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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2017-CP-10-00838
Appellate Case No. 2020-001210

Jacque Lucas, Shirley Ann Lucas,
and Daniel Simerly,

Appellants,

v.

KapStone Paper and Packaging Corporation, KapStone Kraft Paper Corporation, Safway Group Holdings, LLC, Easy Way Insulation Co., Sypris Technologies Inc., Thompson Construction Group, Inc., and Thompson Industrial Services, LLC, Defendants,

Defendants,

Of which

KapStone Paper and Packaging Corporation and KapStone Kraft Paper Corporation are

Respondents.

AMENDED INITIAL BRIEF OF RESPONDENTS

Richard H. Willis (S.C. Bar No. 6159)
Derek D. Tarver (S.C. Bar No. 103289)
Derek.Tarver@bowmanandbrooke.com
1441 Main Street, Suite 1200
Columbia, SC 29201
Tel.: 803-726-7420
Fax: 803-726-7421
Richard.Willis@bowmanandbrooke.com
Derek.Tarver@bowmanandbrooke.com

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Statement of Issues on Appeal

1. Whether the trial court correctly applied the workers' compensation "alter ego" test set forth in *Poch v. Bayshore Concrete Prods./S.C., Inc.*, 405 S.C. 359, 747 S.E.2d 757 (2013) (the "*Poch* test") in concluding that KapStone Paper and Packaging Corporation ("KapStone Paper") and KapStone Kraft Paper Corporation ("KapStone Kraft") (collectively, the "KapStone Defendants") were sufficiently integrated with KapStone Charleston Kraft, LLC ("KapStone Charleston") to be accorded KapStone Charleston's tort immunity.
2. Whether, on this *de novo* review, a preponderance of the evidence supports the conclusion that KapStone Paper and KapStone Kraft were integrated with KapStone Charleston under a *Poch* analysis.

Statement of the Case

I. Underlying Facts

On May 24, 2016, Plaintiffs Jacque Lucas and Daniel Simerly ("Plaintiffs") were injured while performing job-related tasks at a paper mill owned by KapStone Charleston, their employer.[1] *See* First. Am. Compl. at 3. Plaintiffs filed workers' compensation claims in which they initially identified as their employers KapStone Paper and KapStone Kraft, respectively, the corporate grandparent and parent of KapStone Charleston. *See, e.g.*, Plaintiffs' Workers' Compensation Pre-Hearing Briefs, KAPSTONE-000435-36; KAPSTONE-000706.

To date, Plaintiffs have recovered workers' compensation benefits of nearly $4,000,000, through a workers' compensation policy procured and funded by KapStone Paper that covered all of its various subsidiaries, including KapStone Charleston. *See* Memo. of Law in Support of Petitioner Sentry Cas. Company's Motion to Intervene, at 2-3 (December 21, 2017). Plaintiffs' workers' compensation claims remain open.

Despite recovering nearly $4,000,000 through KapStone Paper's workers' compensation insurance policy, Plaintiffs sued KapStone Paper and KapStone Kraft for their injuries. *See* First Am. Compl. The KapStone Defendants sought dismissal based on the South Carolina Supreme

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[1] While not directly implicated by this appeal, that Plaintiffs were injured on property owned by KapStone Charleston raises a practical question: If the KapStone Defendants were not integrated with KapStone Charleston, as Appellants contend, then what duties could they have possibly owed to workers at a paper mill they neither owned nor controlled? South Carolina law is clear that the duty to provide a safe work environment is owed by the employer and is non-delegable. *See, e.g.*, *Wesley v. Holly Hill Lumber Co.*, 211 S.C. 40, 43 S.E.2d 619 (1947) (the duty of an employer to provide an employee with a safe workplace is a nondelegable duty); *see also Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 370, 747 S.E.2d 757, 763 (2013) ("Where an employee of a subsidiary is injured *while working on property owned by the parent corporation* and receives workers' compensation benefits from the subsidiary, the employee may maintain an action in tort against the parent corporation even though parent and subsidiary are covered by same policy of workers' compensation insurance.") (emphasis added) (quotation omitted).

Court's holding in *Poch v. Bayshore Concrete Prods./S.C., Inc.*, that an employer's workers' compensation immunity may be extended to its parents where the companies "are so integrated and comingled that neither can be realistically viewed as a separate economic entity." *See* KapStone Defs.' Rule 12(b)(1) Motion to Dismiss (citing *Poch*, 405 S.C. 359, 375, 747 S.E.2d 757, 765 (2013)).

At the time of the incident giving rise to this lawsuit, the KapStone entities at issue in this case formed a vertical parent-subsidiary relationship. KapStone Paper, a publicly traded entity and one of the largest paper manufacturers in the United States, was the corporate parent of KapStone Kraft, which was the sole member of KapStone Charleston.[2] *See* KAPSTONE-000122; KAPSTONE-000273-287, at 275.

