

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. Supreme Court

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

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

BRIEF OF PETITIONERS

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

v.

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

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

and

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

v.

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

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

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

**and**

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

**v.**

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

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

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## QUESTIONS PRESENTED

- I. **DID THE COURT OF APPEALS ERR IN HOLDING THAT BAYSHORE CONCRETE PRODUCTS CORPORATION WAS ENTITLED TO WORKERS' COMPENSATION IMMUNITY AS AN UPSTREAM, STATUTORY EMPLOYER OF KENNETH POCH AND KEVIN KEY WHEN IN REALITY IT WAS A CO-SUBCONTRACTOR WITH POCH AND KEY?**
  
- II. **DID THE COURT OF APPEALS ERR IN HOLDING THAT BAYSHORE CONCRETE PRODUCTS CORPORATION AND BAYSHORE CONCRETE PRODUCTS/SOUTH CAROLINA, INC. COULD TAKE ADVANTAGE OF IMMUNITY FROM TORT ACTIONS EVEN THOUGH THEY FAILED TO SECURE WORKERS' COMPENSATION BENEFITS FOR KENNETH POCH AND KEVIN KEY IN VIOLATION OF SOUTH CAROLINA STATUTE AND IN CONFLICT WITH THIS COURT'S DECISION IN HARRELL V. PINELAND PLANTATION, LTD.?**

## STATEMENT OF THE CASE

This appeal concerns two men who were buried alive in a ditch. One of these men, Kenneth Poch, suffocated to death in this ditch; his estate and his mother, Thelma Poch, are Petitioners in this action. The other man, Kevin Key, extricated himself at great cost to his health; he and his wife, Sandra Key, are the remaining Petitioners. The parties responsible for this tragic accident are a Virginia corporation, Bayshore Concrete Products Corporation ("Bayshore Corp. (VA)")<sup>1</sup> and a South Carolina corporation, Bayshore Concrete Products/South Carolina, Inc. ("Bayshore SC"), and they are the Respondents to this appeal.

Petitioner Thelma Poch filed wrongful death and survival actions on November 10, 2003 against Bayshore Corp. (VA), as the at-fault co-subcontractor and Bayshore SC, as the party responsible for the job site. (R. pp. 28-40, 54-67). Petitioners Kevin Key and

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<sup>1</sup> In order to avoid confusion and make clear the distinction between the two Bayshore corporations, Bayshore Concrete Products Corporation, called "Bayshore Corp." by the Court of Appeals, will be referred to as "Bayshore Corp. (VA)" in this brief.

Sandra Key filed personal injury and loss of consortium claims on November 10, 2003. (R. pp. 41-53).<sup>2</sup> After a period of depositions and written discovery, on August 14, 2006, Bayshore Corp. (VA) and Bayshore SC filed a “Motion for Summary Judgment or, Alternatively, for a Hearing to Determine Worker’s Compensation Exclusivity Jurisdiction, or Alternatively, Motion to Dismiss for Lack of Subject Matter Jurisdiction”<sup>3</sup> on the ground that the exclusive jurisdiction of the South Carolina Workers’ Compensation Act (the “Act”) applied, and asserting that they were entitled to immunity under varying theories as indirect employers of Poch and Key. (R. pp. 171-175).

On August 6, 2007, the trial court entered an Order holding that Bayshore Corp. (VA) and Bayshore SC were protected by Workers’ Compensation exclusivity on the basis that both entities were upstream, statutory employers of Poch and Key. (R. pp. 10-17). Petitioners timely filed their notices of appeal, and on September 9, 2009, the Court of Appeals affirmed the lower court’s ultimate dispositions, with the exception of its finding as to exclusion of the affidavit of Vernon Dunbar, which the Court of Appeals found was harmless error. Poch v. Bayshore Concrete Products/South Carolina, Inc., 386

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<sup>2</sup> All of these actions were dismissed pursuant to Rule 40(j), SCRCPP, on June 26, 2005; reinstated on June 26, 2006; and Amended Complaints were filed January 26, 2007. (R. pp. 104-140; Appx. p. 949-50).

