayshore Corp., under the Ost and Voss analysis. Therefore, Appellants are not co-subcontractors of Bayshore Corp.

II. **BAYSHORE CORP. AND BAYSHORE SC HAD WORKERS COMPENSATION COVERAGE AND COMPLIED WITH THE ACT'S PROVISIONS**

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.

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

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. 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. "Q. I'm assuming at the South Carolina site workers' compensation coverage was secured?/A. Yes./Q. And who was involved in securing the workers' compensation coverage for that site?/A. It would have been myself by just calling and adding another corporation." (R. at 611-615).³ Moreover, Richard Stadler, the Travelers Insurance underwriter for Bayshore Corp. and Bayshore SC testified that both companies had a workers' compensation policy which would have covered Appellants.⁴

³ In fact, Donnie Kellam, of Bayshore Corp., handled workers' compensation claims on behalf of both Bayshore Corp. and Bayshore SC. (R. at 615).

⁴ 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' take a quotation from Colonna that Bayshore Corp. and Bayshore SC did not obtain workers compensation coverage 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.

(R. at 625). Colonna's testimony indicates that the agreement between Bayshore SC and Job Place was that Job Place would obtain workers' compensation coverage to cover Appellants, not that Bayshore Corp. and Bayshore SC did not have any workers' compensation insurance at all.⁵ Thus, both Bayshore Corp. and Bayshore SC had secured workers' compensation coverage under Pineland.

B. Bayshore Corp. and Bayshore SC Complied with the Act.

Bayshore SC and Bayshore Corp. had workers compensation insurance coverage, and satisfied the requirements of Harrell and S.C. Code Ann. § 42-5-40 (1976). Harrell is inapplicable to the case at bar precisely because Respondents have secured workers compensation coverage. However, Appellants mistakenly rely upon

Appellants. (R. at 844-845)(emphasis added).

⁵ 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, even though Respondents had their own coverage. (R. at 885-886; at 887-888).

S.C. Code of Laws § 42-1-415 for any allegation that Bayshore Corp. and Bayshore SC did not obtain workers compensation coverage. This statutory section only applies where a downstream employer fails to obtain workers' compensation coverage, and the upstream employer seeks 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.

III. THE AFFIDAVITS OF COLONNA, LENART, AND DUNBAR, HAVE NO BEARING ON WHETHER BAYSHORE CORP. AND BAYSHORE SC ARE IMMUNE FROM TORT LIABILITY AS STATUTORY EMPLOYERS.

The Court of Appeals of South Carolina correctly ruled that Appellants' argument that Colonna's affidavit was a "sham" affidavit was not preserved for review and that the admission of Lenart's and Dunbar's affidavits, if considered, were harmless error.

A. Whether Colonna's Affidavit Was a "Sham" Was Not Preserved.

Whether Colonna's affidavit was a "sham" affidavit, which is expressly denied, was not preserved for appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court. See Wright v. Craft, 372 S.C. 1, 20, 640, S.E.2d 486, 497 (S.C. Ct. App. 2006). Appellants admittedly did not raise the issue of a sham affidavit under Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (S.C. 2004), where the sham affidavit was first addressed by this Court.

However, even if this issue was preserved, it would not affect the Court of Appeals decision. The Competing or Sham Affidavit rule, set forth in Cothran, applies where a second affidavit is submitted to create "sham" genuine issue of fact to defeat summary judgment. See id. at 218, 592 S.E.2d at 633.⁶

Colonna's affidavit is not a sham affidavit. First, the trial court did not rule on a summary judgment motion, but instead ruled on a Motion to Dismiss for Lack of Subject Matter Jurisdiction. (R. at 10-17). The sham affidavit doctrine is not applicable where the trial court is free to weigh the evidence in a hearing on the merits and a genuine issue of fact raised by an affidavit is not used to defeat summary judgment.