The KapStone entities were collectively engaged in the manufacture, sale, and distribution of kraft paper products, with each playing a specific role.[3] *See* KAPSTONE-000002 – 134, at 5 - 12. KapStone Kraft and KapStone Charleston both operated paper mills as part of KapStone's "Mill Division." *See id*. KapStone entities in KapStone's "Container Division" made packaging from the paper generated by the mills. *Id.* KapStone entities in the "Distribution Segment" would ship those products to customers. *Id.* KapStone Paper controlled the finances of all of the KapStone subsidiaries, including: performing accounting for each, managing and funding all KapStone employee payroll, managing sales, collecting on accounts receivable, paying accounts payable, negotiating and entering certain leases and purchases, filing and paying taxes, as well as the performance of other administrative tasks and shared corporate services. *Id.* No KapStone

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[2] In November 2018, WestRock purchased KapStone Paper and, through that purchase, the various KapStone subsidiaries.

[3] "Kraft" paper or paperboard (cardboard) is a type of paper produced via the "kraft" process, which produces a very resilient paper product, and is named after the German word for "strength."

entity was involved in any business unrelated to the manufacture and sale of kraft paper. *See id.*

The KapStone entities shared the same "KapStone" trademark (which included the "KapStone" name, the "K box" logo, and trade dress). This trademark was used on the shared "KapStone" website (KAPSTONE-000758-59), KapStone letterhead (KAPSTONE-000344-45), employee applications (KAPSTONE-000378-83), policies and procedures (KAPSTONE-000464, 694, 736), and other internal and external documents. *See* KAPSTONE-000465, 486, 702-05, 741-44.

The KapStone entities collectively referred to themselves as "KapStone," "we," "us," and "the Company." KapStone Paper did so in financial disclosure documents filed with the Securities Exchange Commission. *See* KAPSTONE-000002-134. The KapStone entities used similar verbiage on the KapStone website (KAPSTONE-000758-59), as well as documents disseminated to KapStone employees, such as internal policies and procedures, like the "KapStone Code of Conduct" (KAPSTONE-000694, 736) and "KapStone Anti-bribery" policies. *See* KAPSTONE-001959-63.

All of KapStone Kraft's Directors were also Directors for KapStone Paper. *See* KAPSTONE-001184-85. While KapStone Charleston had no Directors, by virtue of being an LLC, KapStone Kraft was the sole managing member of KapStone Charleston. *See id.*; KAPSTONE-000273-287, at 276 and 277. KapStone Charleston, KapStone Kraft, and KapStone Paper all had the same officers in essentially identical positions. *See* KAPSTONE-001184-85.

All of the KapStone entities were headquartered at 1101 Skokie Blvd, Suite 300, in Northbrook, Illinois. *See* KAPSTONE-000002-134, at 2; 275-76. All Directors and officers of the KapStone entities, as well as several other managers, worked from 1101 Skokie Blvd. *See* Niehus Dep. 132:6-132:13; Hulseman Dep. 270:7-272:14. Nearly ten percent of the workforce at

KapStone Charleston's mill was comprised of employees of KapStone Paper and KapStone Kraft. *See* KAPSTONE-002596-2650. Fifteen percent of the workforce at the corporate headquarters was comprised of KapStone Kraft employees. *See id.*

All KapStone employee compensation was provided by KapStone Paper through direct electronic funds transfer or, if the employee preferred, paper checks issued by "ADP," a centralized payroll processor. *See* Lester Aff. ¶¶ 79-80; KAPSTONE-000439, 335-337, 2510, 718 (in that order). KapStone Paper funded all payroll through the KapStone "Master Account," which, in addition to holding collections performed by KapStone Paper for the sales of KapStone paper products, also received funds transferred from the KapStone subsidiaries' "zero balance accounts" on a nightly basis. *See* KAPSTONE-000339; Lester Aff. ¶¶ 79-80. Non-union hourly and salary employees of all KapStone entities were offered identical benefits packages, including various forms of insurance, retirement packages, and scholarships. *See* KAPSTONE-000149-192, 403-05. KapStone Paper both procured and funded these benefits. *See id.*

KapStone Paper also maintained consolidated electronic records related to accounting, materials, production, sales, and personnel for all of the KapStone entities. *See* KAPSTONE-003462-3480. KapStone's accounting system could show data representative of all of the KapStone entities collectively, or be selectively reviewed in terms of particular divisions, products, locations, and specific entities. *See id.*

In April of 2016, KapStone Paper's accounting team analyzed these shared records and found that KapStone's shared "EBITDA" ("Earnings Before Interest, Tax, Depreciation, and Amortization") could be improved by implementing a plan to enhance the centralization of the operational systems in the Mill and Container divisions, to reduce costs. *See, e.g.*, KAPSTONE-003536-72. This effort became known as "One KapStone" and was implemented by KapStone

Paper over all KapStone entities without issue.