<sup>3</sup> In advance of the hearing on this motion, the Petitioners filed motions asking the trial court to disregard the testimony contained in three affidavits submitted by Respondents. Petitioners 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 Petitioners any opportunity to cross-examine the witness. The trial court denied these motions. (R. pp. 18-25, 474-539) see also (Appx. pp. 977-85) (Appellant’s Brief on these issues).

S.C. 13, 686 S.E.2d 689 (Ct. App. 2009). Petitioners filed their Petition for Rehearing on September 24, 2009, which was denied on December 7, 2009. (Appx. pp. 1066-71, 1107-9).

Petitioners filed their Petition for a Writ of *Certiorari* on or about January 6, 2010. By order dated March 12, 2012, this Court issued a Writ of *Certiorari* to the issues addressed in this brief.

### FACTS

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

The trench was located at 2563 Fire Tower Road, Little River, South Carolina, a site that was leased by Bayshore Corp. (VA). (R. p. 3, ¶ 4). Bayshore SC, a subsidiary of Bayshore Corp. (VA), 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. (VA) 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 Poch and Key, there was no one else in the vicinity to hear their cries for help. (R. p. 808, lines 14-23). Subsequently, OSHA cited Bayshore SC for three serious violations that resulted in this tragic incident. (R. pp. 889-891; pp. 733, 735; p. 742). OSHA reduced the fines, however, because in part Poch was not “an employee of Bayshore”. (R. p. 736, lines 20-24).

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

In addition to leasing the facility, Bayshore Corp. (VA) sent some of its own employees to South Carolina to work as subcontractors to Bayshore SC. (R. pp. 597-599). Bayshore SC separately employed numerous employees at the site whose wages and benefits it directly paid. (R. pp. 606-609, 670). Bayshore Corp. (VA) and Bayshore SC agree, however, that none of the Bayshore entities were Poch’s and Key’s actual employers. (R. pp. 734, 736). Neither Bayshore Corp. (VA) nor Bayshore SC paid for, provided or secured any benefits to Poch or Key, including the payment of Workers’ Compensation. (R. pp. 588, 589-590; p. 625; pp. 747-749; pp. 833-834). Rather, PRI and Job Place provided Poch and Key with Workers’ Compensation coverage and benefits. (R. pp. 907-916, ¶¶ 4(b), 8(a); pp. 588, 589-590; p. 625).

Unfortunately, Bayshore SC misrepresented to Job Place the nature of the work

that its workers would be asked to perform at the site. Bayshore SC contracted with Job Place to provide workers for the light industrial work of cleaning-up the work site and dismantling equipment. (R. p. 902; p. 903; p. 904). (see also R. p. 703; pp. 727-728). The job code describing the work for which Bayshore SC and Job Place contracted entails cleaning and debris removal – *i.e.*, tasks such as removing scrap lumber, scrap metal, and other scrap material used in construction, as well as washing windows, sweeping, mopping, scrubbing tile, and polishing plumbing fixtures. (R. pp. 583-584). At no time did Bayshore SC inform Job Place that the Job Place employees would need to work in deep trenches to dismantle and remove foundational support structures or perform excavation work. (R. pp. 705, 719). Poch and Key were not trained for trench work or in “heavy industrial” safety protocols and Job Place would not have sent them to the facility had they known they would be working in a trench. (R. pp. 701-706, 709, 713-714, 717-718; pp. 584-587; p. 730) (Job Place employees Coyle, Cason, and Cutchin testifying that Key and Poch were not intended to work in trenches).

Ultimately, Bayshore SC’s misrepresentations and the negligence of Bayshore Corp. (VA) resulted in the death of Kenneth Poch, the injuries of Kevin Key, and the lawsuits that are the subject of this appeal.

#### **STANDARD OF REVIEW**

The existence of the employer-employee relationship is a jurisdictional question and one of law. Porter v. Labor Depot, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct.App.2007). When deciding questions of law, this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence. Wilkinson ex rel. Wilkinson v. Palmetto State Transp.

Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009); Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999).

## ARGUMENT

The Court of Appeals erroneously held that Bayshore SC and Bayshore Corp. (VA) were the statutory employers of Poch and Key and were thus entitled to immunity from the Petitioners' tort actions. In doing so, the Court of Appeals has not only created new law, but has also misinterpreted and misapplied existing South Carolina precedent. In making its erroneous ruling, the Court of Appeals has also fundamentally misapprehended the status of Bayshore Corp. (VA)'s employee Larry Lenart, who was acting as a *co-subcontractor* with Poch and Key for Bayshore SC. This Court must reverse the Court of Appeals and direct that the trial court deny the Bayshore entities' motion and allow this litigation to proceed.