Second, Colonna asserts consistently in both affidavits that Bayshore Corp. and Bayshore SC are separate corporate entities and that Bayshore SC was performing the work of Bayshore Corp. Appellants mistakenly equate Colonna's testimony that Bayshore SC is performing the work of Bayshore Corp, to Colonna denying a separate corporate existence to those two entities. Bayshore Corp. procured a bid in South Carolina and created Bayshore SC to fulfill that job. (R. at 917). The explanation in Colonna's second affidavit is entirely consistent with his first affidavit, where he testified that only Bayshore SC was in charge of the day to day operations of the site,

⁶ 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.

including digging trenches. Whether Bayshore Corp. had anything to do with Bayshore SC's day to day activities would only matter in an analysis of whether Bayshore Corp. was liable in tort for Appellants' injuries, but would not apply to an analysis of whether Bayshore Corp. was a statutory employer, immune from tort liability.

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, the Court of Appeals decision should be affirmed.

B. Lenart's Affidavit Has No Bearing on Whether Bayshore Corp. and Bayshore SC are Immune Under Workers Compensation Exclusivity.

Appellants have failed to show that Lenart's affidavit was relied on by the trial court or the Court of Appeals, to the prejudice of Appellant and have further failed to show that the exclusion of Lenart's affidavit would affect the decision that Bayshore Corp. and Bayshore SC are statutory employees of Appellants. The admissibility of evidence is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion or the commission of legal error prejudicing the defendant. See Wright at 33-34, 640 S.E.2d at 503-504. A trial court has wide discretion in determining the relevance of evidence, and its decision to admit or reject evidence will not be reversed on appeal absent an abuse of that discretion. See id. To warrant reversal based on the admission or exclusion of evidence, an 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. See id.

Appellants were not prejudiced by Lenart's affidavit. The evidence supporting the Court of Appeals decision can be found in other parts of the record. For instance, Appellants incorrectly argue that Lenart's affidavit is the only evidence that Lenart was an employee of Bayshore SC. (Appellants Brief In Support of Petition for Cert. at pg. 13). This is patently incorrect as Colonna testified both in his 2005 affidavit and in his deposition that Lenart was an employee of Bayshore SC. (R. at 839, 841; at 620)

Moreover, 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 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. (R. at 6-9). 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. (R. 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.

C. Dunbar's Affidavit Has No Bearing on Whether Bayshore Corp. and Bayshore SC are Immune Under Workers Compensation Exclusivity.

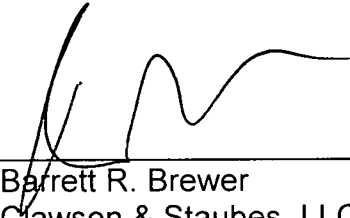
Appellants have failed to show that Dunbar's affidavit was relied on by the trial court or the Court of Appeals, to the prejudice of Appellant and have further failed to show that the exclusion of Dunbar's affidavit would affect the decision that Bayshore Corp. and Bayshore SC are statutory employees of Appellants. The record is replete with evidence to support the trial court and Court of Appeals decision that Bayshore Corp. and Bayshore SC are the statutory employers of Appellants.

Moreover, even if the trial court and court of appeals should not have admitted Dunbar's affidavit, it amounts to harmless error. In Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2003), this Court ruled an expert opinion is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. There is no evidence the lower courts relied on this affidavit or that they wouldn't have reached the same conclusion had it been excluded.

CONCLUSION

For the reasons stated in Respondents' Brief, and oral argument to this Court, the Respondents respectfully request this Court to find Bayshore SC and Bayshore Corp. the statutory employers of Appellants, and to affirm the trial court's and the Court of Appeals' rulings 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 uphold the Court of Appeals' ruling regarding the Affidavits of Colonna, Lenart, and Dunbar, and grant such other relief to the Respondents as is just and equitable.



Barrett R. Brewer
Clawson & Staubes, LLC
126 Seven Farms Dr., Suite 200
Charleston, South Carolina 29492
(843) 577-2026

Attorneys for Respondents

Charleston, South Carolina
March 26, 2010

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM THE COURT OF APPEALS

Honorable Judges J. Lockemy, C.J. Hearn and J. Pieper

Opinion No. 4617
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

Petitioner

v.

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

of whom BAYSHORE CONCRETE
PRODUCTS/SOUTH CAROLINA INC.,
BAYSHORE PRODUCTS CORPORATION ARE THE

Respondents.