Based on the above facts, the trial court concluded that under the analysis set forth in *Poch*, the KapStone entities "could be viewed as only one economic entity" for workers' compensation purposes, and therefore KapStone Charleston's workers' compensation immunity extended to KapStone Paper and KapStone Kraft. *See* Order Granting the KapStone Defendants' Motion to Dismiss, p. 24.

II. Procedural History

On February 17, 2017, Plaintiffs commenced this action against KapStone Kraft and KapStone Paper seeking civil recovery for their workplace injuries beyond the nearly four million dollars they had already recovered from KapStone Paper's workers' compensation policy. On June 6, 2017, the KapStone Defendants filed a Rule 12(b)(6) motion to dismiss, asserting that under *Poch*, KapStone Charleston's immunity extended to them. KapStone Defendants filed an Amended Rule 12(b)(6) motion on July 31, 2017, clarifying their position. On September 22, 2017, the KapStone Defendants submitted a Second Amended Motion to Dismiss, specifying that because the *Poch* issue was a jurisdictional one, they were challenging the trial court's subject matter jurisdiction under Rule 12(b)(1).

On November 28, 2017, the trial court stayed merits discovery until the jurisdictional issue was resolved. Thereafter, Plaintiffs and the KapStone Defendants engaged in jurisdictional discovery relevant to the *Poch* inquiry. The KapStone Defendants produced approximately 3,800 pages of business records in response to Plaintiffs' jurisdictional discovery requests. The KapStone Defendants also submitted three affidavits by corporate officers, one by Ms. Kelly Hulseman, the Vice President of Shared Services at KapStone Paper, and two by Mr. Mark Niehus, the Vice President and Controller for KapStone Paper. Plaintiffs deposed these affiants. The

KapStone Defendants also submitted the Affidavit of Todd Lester, a financial analyst and forensic accounting consultant, to provide an analysis of the nature of economic integration of the KapStone entities, as set forth in the information produced in response to Plaintiffs' jurisdictional discovery requests. Mr. Lester was deposed on September 5, 2019.

The trial court heard the parties' arguments on the pending motion to dismiss on September 27, 2019. On February 26, 2020, the trial court issued an order finding that "substantial documentary support in the record" supported a conclusion that the KapStone Defendants and KapStone Charleston were sufficiently integrated to be treated as one company for workers' compensation purposes. As such, KapStone Charleston's immunity extended to the KapStone Defendants, and therefore the trial court dismissed Plaintiffs' claims against them.

On March 9, 2020, Plaintiffs filed a Motion to Reconsider, which the trial court denied in a short form order. On August 20, 2020, the KapStone Defendants filed a Motion for Rule 54(b) Certification of the Trial Court's Order as a Final Judgment. The trial court certified its dismissal of the Plaintiffs' claims against the KapStone Defendants on August 26, 2020. On September 4, 2020, Plaintiffs filed and served a Notice of Appeal of the trial court's denial of their Motion to Reconsider, and later filed an Amended Noticed of Appeal on September 8, 2020, to include an appeal of the trial court's dismissal of Plaintiffs' claims under Rule 12(b)(1), SCRCP.

Standard of Review

The trial court concluded that KapStone Charleston's tort immunity under the Worker' Compensation Act ("Act") extended to the KapStone Defendants by virtue of their integration under a *Poch* analysis. [Order at 24-25].

"[T]he determination of the employer-employee relationship for workers' compensation purposes is jurisdictional." *Poch*, 405 S.C. at 367, 747 S.E.2d at 761 (quoting *Glass v Dow Chem.*

Co., 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997)). An appellate court "has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence." *Id.*

"Any doubts as to a worker's status should be resolved in favor of including him or her under the Workers' Compensation Act." *Poch*, 405 S.C. at 367, 747 S.E.2d at 761 (quoting *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 218-19, 661 S.E.2d 395, 400 (Ct. App. 2008)). "[B]road construction in favor of coverage . . . . is the standard of review for cases in which the workers' compensation statute is used as a shield to liability under another theory." *See Olmstead v. Shakespeare*, 354 S.C. 421, 427, 581 S.E.2d 483, 486 (2003).