### **I. THE COURT OF APPEALS ERRED IN DETERMINING THAT BAYSHORE CORP. (VA) WAS ENTITLED TO WORKERS' COMPENSATION IMMUNITY AS A STATUTORY EMPLOYER OF POCH AND KEY.**

The decision of the Court of Appeals failed to ascertain from the record the critical fact that Bayshore Corp. (VA), Poch, and Key were *co-subcontractors* in the Carolina Bays project, and thus Bayshore Corp. (VA) is not entitled to tort immunity. Instead, the Court of Appeals, using a legal standard contrary to South Carolina precedent and the majority of other jurisdictions, allowed Bayshore Corp. (VA) to ignore the corporate form it asserted in other contexts and share in the alleged Workers' Compensation immunity of Bayshore SC.'

**A. BAYSHORE CORP. (VA) WAS A CO-SUBCONTRACTOR WITH POCH'S AND KEY'S EMPLOYER AND, THEREFORE, NOT SUBJECT TO IMMUNITY.**

The Court of Appeals failed to recognize the true nature of Lenart, Poch, and Key, which is as *co-subcontractors for Bayshore SC*. This is a clear error, as the evidence plainly shows that Bayshore Corp. (VA)'s employees at the site were subcontractors to Bayshore SC, the owner of the project. As it was Bayshore Corp. (VA)'s employee Larry Lenart who dug the trench that buried Poch and Key, Bayshore Corp. (VA) is liable in tort to Petitioners and is not subject to Workers' Compensation immunity.

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; see also Cason v. Duke Energy Corp., 348 S.C. 544, 548 n.2, 560 S.E.2d 891, 893 n.2 (2002) (exception to immunity when "...the injury results from the act of a subcontractor who is not the injured person's direct employer...").

This Court directly addressed co-subcontractor liability 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, 430 S.E.2d at 508. 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 551-2, 430 S.E.2d at 508. 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, 430 S.E.2d at 509. 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 qualifies 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 workers’ compensation liability to the plaintiff.” Id. at 96, 431 S.E.2d at 630. Indeed, the court classified both the Talent Tree temporary worker and the Sanders Brothers employee as subcontractors hired by a common employer, Milliken. Id. As such, Sanders Brothers was not entitled to immunity from suit by the injured temporary worker.

Larry Lenart dug the trench that later collapsed, trapping Key and killing Poch. (R. pp. 790-791, 794-795, 820-821). Lenart was an employee of Bayshore Corp. (VA), not Bayshore SC, at the time of the accident (See Section I.B, *infra*). Therefore, as the employer of the subcontractor to Bayshore SC whose negligence injured the Petitioners, Bayshore Corp. (VA) is not entitled to immunity from suit under the Workers’ Compensation Act. Rather, like the employees in Day, Poch, Key, and Lenart were co-

subcontractors hired by a common employer on the Carolina Bays Parkway project. As such, Lenart's employer Bayshore Corp. (VA) is not entitled to immunity from suit by Petitioners. The Court of Appeals should have reversed the trial court's findings on this point, and this Court must reverse the Court of Appeals.

**B. THE OPINION OF THE COURT OF APPEALS IS SUPPORTED BY AN ERRONEOUS FINDING THAT LARRY LENART WAS AN EMPLOYEE OF BAYSHORE SC, NOT BAYSHORE CORP. (VA).**

Underpinning the Court of Appeals' erroneous finding of tort immunity for Bayshore Corp. (VA) is its clearly erroneous (and internally contradictory) finding that Larry Lenart was a *Bayshore SC employee*. A correct understanding of Larry Lenart's employment status is critical in evaluating jurisdiction of the Circuit Court, as the evidence shows that Poch, Key, and Bayshore Corp. (VA) were *co-subcontractors* on this project (See Section I.A, *supra*).