KEVIN KEY and SANDRA KEY,

Petitioners

v.

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

Respondents.

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

Petitioners,

v.

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

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

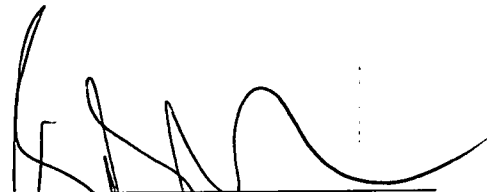
Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2010, I have mailed, regular first class mail,
postage prepaid, a copy of Respondents' Return to Appellants' Petition for Writ of
Certiorari to the Supreme Court to:

Christine C. Varnado, Esquire
Seibels Law Firm, P.A.
165 A King Street
Charleston, SC 29401

John Kuhn, Esquire
Kuhn & Kuhn, LLC
39 Broad Street
Suite 301
Charleston, SC 29401



Barrett R. Brewer
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Attorneys for Respondents

Charleston, South Carolina
March 26, 2010

CLAWSON & STAUBES, LLC
ATTORNEYS AT LAW

BARRETT R. BREWER
bbrewer@clawsonandstaubes.com

February 2, 2010

RECEIVED

Reply to Charleston Office
File No.: 2004-67brb

Daniel E. Shearhouse, Clerk of Court
South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

MAR 29 2010

S.C. SUPREME COURT

Re: Thelma M. Poch, et al. v. Bayshore Concrete Products, et al.; Kevin and Sandra Key v. Bayshore Concrete Products, et al.; and Thelma M. Poch, individually, et al. v. Bayshore Concrete Products, Inc., et al.
Case Nos: 06-CP-26-3194R; 06-CP-26-3195R; and 06-CP-26-3196R
Supreme Court Reference No.: 2010-149288

Dear Mr. Shearhouse:

Enclosed please find the original and six copies of Bayshore Concrete Products South Carolina's Return to Appellant's Petition for Writ of Certiorari to the Supreme Court along with the Certificate of Service regarding the above-referenced matter. Please file the original and return the clocked copy in the enclosed, self-addressed stamped envelope.

Thank you for your assistance in this matter.

With kindest regards, I remain

Very truly yours,

CLAWSON & STAUBES, LLC


Barrett R. Brewer

BRB/vc

Charleston Office:
126 Seven Farms Dr., Suite 200
Charleston, SC 29492-8144
(o) 843.577.2026
(f) 843.722.2867

Charlotte Office:
756 Tyvola Rd., Suite 130
Charlotte, NC 28217-3535
(o) 704.940.9128
(f) 704.522.9033

clawsonandstaubes.com

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

Petitioner,

v.

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

Defendants,

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

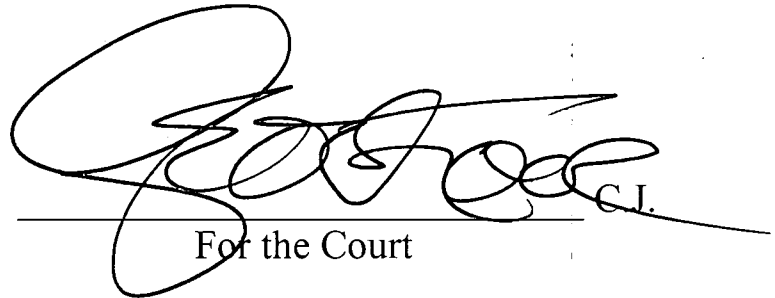
Respondents.

The Honorable Paul M. Burch
Horry County
Trial Court Case No. 2006-CP-26-3194R
2006-CP-26-3195R
2006-CP-26-3196R

ORDER

Respondent seeks a second extension of time to serve and file the Return to Petition for a Writ of Certiorari in the above entitled matter. The request for an extension to is granted and extended until April 2, 2010. No further extensions of time will be granted absent the showing of extraordinary circumstances.

IT IS SO ORDERED.