Summary of Argument

The Supreme Court of South Carolina held in *Poch* that an employer's tort immunity afforded under the Workers' Compensation Act ("Act") is accorded to the employer's corporate parent where a preponderance of the evidence supports a finding that the two entities were so integrated that they "could be viewed as only one economic entity" for workers' compensation purposes. *See Poch*, 405 S.C. at 374, 747 S.E.2d at 765 (citing 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 43.80 (Supp. 2012) (quote omitted)).

Since 1939, South Carolina courts have recognized a legislative intent to extend the Workers' Compensation Act, whenever possible, beyond the strict limitations of the corporate form. *See Marchbanks v. Duke Power, Co.*, 190 S.C. 336, 2 S.E.2d 825, 835 (1939). This is not "veil piercing," but the judiciary acting in accordance with the General Assembly to extend the reach of the Act for the benefit of both the employee and employer. This preference toward extending the Act gave rise to both the "statutory employer" inquiry and the *Poch* inquiry, two

doctrines used to expand the reach of the Act to provide no fault coverage for the employee and, correspondingly, tort immunity for the employer.

A *Poch* inquiry is distinct, both in purpose and substance, from the test used to "pierce the corporate veil" for tort liability. Facts required to satisfy one cannot satisfy the other. For example, "veil piercing" requires a showing of fraud or abuse of the corporate form. *See Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 367-68, 271 S.E.2d 596, 600 (1980). A *Poch* inquiry, however, cannot be satisfied if there is any evidence of fraud or abuse of the corporate privilege. *Poch,* 405 S.C. at 371, 747 S.E.2d at 763 ("immunity does not exist where . . . there is evidence of fraud, abuse of corporate privilege, or an attempt to circumvent the law to avoid liability") (quoting Annotation, *Workers' Compensation Immunity as Extending to One Owning Controlling Interest in Employer Corporation*, 30 A.L.R. 4th 948, § 2 (1984 & Supp. 2013)).

While South Carolina courts discourage "veil piercing" for tort liability,[4] the Supreme Court has repeatedly held that when considering whether the Act should extend beyond the corporate form, "[a]ny doubts as to a worker's status should be resolved in favor of including him or her under the Workers' Compensation Act." *See Poch*, 405 S.C. at 367, 747 S.E.2d at 761. The same preference for extension applies in the case of extending the Act for purposes of establishing tort immunity. *See Olmstead*, 354 S.C. at 427, 581 S.E.2d at 486 ("[B]road construction in favor of coverage . . . . is the standard of review for cases in which the workers' compensation statute is used as a shield to liability under another theory."). As such, the appropriate standard of review is to resolve any doubts in favor of including parties within the scope of the Act. *See, e.g.*, *Poch* at 367, 747 S.E.2d at 761.

[4] *See, e.g.*, *Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 367, 271 S.E.2d 596, 600 (1980); *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008).

The trial court correctly analyzed the record through the lens of *Poch* to reach its conclusion. A preponderance of the evidence shows the KapStone entities were so integrated at the time of the Plaintiffs' injuries that they functioned as a single company for purposes of workers' compensation. Appellants mischaracterize the trial court's analysis to create the illusion that the trial court failed to consider the degree of integration as to each individual defendant's relationship with KapStone Charleston. But the record shows that the trial court performed an appropriate analysis and pointed to an abundance of evidence in support of its finding that the KapStone Defendants were both economically integrated with KapStone Charleston. Regardless, because this is a *de novo* review, this Court must review all of the evidence and reach its own conclusion.

Appellants cite no law that requires a court to bifurcate a *Poch* analysis in a case involving three entities. But even under a bifurcated analysis, each KapStone Defendant was integrated with KapStone Charleston. Under an analysis of the operational reality of the KapStone corporate family from a functional standpoint, the degree of integration becomes even more apparent: KapStone Paper, KapStone Kraft, and KapStone Charleston operated like a single entity engaged in the manufacture, sale, and distribution of kraft paper products. The only way to avoid this conclusion is to disregard transitive logic: if a parent entity "A" (KapStone Paper) is integrated with subsidiary "B" (KapStone Kraft), and subsidiary "B" is integrated with its own subsidiary "C" (KapStone Charleston) then parent "A" is integrated with subsidiary "C." And any variation of this logic results in the same conclusion (if A=B and A=C, then B=C). Regardless of how the Court decides to apply the *Poch* test, it will find that the preponderance of the evidence supports the conclusion that the KapStone entities at issue in this case were integrated under *Poch*.

Argument

I. The trial court correctly applied the *Poch* test in concluding that the KapStone entities were sufficiently integrated such that KapStone Charleston's tort immunity extended to the KapStone Defendants.