The Court of Appeals recognized the importance of Lenart's employment, as evidenced by how frequently it referenced Lenart in its opinion. In its summary of the facts of the case, the Court of Appeals identifies Lenart as "a Bayshore SC supervisor." (Appx. p. 1056). 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 incorrect assumption that Bayshore SC's "own employees, including Lenart, assisted in the same type of removal work as Poch and Key." (Appx. p. 1060-1). On the other hand, in the section analyzing whether Bayshore Corp. (VA) is an upstream statutory employer of Poch and Key, the Court notes that "Bayshore Corp[. (VA)]'s salaried employees, including but not limited to Lenart, exercised control over the hourly employees of Bayshore SC." (Appx. p. 1063).

The record is clear that all times relevant to this case, Lenart was employed by Bayshore Corp. (VA), not Bayshore SC; Lenart's employment status with Bayshore Corp. (VA) is established by the documents produced by the Respondents during discovery. Looking first at the Bayshore Corp. (VA) offer letter sent to Lenart on February 1, 2001 (a year and a half prior to the June 6, 2002 accident), this offer of employment as one of the company's salaried staff is written on Bayshore Corp. (VA) letterhead and signed by Bayshore Corp. (VA) president W. Vincent Campbell. (R. p. 924). Bayshore Corp. (VA) paid Lenart's 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. (VA). (R. p. 925). This form sets Lenart's initial date of employment with Bayshore Corp. (VA) as September 25, 2000. (R. p. 925). Lenart was not terminated from his employment with Bayshore Corp. (VA) until December 31, 2004. (R. p. 926).

Bayshore SC president Keith Colonna testified that *at the time of the accident* Lenart was a salaried employee of Bayshore Corp. (VA) and, like all salaried Bayshore Corp. (VA) employees, was paid his salary and benefits by Bayshore Corp. (VA). (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. (VA) 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. (VA) 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. (VA) is Lenart's spurious, self-serving affidavit in which he attested that he was "employed by Bayshore Concrete Products/South Carolina, Inc." (R. p. 877). This affidavit, as an initial matter, directly contradicts the documentary evidence in the record described above. Second, as argued by Petitioners at the trial court, this affidavit, from a witness who failed to appear<sup>4</sup> for his own deposition (and thus robbing the Petitioners of any meaningful opportunity to cross-examine) should not be afforded any probative weight by this Court. (See R. pp. 519-39).

In short, all credible evidence indicates that although he was performing work at the site in South Carolina, Lenart was employed by Bayshore Corp. (VA) at the time of the accident. As the Court of Appeals' holding relies on the finding that Lenart was an employee of Bayshore SC, this incorrect finding constitutes reversible error.

**C. THE COURT OF APPEALS ERRED IN FINDING THAT BAYSHORE CORP. (VA) WAS AN UPSTREAM EMPLOYER OF POCH AND KEY.**

Instead of recognizing the *co-subcontractor relationship* of Bayshore Corp. (VA), Poch, and Key, the Court of Appeals erroneously attempted to apply law appropriate for parent-subsidiary relationships to Bayshore Corp. (VA) and Bayshore SC. The error of

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<sup>4</sup> The circumstances of Lenart's failure to appear (*i.e.* the last-minute excuse that he moved out-of-state, his sighting at his house at the day of the deposition) further undermine his credibility. (R. p. 520).

applying parent-subsidary case law to the facts at bar is compounded by the Court of Appeals' use of the incorrect legal standard for its analysis.

**1. RELIANCE ON VOSS AND OST IS MISPLACED IN ORDER TO DISREGARD THE CORPORATE FORM AND ALLOW BAYSHORE CORP. (VA) TO SHARE BAYSHORE SC'S ALLEGED IMMUNITY.**

In its analysis, the Court of Appeals relied 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), both cases that concern contractors and their subcontractors. The fact that Bayshore Corp. (VA) and Bayshore SC are separate corporate entities (parent and subsidiary) demands the application of different law than that of the contractor-subcontractor relationship found in Voss and Ost. The Court of Appeals appears to acknowledge this ("We recognize the above cases and referenced statutes involve a contractor/subcontractor relationship rather than a parent/subsidiary relationship.") (Appx. p. 1063), but nonetheless it proceeds to incorrectly and impermissibly expand<sup>5</sup> the law of statutory employment in South Carolina.