C.J.
For the Court

Columbia, South Carolina

February 18, 2010

cc: Christine C. Varnado, Esquire
John R. Kuhn, Esquire
Barrett Ray Brewer, Esquire

CLAWSON & STAUBES, LLC
ATTORNEYS AT LAW

BARRETT R. BREWER
bbrewer@clawsonandstaubes.com

February 2, 2010

Reply to Charleston Office
File No.: 2004-67brb

Daniel E. Shearhouse, Clerk of Court
South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

RECEIVED

FEB 04 2010

S.C. SUPREME COURT

Re: Thelma M. Poch, et al. v. Bayshore Concrete Products, et al.; Kevin and Sandra Key v. Bayshore Concrete Products, et al.; and Thelma M. Poch, individually, et al. v. Bayshore Concrete Products, Inc., et al.
Case Nos: 06-CP-26-3194R; 06-CP-26-3195R; and 06-CP-26-3196R
Supreme Court Reference No.: 2010-149288

Dear Mr. Shearhouse:

Enclosed please find the original and a copy of Bayshore Concrete Products South Carolina's Motion to Extend Time to Return to Appellants' Petition for Writ of Certiorari to the Supreme Court along with the Certificate of Service regarding the above-referenced matter. Please file the original and return the clocked copy in the enclosed, self-addressed stamped envelope.

Thank you for your assistance in this matter.

With kindest regards, I remain

Very truly yours,

CLAWSON & STAUBES, LLC


Barrett R. Brewer

BRB/dm

Charleston Office:
126 Seven Farms Dr., Suite 200
Charleston, SC 29492-8144
(o) 843.577.2026
(f) 843.722.2867

Charlotte Office:
756 Tyvola Rd., Suite 130
Charlotte, NC 28217-3535
(o) 704.940.9128
(f) 704.522.9033

clawsonandstaubes.com

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM THE COURT OF APPEALS

Honorable Judges J. Lockemy, C.J. Hearn and J. Pieper

Opinion No. 4617
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

Petitioner

v.

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

of whom BAYSHORE CONCRETE
PRODUCTS/SOUTH CAROLINA INC.,
BAYSHORE PRODUCTS CORPORATION ARE THE

RECEIVED

FEB 04 2010

S.C. SUPREME COURT

Respondents.

KEVIN KEY and SANDRA KEY,

Petitioners

v.

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

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

Respondents.

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

Petitioners,

v.

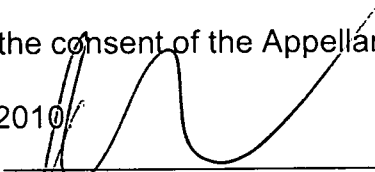
BAYSHORE CONCRETE PRODUCTS/
SOUTH CAROLINA, INC., BAYSHORE
CONCRETE PRODUCTS CORPORATION
TIDEWATER SKANSKA GROUP, INC.,
and TIDEWATER SKANSKA INC.,

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

Respondents.

**RESPONDENTS' MOTION TO EXTEND TIME TO FILE RETURN TO
APPELLANTS' PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT**

Please take notice that the Respondents, Bayshore Concrete Products South Carolina and Bayshore Concrete Products Corporation hereby request an additional 30 day extension to file a Return to Appellants' Petition for Writ of Certiorari to the Supreme Court. This Motion is brought to the Court with the consent of the Appellants. If granted, Respondents' Return would be due by April 2, 2010.



Barrett R. Brewer
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Attorneys for Respondents

Charleston, South Carolina
February 2, 2010

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM THE COURT OF APPEALS

Honorable Judges J. Lockemy, C.J. Hearn and J. Pieper

Opinion No. 4617
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

Petitioner

v.

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

of whom BAYSHORE CONCRETE
PRODUCTS/SOUTH CAROLINA INC.,
BAYSHORE PRODUCTS CORPORATION ARE THE

Respondents.

KEVIN KEY and SANDRA KEY,

Petitioners

v.

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

Respondents.

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

Petitioners,

v.