In *Poch*, the Supreme Court listed "eight factors that courts should consider in determining whether two related businesses are separate and distinct corporations for workers' compensation purposes." *See* 405 S.C. at 372, 747 S.E.2d at 764. Where businesses are shown to be integrated under these factors, the Workers' Compensation Act ("Act") extends beyond the limitations of the corporate forms of the entities and will provide coverage to employees that would not otherwise receive benefits, *see Mickle v. Boyd Bros. Transp.*, No. 2015-UP-069, 2015 WL 576711 (S.C. Ct. App. 2015), and extend tort immunity to a company that is not the direct employer of the employee. *See Poch*, 405 S.C. at 370-72, 747 S.E.2d at 763-75.

The factors listed in *Poch* inquire:

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

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

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

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

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

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

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

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

Id. "[N]o one factor is controlling. *Id.* In considering these factors, the court must resolve any doubts in favor of including persons and entities within the scope of the Act. *See id.* at 367, 747 S.E.2d at 761 (citing *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 218-19, 661 S.E.2d 395, 400 (Ct. App. 2008)).

Here, the trial court applied the correct standard of review, and assigned appropriate weight to each factor and to the evidence in the record in reaching its conclusion that the KapStone entities were integrated under *Poch*. Appellants incorrectly contend that the trial court's finding must be overturned because a *Poch* analysis is a form of "veil piercing" that should be discouraged. Appellants also argue that the Court should ignore the first and second factors of the *Poch* test, effectively rewriting the test and disregarding express instruction from the Supreme Court to the contrary. These arguments are addressed in turn.

A. Extension of the Workers' Compensation Act under Poch is neither "veil piercing" nor discouraged.

1. South Carolina Courts have long recognized a legislative intent to extend the scope of the Workers' Compensation Act.

Since the earliest iterations of South Carolina's Workers' Compensation Act, our Appellate Courts have recognized a legislative intent to extend the scope of the Workers' Compensation Act beyond corporate boundaries. The standard of review under *Poch* – to resolve any doubts in favor of including both employers and employees within the Act – is premised upon the Supreme Court's recognition of this legislative intent, and reaches back to the Supreme Court's holding in *Marchbanks v. Duke Power, Co.*, 190 S.C. 336, 2 S.E.2d 825, 835 (1939).[5]

[5] "Compensation laws should be given a liberal construction in furtherance of the beneficent purpose for which they were enacted, and if possible, so as to avoid incongruous or harsh results . . . . Does this interpretation of our statute deprive an injured employee of his right to sue for damages under the common law? If the facts bring the case within the terms of the Compensation Act, the employee is restricted to his right of claim for compensation under the Act."

Historically, the Act has been interpreted broadly both to provide coverage to employees and tort immunity to employers. *See id.* "It is the policy of South Carolina courts to resolve jurisdictional doubts in favor of inclusion of employers and employees under the Workers' Compensation Act." *Posey* at 217, 661 S.E.2d at 399. "[B]road construction in favor of coverage" is the standard of review, both in terms of extending benefits to injured persons and when "used to shield [a defendant from] liability under another theory." *See Olmstead*, 354 S.C. 421, 427, 581 S.E.2d 483, 486 (2003).

South Carolina courts have applied the legislative intent to extend the scope of the Act consistently and without reservation. In *Poch*, the Supreme Court engaged in a three-step analysis to encompass both Bayshore defendants within the Act, despite *neither* being the plaintiffs' actual employer or the source of workers' compensation benefits. *See* 405 S.C. 359, 747 S.E.2d 757.

In *Poch*, the plaintiffs were employees of a temp agency, "Job Place." *See Poch*, at 363, 747 S.E.2d at 759. The plaintiffs had recovered workers' compensation benefits from Job Place following a workplace accident that occurred while they were performing duties as temporary contract workers for Bayshore Concrete Products/South Carolina, Inc. ("Bayshore SC"). *See id.* Following the accident, the plaintiffs sued Bayshore SC and its corporate parent, Bayshore Concrete Products Corporation ("Bayshore Corp."). *See id.* The Bayshore defendants moved to dismiss, asserting that they were the "statutory employers" of the plaintiffs and therefore should be accorded Job Place's workers' compensation immunity. *See id.*

The *Poch* court performed a three-step analysis to extend workers' compensation tort immunity to the Bayshore defendants. *See id.* at 366-75, 747 S.E.2d at 761-65. *First*, the court noted that plaintiffs had recovered workers' compensation benefits from their employer, Job Place. *Id.* As a result, Job Place was immune to tort liability under the Workers' Compensation Act. *See*

id. *Second*, to extend Job Place's tort immunity to Bayshore SC, the court concluded that plaintiffs were the "statutory employees" of Bayshore SC, since they were performing tasks in the furtherance of Bayshore SC's business when they were hurt. *See id.* at 368-69, 747 S.E.2d at 761-62. *Third*, to extend Job Place's tort immunity to Bayshore Corp., the court applied the eight-factor test adopted from *Monroe v. Monsanto Company*, 531 F. Supp. 426 (D.S.C. 1982), to conclude that Bayshore Corp. was so integrated with Bayshore SC that the tort immunity extended to Bayshore SC from Job Place would also extend through Bayshore SC to Bayshore Corp. *See Poch*, at 369-75, 747 S.E.2d at 762-65. The multi-step analysis performed by the Supreme Court in *Poch* demonstrates the ends to which our courts are authorized to go to effectuate the legislative intent to extend the Act beyond the narrow limits of the corporate form, for the benefit of both the employee and the employer.