If a parent-subsidary analysis were proper under these facts, the Court of Appeals would have been correct to rely upon Brown v. Moorhead Oil Co., 239 S.C. 604, 124 S.E.2d 47 (1962),<sup>6</sup> where a claimant sought relief under the Act from the corporate parent of his employer. The claimant in Brown argued that the corporate subsidiary "was a

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<sup>5</sup> It is not the place of the Court of Appeals to modify the common law of this state. See Daniels v. City of Goose Creek, 314 S.C. 494, 431 SE 2d 256 (Ct. App. 1993) (citing S.C. Const. Art. V, § 9) see also Jean Hoefer Toal, et al., Appellate Practice in South Carolina 12 (2nd ed. 2002) ("The Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court.").

<sup>6</sup> In following Brown, Petitioners suggest that the Court should also look to Monroe v. Monsanto Company, 531 F. Supp. 426 (D.S.C. 1982). While Monroe is a South Carolina District Court case, and therefore not controlling, the Monroe Court based its well-reasoned decision in large part on Brown. (See also Appx. pp. 957-61).

corporation in name only and in reality was a part of the business operations [of the parent corporation].” Id. at 607, S.E.2d at 49. In holding that the parent corporation was not responsible for benefits under the Act, 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 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. Although courts will in the furtherance of justice disregard the corporate entity, we find insufficient evidence to justify such action here.

Id. at 609-10, 124 S.E.2d at 50 (citations removed). This Court’s holding indicates that the appropriate test for immunity for parent corporations under the Act is analogous to South Carolina’s extant law for holding a parent corporation liable in place of a subsidiary. See Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp., 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007) (Setting forth the bases for holding a parent corporation liable for a subsidiary). Accordingly, in order for a parent corporation to claim the Workers’ Compensation immunity of its subsidiary, a court must disregard the distinctions between the two entities’ corporate forms. South Carolina courts are generally reluctant to disregard the corporate form. See Mid-S. Mgt., at 597, 649 S.E.2d at 140 (piercing the corporate veil).

It is the majority position among United States jurisdictions that courts are reluctant to disregard the corporate form in order to extend Workers’ Compensation immunity. A succinct explanation of the majority position has been set forth by the New Jersey Supreme Court (quoting the Sixth Circuit): “[t]he owners may take advantage of the benefits of dividing the business into separate corporate parts, but principles of

reciprocity require that courts also recognize the separate identities of the enterprises when sued by an injured employee.” Volb v. GE Capital Corp., 651 A.2d 1002 (N.J. 1995) (quoting Boggs v. Blue Diamond Coal. Co., 590 F.2d 655, 662 (6th Cir. 1979)). North Carolina courts follow the majority view, and this is significant because North Carolina’s Workers’ Compensation decisions are given “great weight” in South Carolina. Eg. Munn v. Nucor Steel, Div. of Nucor Corp., 336 S.C. 28, 31, 518 S.E.2d 289, 290 (Ct. App. 1999). North Carolina courts have held where the employer and its parent corporation or sole shareholder are merely separate but related entities, the parent is not entitled to immunity. Van Dyke v. CMI Terex Corp., 689 S.E.2d 459, 461 (N.C. Ct. App. 2009) (citing Cameron v. Merisel, 593 S.E.2d 416, 423 (N.C. Ct. App. 2004); Phillips v. Stowe Mills, 167 S.E.2d 817, 820 (N.C. Ct. App. 1969) see also Richmond v. Indalex, 308 F.Supp.2d 648, 659 (M.D.N.C. 2004) (applying North Carolina law). In Phillips, the North Carolina Court of Appeals refused to allow a parent company to share in Workers’ Compensation immunity even when the parent and subsidiary shared administrative offices, purchasing agents, personnel department, and sales organization. 167 S.E.2d at 820; accord 6 Arthur Larson & Lex K. Larson, Larson’s Workers’ Compensation Law § 112.01 (2007) (“Generally, common ownership, identity of management, and the presence of a common insurer are not enough to create identity between parent and subsidiary for compensation purposes.”).