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

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

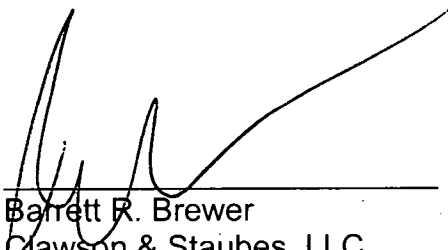
Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2010, I have mailed, regular first class mail,
postage prepaid, a copy of Respondents' Motion to Extend Time to File Return to
Appellants' Petition for Write of Certiorari to the Supreme Court to:

Christine C. Varnado, Esquire
Seibels Law Firm, P.A.
165 A King Street
Charleston, SC 29401

Richard H. Ottinger, Esquire
Vandeventer Black, LLP
500 World Trade Center
Norfolk, VA 23510



Barrett R. Brewer
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Attorneys for Respondents

Charleston, South Carolina
February 2, 2010

JEAN H. TOAL, CHIEF JUSTICE

BY 
CLERK

Columbia, South Carolina

January 20, 2010

cc: Christine C. Varnado, Esquire
John R. Kuhn, Esquire
Barrett Ray Brewer, Esquire

CLAWSON & STAUBES, LLC
ATTORNEYS AT LAW

BARRETT R. BREWER
bbrewer@clawsonandstaubes.com

January 13, 2010

Reply to Charleston Office
File No.: 2004-67brb

Debbie M. Hopkins
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

Re: Thelma M. Poch, et al. v. Bayshore Concrete Products, et al.; Kevin and Sandra Key v. Bayshore Concrete Products, et al.; and Thelma M. Poch, individually, et al. v. Bayshore Concrete Products, Inc., et al.
Case Nos: 06-CP-26-3194R; 06-CP-26-3195R; and 06-CP-26-3196R

Dear Debbie:

Per your request, enclosed please find a check in the amount of \$25.00 made payable to South Carolina Supreme Court for the administrative fee for filing our Motion for Extension of Time. Thank you for your assistance in this matter.

With kindest regards, I remain

Very truly yours,

CLAWSON & STAUBES, LLC


Barrett R. Brewer

RECEIVED

JAN 19 2010

BRB/vc S.C. SUPREME COURT RECEIVED

Enclosure

JAN 19 2010

S.C. SUPREME COURT

Charleston Office:
126 Seven Farms Dr., Suite 200
Charleston, SC 29492-8144
(o) 843.577.2026
(f) 843.722.2867

Charlotte Office:
756 Tyvola Rd., Suite 130
Charlotte, NC 28217-3535
(o) 704.940.9128
(f) 704.522.9033

clawsonandstaubes.com

CLAWSON & STAUBES, LLC
ATTORNEYS AT LAW

BARRETT R. BREWER
bbrewer@clawsonandstaubes.com

October 13, 2009

Reply to Charleston Office
File No.: 2004-67brb

Daniel E. Shearhouse, Clerk of Court
South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

Re: Thelma M. Poch, et al. v. Bayshore Concrete Products, et al.; Kevin and Sandra Key v. Bayshore Concrete Products, et al.; and Thelma M. Poch, individually, et al. v. Bayshore Concrete Products, Inc., et al.
Case Nos: 06-CP-26-3194R; 06-CP-26-3195R; and 06-CP-26-3196R

Dear Mr. Shearhouse:

Enclosed please find the original and a copy of Bayshore Concrete Products South Carolina's Motion to Extend Time to Return to Appellants' Petition for Writ of Certiorari to the Supreme Court along with the Certificate of Service regarding the above-referenced matter. Please file the original and return the clocked copy in the enclosed, self-addressed stamped envelope.

Thank you for your assistance in this matter.

With kindest regards, I remain

Very truly yours,

CLAWSON & STAUBES, LLC


Barrett R. Brewer

RECEIVED

BRB/vc

JAN 11 2010

S.C. SUPREME COURT

Charleston Office:
126 Seven Farms Dr., Suite 200
Charleston, SC 29492-8144
(o) 843.577.2026
(f) 843.722.2867

Charlotte Office:
756 Tyvola Rd., Suite 130
Charlotte, NC 28217-3535
(o) 704.940.9128
(f) 704.522.9033

clawsonandstaubes.com

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM THE COURT OF APPEALS

Honorable Judges J. Lockemy, C.J. Hearn and J. Pieper

Opinion No. 4617

Case Nos.