This Court applied the same broad analysis in *Mickle v. Boyd Bros. Transportation*, which Appellants have failed to address in their brief. In *Mickle*, this Court applied *Poch* to conclude that a plaintiff-employee was covered by a parent corporation's workers' compensation policy, despite the plaintiff's actual employer being statutorily exempt from the Act. *See* No. 2015-UP-068, 2015 WL 576711 (S.C. Ct. App. 2015). There, the plaintiff's employer, WTI, a subsidiary of defendant Boyd Bros. was found to be sufficiently integrated under *Poch* based solely on the testimony of a single corporate representative. *See id.* at *2. That testimony provided that the companies had a shared owner, were both involved in trucking, shared a website and were openly related, had a joint dispatch system, provided the same benefits for their employees, and that the parent maintained ultimate control over the operations of its subsidiary. *See id.* Despite the absence of documentary evidence, the *Mickle* court concluded that the entities at issue were sufficiently integrated to be considered one for the purposes of workers compensation. *See id.*

Mickle and *Poch* are the only two appellate cases that have applied the eight-factor *Poch* test since it was adopted by the Supreme Court. In each case, the court applied the same broad standard of review applicable here, in recognition of the legislative intent to extend the benefits of the Act beyond the limits of the corporate form when possible. The same standard has similarly been applied in other cases that involved extending the Act under the "statutory employer" test. *See, e.g.*, *Glass v. Dow Chem. Co.*, 325 S.C. 198, 482 S.E.2d 49, 51 (1997) (applying statutory employer test to extend tort immunity to defendant).

Contrary to Appellants' lead argument, there is no indication in the case law that the extension of the Act is considered by any South Carolina courts to be a form of "veil piercing." Notably, neither the word "veil" or any iteration of the word "piercing" appears in the *Poch* decision or its dissent by Justice Pleicones, in the *Mickle* decision, or in the line of case law from which the *Poch* test was developed.

2. A *Poch* inquiry is wholly distinct from "veil piercing."

The *Poch* test is not a form of "veil piercing." Extension of the Act under *Poch* is distinct, both in purpose and form, from tort-based veil piercing, and it would be error to conflate the two. The elements of the two are irreconcilable. The facts required to pierce the corporate veil will defeat a *Poch* inquiry. Appellants' argument that the *Poch* test is "veil piercing" is incorrect.

There are three tests in South Carolina that may be used to pierce the corporate veil for purposes of tort liability: (1) traditional "veil piercing"; (2) "alter ego/instrumentality"; and (3) "single business enterprise." All three tests require the plaintiff to show a fraudulent abuse of the corporate form. *See, respectively, Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984) ("[W]hen the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons."); *Colleton County*

Taxpayers Ass'n v. School Dist. Of Colleton Cnty., 371 S.C. 224, 638 S.E.2d 685 (2006) ("[T]his theory [alter-ego/instrumentality] does not apply in the absence of fraud of misuse of control by the dominant entity which results in some injustice."); *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 654-55, 817 S.E.2d 273, 280-81 (2018) ("Combining multiple corporate entities into a single business enterprise requires further evidence of bad faith, fraud, wrongdoing, or injustice. . . .").

Importantly, the showing of fraud or abuse of the corporate form requisite to pierce the corporate veil would defeat a *Poch* inquiry. *See Poch*, 405 S.C. at 371, 747 S.E.2d at 736 ("[workers compensation] immunity does not extend where . . . there is evidence of fraud, abuse of corporate privilege, or an attempt to circumvent the law to avoid liability") (quoting Annotation, *Workers' Compensation Immunity as Extending to One Owning Controlling Interest in Employer Corporation*, 30 A.L.R. 4th 948, § 2 (1984 & Supp. 2013)). As such, "veil piercing" and a *Poch*-based extension of the Workers' Compensation Act cannot coexist under the same facts.