**2. THE FACTS DO NOT SUPPORT THE COURT OF APPEALS DISREGARDING THE CORPORATE FORM IN ORDER TO FIND IMMUNITY FOR BAYSHORE CORP. (VA) UNDER THE CORRECT LEGAL STANDARD OR THE COURT OF APPEALS' STANDARD.**

In its analysis, the Court of Appeals made findings that not only fail the Brown test (described above), but also would not pass the Voss and Ost tests it erroneously applied. The Court of Appeals erred in finding under Voss that Poch's and Key's work was "an essential part of Bayshore Corp. (VA)]'s business" and thus Bayshore Corp. (VA) was entitled to immunity. (Appx. p. 1063). It further erred in finding that Bayshore Corp. (VA)'s ownership of Bayshore SC entitled it to immunity simply because it was financially beneficial to Bayshore Corp. (VA), as a parent company of Bayshore SC, for its subsidiary to be profitable. Not only is this finding irrelevant to any analysis under parent-subsidiary law under Brown, it also sets a dangerously low standard for disregarding the corporate form in order to share Workers' Compensation immunity. Under the Court of Appeals' analysis, all parent companies would automatically be statutory employers of employees of their subsidiaries (and thus immune to tort suit), as it is axiomatic that it is financially beneficial to parent entities that subsidiary companies are profitable. This is also a dangerous holding in light of the fact that South Carolina courts have long held that employees of a subsidiary corporation are not deemed to be the employees of the parent corporation by virtue of the parent-subsidiary relationship. Carroll v. Smith-Henry, 281 S.C. 104, 313 S.E.2d 649 (Ct. App. 1984).

The Court of Appeals then erroneously made findings under the factors of Ost: (1) the general contractor's control over the subcontractor and the importance of the subcontractor's work in relation to the general contractor's product; (2) the companies'

intertwined operations; and (3) the similarities of the companies business activities and shared employees. Ost 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. (VA) was not the owner of the project, and it 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 Bayshore SC president Keith 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. (VA) 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. (VA) 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. (VA) There is no evidence that Bayshore SC was working as a contractor for Bayshore Corp. (VA) on this project. Rather, as Bayshore Corp. (VA) and Bayshore SC have asserted in the courts below: “[o]nly [Bayshore SC] had anything to do with this accident and the activities at the Horry County site.” (R. p. 841, ¶ 11 ).

However, even when the Ost factors are (incorrectly) applied to the facts, the weight of the evidence shows that that Bayshore Corp. (VA) 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. (VA) 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. (VA), 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. 838, ¶ 4; pp. 738, 740, 743, 751-757, 892). 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). As Colonna testified, Bayshore Corp. (VA) 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. (VA) 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 Bayshore entities kept separate corporate minutes. (R. pp. 917-8). The corporations were headquartered and transacted the main part of their business from separate locations. (R. pp. 892, 893). Bayshore Corp. (VA) 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. (VA) 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. (VA), which then charged Bayshore SC for the expense, just as they would 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. (VA) had the authority to hire and fire the salaried Bayshore Corp. (VA) employees. (R. p. 622, lines 3-16). Bayshore Corp. (VA) employees were paid by Bayshore Corp. (VA) with Bayshore Corp. (VA) 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 Poch and Key, to assist on the site. (R. p. 841, ¶ 6). Bayshore Corp. (VA) had no hand in hiring 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. (VA) 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 this 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 entity from Bayshore Corp. (VA). There is insufficient evidence to support a finding of immunity under a parent-subsidary analysis (even if it were appropriate) under Voss, Ost, Brown, or any other theory. Thus, the Court of Appeals should have found that Bayshore Corp. (VA) was *not* Poch and Key's statutory employer under the Act, and it must be reversed.

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

The Court of Appeals' holding that S.C. Code § 42-5-40 has no role in determining whether Bayshore Corp. (VA) 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, 523

S.E.2d 135 (Ct. App. 2007). 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 at 327, 523 S.E.2d at 773 (citing S.C. Code § 42-5-40 (1985)). Failing the entity's demonstration of compensation, "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. at 329, 523 S.E.2d at 774.

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 § 42-5-40 (emphasis added). The Court of Appeals erred in adopting the circuit court's finding that S.C. Code § 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 thus cannot be applied to prevent an employer from benefitting from Workers' Compensation immunity if they did not meet the Code's requirements. (Appx. p. 1060). This is an incorrect reading of the law. It is in reliance on this section that this 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 at 327, 523 S.E.2d at 773.