2006-CP-26-3194R

2006-CP-26-3195R

2006-CP-26-3196R

RECEIVED

JAN 11 2010

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

Petitioner

v.

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

of whom BAYSHORE CONCRETE
PRODUCTS/SOUTH CAROLINA INC.,
BAYSHORE PRODUCTS CORPORATION ARE THE

Respondents.

KEVIN KEY and SANDRA KEY,

Petitioners

v.

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

Respondents.

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

Petitioners,

v.

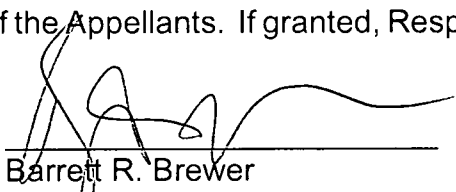
BAYSHORE CONCRETE PRODUCTS/
SOUTH CAROLINA, INC., BAYSHORE
CONCRETE PRODUCTS CORPORATION
TIDEWATER SKANSKA GROUP, INC.,
and TIDEWATER SKANSKA INC.,

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

Respondents.

**RESPONDENTS' MOTION TO EXTEND TIME TO FILE RETURN TO
APPELLANTS' PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT**

Please take notice that the Respondents, Bayshore Concrete Products South Carolina and Bayshore Concrete Products Corporation hereby request a 30 day extension to file a Return to Appellants' Petition for Writ of Certiorari to the Supreme Court. This Motion is brought to the Court with the consent of the Appellants. If granted, Respondents' Return would be due by March 5, 2010.



Barrett R. Brewer
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Attorneys for Respondents

Charleston, South Carolina
January 6, 2010

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM THE COURT OF APPEALS

Honorable Judges J. Lockemy, C.J. Hearn and J. Pieper

Opinion No. 4617
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

Petitioner

v.

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

of whom BAYSHORE CONCRETE
PRODUCTS/SOUTH CAROLINA INC.,
BAYSHORE PRODUCTS CORPORATION ARE THE

Respondents.

KEVIN KEY and SANDRA KEY,

Petitioners

v.

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

Respondents.

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

Petitioners,

v.

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

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

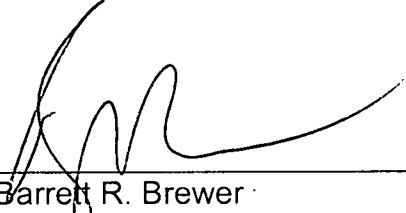
Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2010, I have mailed, regular first class mail,
postage prepaid, a copy of Respondents' Motion to Extend Time to File Return to
Appellants' Petition for Writ of Certiorari to the Supreme Court to:

Christine C. Varnado, Esquire
Seibels Law Firm, P.A.
165 A King Street
Charleston, SC 29401

Richard H. Ottinger, Esquire
Vandeventer Black, LLP
500 World Trade Center
Norfolk, VA 23510



Barrett R. Brewer
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Attorneys for Respondents

Charleston, South Carolina
January 6, 2010

January 6, 2010

South Carolina Supreme Court
Office of the Clerk of the Supreme Court
Attn: Debbie
1231 Gervais Street
Columbia, SC 29211

RECEIVED

JAN 07 2010

RE: Poch & Key v. Bayshore Concrete Products, et al
Case Nos.: 2006-CP-26-3194R
2006-CP-26-3195R
2006-CP-26-3196R
Our File Nos.: 7000-1 & 7000-2

S.C. SUPREME COURT

Dear Debbie:

In accord with our conversation of today, enclosed please find corrected pages to be substituted to rectify typographical or formatting errors in Petitioners' *Petition for Writ of Certiorari* and Appendix which were filed with the Court in the above-referenced matter, consisting of the following:

- * Original and 6 copies of page 1 of the Petition;
- * Original and 6 copies of page 25 of the Petition;
- * Original and 6 copies of the Proof of Service;
- * One copy each of the cover/caption pages (1 and 2) of the unbound Appendix Volume I;
- * One copy of the cover/caption page of the unbound Appendix Volume II; and
- * One copy of the cover/caption page of the unbound Appendix Volume III.

In addition, I have enclosed labels to be used to correct these errors on the cover/caption pages of the bound Appendix Volumes I, II, and III.