In addition to the showing of fraud needed to pierce the corporate veil, the elements of the three "veil piercing" tests have no overlap with the *Poch* test. The *Poch* test includes eight non-exclusive factors that consider whether the businesses: (1) maintained separate corporate identities; (2) maintained separate officers and Boards of Directors; (3) transacted business from different locations under different managers; (4) hired and paid their own employees; (5) held themselves to their employees as two separate identities; (6) engage in different business activities; (7) maintain separate books, bank accounts; and payroll records; and (8) file separate tax returns. 405 S.C. at 372, 747 S.E.2d at 764.

Piercing the corporate veil involves a two-part test. Part one inquires whether the defendant corporation: (1) was grossly undercapitalized; (2) failed to observe corporate formalities; (3) failed

to pay dividends; (4) was insolvent; (5) had its funds siphoned by the dominant shareholders; (6) had non-functioning officers or directors; (7) failed to maintain corporate records; and (8) was merely a façade for the operations of the dominant shareholder. *See Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984). Part two of the test requires a showing of injustice or fundamental unfairness to the plaintiff absent piercing of the veil. *See id.* There is no substantive overlap with *Poch*.

The "alter-ego/instrumentality" test requires a showing of "total domination" by one entity over another, *and* a showing of fraud or misuse of control over the subservient entity. *Colleton County Taxpayers Ass'n v. School Dist. Of Colleton Cty.*, 371 S.C. 224, 638 S.E.2d 685 (2006). "Total domination" and "fraud of misuse of control" are not considerations under a *Poch* analysis.

Perhaps most closely related to the *Poch* test is the "single business enterprise" theory of veil piercing, which requires that the entities at issue operate fundamentally as a single organization would, but with the requirement of "evidence of abuse, or . . . injustice and inequity [such as] fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like." *Pertuis*, 423 S.C. at 654-55, 817 S.E.2d at 280 (quoting *SSP Partners v. Gladstrong Invs (USA) Corp.*, 275 S.W.2d 444, 455 (Tex. 2008)). Again, the fraud requirement distinguishes this veil piercing inquiry from the *Poch* test. To be clear, there is no potential showing of fraud against the KapStone Defendants in this case, nor have the Plaintiffs alleged fraud or abuse of corporate privileges in the almost four years of litigation of this case.

Moreover, the *Poch* test evolved from a body of case law that developed entirely apart from the concept of "veil piercing." *Poch* emerged from a lineage of case law related strictly to the issue of legislative intent to extend the coverage and immunity features of the Workers' Compensation Act. Not one case in the universe of cases from which the *Poch* test was formed

dealt with the issue of "veil piercing." The concept is not even mentioned in passing. The cases culminating in the *Poch* test focus exclusively on the circumstances when it is appropriate to extend the benefits of the Workers' Compensation Act. Conversely, none of the "veil piercing" cases Appellants cite address workers' compensation. Those cases focus solely on remedying the inequity of fraudulent abuse of the corporate form to avoid tort liability.

Having compared the purpose and substance of the *Poch* test to "veil piercing," it is evident that these concepts are distinct and irreconcilable. Further, it is clear that South Carolina courts, while reticent to pierce a corporate veil for purposes of tort liability, recognize a directive to extend the scope of the Workers' Compensation Act beyond the limits of the corporate form.

B. A *Poch* inquiry requires consideration of each factor in light of the entire record, with a view toward expansion of the Act.

The Supreme Court held that an appropriate *Poch* analysis requires review of the entire record in light of *each* factor, with a preference toward extending the scope of the Act to cover both employees and employers. *See id.* Despite this, Appellants incorrectly assert that certain factors "carry the most weight" (those they believe favor their position) and that the Court should disregard the remaining factors (those they believe hurt their position) in order to reach the desired result. *See* App. Br. at 15-17. The Supreme Court expressly warned against this in *Poch*, noting that:

> In applying the eight-factor *Monroe* test, the dissent reaches the opposite conclusion. . . . [T]he dissent offers a cursory review of the few factors that favor its position . . . . [W]e believe the dissent may have overlooked the preponderance of the evidence to reach a desired result.

See at 374 n.9, 747 S.E.2d at 765 n.9.

Not only is a court required to carefully consider *each* factor, but the Supreme Court also emphasized that "these factors [a]re not the only relevant factors," and that more may exist under

certain circumstances. *See Poch*, at 373, 747 S.E.2d at 764 (citing *Monroe v. Monsanto*, 531 F. Supp. 426, 434 (D.S.C. 1982)). However, at no point did the court hold that any of the eight listed factors could be disregarded or be given disproportionate weight.