The Court of Appeals was correct in noting that section 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. (Appx. p. 1060). It has never been Petitioners' contention, however, that this section *alone* provides the foundation for a finding as to whether Bayshore SC or Bayshore Corp. (VA) can take advantage of the statutory employer status. Rather, the role of section 42-1-415(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 section 42-5-40. This is the roadmap set forth by this 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 section 42-5-40 if the employer satisfied the requirements of section 42-1-415. Harrell at 330, 523 S.E.2d at 774-5. Here, neither Bayshore Corp. (VA) nor Bayshore SC secured compensation directly or indirectly for Poch and Key, nor did they meet the requirements of section 42-1-415. Thus, neither entity can claim benefit of the Workers' Compensation immunity even if they are deemed a statutory employer.

The Workers' Compensation benefits paid to Kenneth Poch and Kevin Key were paid not by Bayshore Corp. (VA) or Bayshore SC, but by Carolina Staffing, Inc. d/b/a Job Place of Conway. (R. p. 588; p. 589, ln. 24-p. 590, ln. 11; p. 625, ln. 7-25; p. 883, ¶

5.5; pp. 907-916, ¶¶ 4(b), 8(a)). Both Bayshore Corp. (VA) and Bayshore SC were self-insured. (R. p. 612, ln. 8-19). Bayshore Corp. (VA) and Bayshore SC did not submit to the trial court an insurance policy of these entities that provided coverage for Poch and Key.<sup>7</sup>

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 § 42-1-415(B), 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 also Harrell, 337 S.C. at 330, 523 S.E.2d at 774-5 (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 section 42-1-415 when the subcontractor was engaged to perform work rendered its immunity inapplicable).

Here, it is undisputed Bayshore Corp. (VA) and Bayshore SC did not secure the proper documentation until after the accident took place: "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." (R. p. 927). Bayshore SC and Bayshore Corp. (VA) failed to demonstrate that they either directly provided workers' compensation coverage for

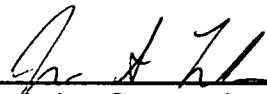
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<sup>7</sup> Bayshore Corp. (VA) and Bayshore SC did submit a self-serving, ambiguous, and conclusory affidavit from their underwriter appears to claim some entity had Workers' Compensation coverage for Poch and Key. (R. p. 845). This four-sentence affidavit cannot be given any probative weight by this Court.

Poch and Key *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. Accordingly, this Court should find that as alleged "upstream" employers Bayshore Corp. (VA) and Bayshore SC failed to secure compensation benefits for Poch and Key in a manner sufficient for them to claim statutory immunity from this action pursuant to S.C. Code § 42-5-40 and Harrell and reverse the decision of the Court of Appeals.

### CONCLUSION

Bayshore Corp. (VA) was a co-subcontractor on the Carolina Bays project with Poch and Key, and it is not entitled to immunity from tort suit pursuant to the Workers' Compensation Act. Moreover, even if they can be deemed upstream employers, both Bayshore Corp. (VA) and Bayshore SC have failed to meet their obligation to secure Workers' Compensation benefits to Poch and Key and cannot claim the benefit of the immunity provisions. For these reasons, and all the other arguments set forth above, the Petitioners ask this Court to reverse the Court of Appeals and allow the Petitioners' tort actions against Bayshore Corp. (VA) and Bayshore SC to proceed.

  
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May 7, 2012

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

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

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

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**CERTIFICATE OF SERVICE**

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

**v.**

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

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

**and**

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

**v.**

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

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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 the .....Respondents.**

**and**

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Kenneth O. Poch and Julius  
Poch, .....Petitioners,**

**v.**

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Bayshore Concrete Products  
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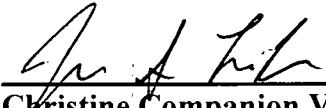
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**I certify that I have served the *Brief of Petitioners* on the Clerk of the  
Supreme Court and on counsel for the Respondents by serving copies of the same  
via U.S. Mail on 7 May 2012 to the following:**

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I further certify that on 7 May 2012 a facsimile copy of the *Brief of Petitioners* was electronically transmitted to [dhopkins@sccourts.org](mailto:dhopkins@sccourts.org) pursuant to Rule 262(a)(2), SCACR.

  
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**S.C. SUPREME COURT**