Please note that I have corrected Mr. Kuhn's address on all of our submissions; we had listed his former office address. In addition, we have deleted all references to the names of counsel for Petitioners from West Virginia who were admitted *pro hac vice* before the trial court, as they have not yet been admitted before the South Carolina Supreme Court. Counsel are informed and are aware that they will not receive any direct communications from the Supreme Court on this matter unless and until they have been admitted and provided a formal notice of appearance.

South Carolina Supreme Court
Office of the Clerk of the Supreme Court
January 6, 2010
Page Two

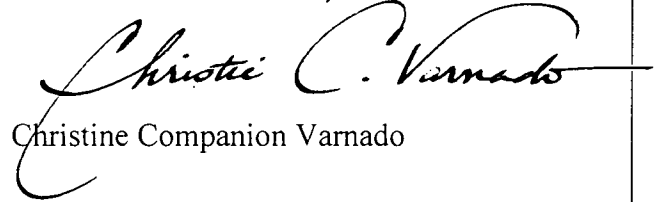
In addition, a copy of the corrected Petition has been served on opposing counsel and with the Court of Appeals.

I very much thank you for your kind assistance. Should you have any questions or require anything further, please do not hesitate to contact me.

With kind regards, I remain

Very truly yours,

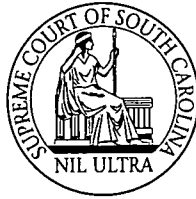
SEIBELS LAW FIRM, P.A.

A handwritten signature in cursive script that reads "Christine C. Varnado". The signature is written in black ink and is positioned above the printed name of the signatory.

Christine Companion Varnado

CCV/kfg
Enclosures

cc: Frank X. Duff, Esquire and Gerald E. Lofstead, III, Esquire
Barrett R. Brewer, Esquire
Richard H. Ottinger, Esquire
John R. Kuhn, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 6, 2010

Christine C. Varnado, Esquire
Seibels Law Firm, P.A.
127 King Street
Suite 100
Charleston, SC 29401

John R. Kuhn, Esquire
Kuhn & Kuhn, LLC
7 State Street
Charleston, SC 29401

Re: Poch & Key v. Bayshore Concrete
Case Tracking No. 2010-149288

Dear Counsel:

This office has received your Petition for a Writ of Certiorari in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Christine C. Varnado, Esquire
John R. Kuhn, Esquire
Page Two
January 6, 2010

Very truly yours,

A handwritten signature in black ink, appearing to be "D. E. S." with a long horizontal flourish extending to the right.

CLERK

DES/dmh

Enclosure

cc: Barrett Ray Brewer, Esquire

THE
SEIBELS
LAW FIRM, P.A.

127 KING STREET, SUITE 100
CHARLESTON, SOUTH CAROLINA 29401

843.722.6777
fax 843.722.6781

January 5, 2010

VIA FED EX

The Honorable Daniel E. Shearouse
S. C. Supreme Court Clerk
1231 Gervais Street
Columbia, SC 29211

RE: Poch & Key v. Bayshore Concrete Products, *et al*
Case No.: 2006-CP-26-3194R
2006-CP-26-3195R
2006-CP-26-3196R
Our File No.: 7000-1

RECEIVED
JAN 06 2010
S.C. SUPREME COURT

Dear Mr. Shearouse:

Enclosed please find an original and six copies of Petitioner Kevin Key's and Thelma Poch, as personal representative of Kenneth Poch's *Petition for Writ of Certiorari* in the above-referenced matter. Also enclosed is our firm's check for \$100.00 representing the required filing fee.


In addition, I have enclosed one bound and one unbound copy of the Appendix.

Should you have any questions or require anything further, please do not hesitate to contact me.

With kind regards I remain

Very truly yours,

SEIBELS LAW FIRM, P.A.


Christine C. Varnado

CCV/kfg
Enclosure

cc: Frank X. Duff, Esquire and Gerald E. Lofstead, III, Esquire
Barrett R. Brewer, Esq., Samuel R. Clawson, Esq. and Timothy A. Domin, Esq.
Richard H. Ottinger, Esquire