In fact, the *Poch* court exercised discretion in expanding the scope of certain factors listed in *Monroe* to consider evidence not expressly included within the factor. For example, under the second factor ("Did the two businesses maintain separate Boards of Directors?"), the court looked beyond the members of the boards of directors, and found it probative that the Bayshore defendants also shared the same officers, legal counsel, safety director, engineers, and that all of these persons were compensated by the parent, Bayshore Corp. *See id.*

Under the third factor ("Did the two businesses transact business from different locations under different managers?"), the court acknowledged that Bayshore SC and Bayshore Corp. were headquartered in different states, and that Bayshore SC operated exclusively in South Carolina, but found the factor was still met because Bayshore Corp. purchased equipment for the South Carolina site and periodically sent employees to the site. *See id.* at 373, 747 S.E.2d at 764.

Under the fourth factor ("Did the two businesses hire and pay their own employees?"), although the court noted that Bayshore SC hired and paid all of its hourly and temp workers, the factor was satisfied because Bayshore Corp. hired and paid *three* salaried Bayshore SC employees, including the provision of retirement plans and health insurance. *See id.* at 373-74, 747 S.E.2d at 764-65.

Under the seventh factor ("Did the two corporations maintain separate books, bank accounts, and payroll records?"), despite the fact that Bayshore SC and Bayshore Corp. maintained separate books, the court found the factor was met because Bayshore SC contributed to Bayshore

Corp.'s gross revenues, and Bayshore Corp. was responsible for Bayshore SC's "financial operation." *See id*. at 374, 747 S.E.2d at 765.

The broad application of the various factors in *Poch* illustrates the Supreme Court's interpretation of the legislative intent to resolve any doubts in favor of extending the scope of the Act when possible. It is apparent that in applying the *Poch* test, a court has the authority both to interpret the scope of the factors in favor of extension, and also to add factors where it determines they are relevant to the degree of economic integration. Appellants have cited no controlling case law that supports their position that certain factors under a *Poch* analysis "carry the most weight," or that the remaining factors should be excluded in favor of limiting the scope of the Act. The cases Appellants cite predate the Supreme Court's adoption of the eight-factor test in *Poch*, are not cited in *Poch* (because *Poch* changed the law), and consider issues only marginally relevant to *Poch*. As such, Appellants' argument that certain factors are more relevant than others and that the Court should disregard certain factors is directly contradicted by the *Poch* decision itself.

II. Under the *Poch* analysis, the KapStone entities operated as a single economic entity for workers' compensation purposes.

The trial court appropriately considered the entire record and concluded that a preponderance of the evidence supported a finding that the KapStone entities were sufficiently integrated such that they should be considered a single employer for purposes of workers' compensation. A preponderance of the evidence in the record on appeal supports the same finding by this Court.

A. A preponderance of the evidence shows the KapStone entities were economically integrated under Poch.

A preponderance of the evidence shows that the KapStone entities were "economically integrated" under *Poch* at the time of the accident. Appellants incorrectly assert that *Poch* mandates a separate analysis of each KapStone Defendant as it relates to KapStone Charleston.

There is no case that supports this contention. Such an analysis disregards the "operational realities" (a term used repeatedly by Appellants) that exist when three vertically integrated entities function in the manner the KapStone family of companies did. However, even under a bifurcated analysis, it is evident the KapStone Defendants were each sufficiently integrated with KapStone Charleston.

The "operational realities" between three entities, as opposed to only two, invokes the Supreme Court's observation in *Poch* that certain evidence beyond the eight listed factors may be relevant to a finding of integration. *See Poch*, at 373, 747 S.E.2d at 764. It is both relevant and probative to the *Poch* test that all three KapStone entities operated as inter-reliant entities with a common goal. However, whether a *Poch* inquiry mandates a segregated analysis of three entities or permits a collective analysis to understand "operational realities" is not expressly addressed in *Poch*. As such, the below discussion addresses both arguments, and shows that regardless of whether the Court engages in a segregated or collective analysis, a preponderance of the evidence demonstrates substantial economic integration between the KapStone entities that satisfies *Poch*.

1. KapStone Paper, KapStone Kraft, and KapStone Charleston shared a common corporate identity: "KapStone."

The first *Poch* factor is whether the entities at issue share a "common corporate identity." *See* 405 S.C. at 372-73, 747 S.E.2d at 764-65. "[C]orporate identity is the reality and uniqueness of an organization which is integrally related to its external and internal image and reputation through corporate communication." J. Balmer & E. Gray, *Corporate Identity and Corporate Communications: Creating a Competitive Advantage*, Indus. & Comm. Training, Vol. 32, Iss. 7, pp. 256-62 (2000). The corporate identity is typically visualized by branding and with the use of trademarks, but may extend to product design, advertising, and public relations. *See* P.M. Knapp, *et al.*, Designing Corporate Identity: Graphic Design as a Business Strategy (2001).

In *Poch*, the Supreme Court concluded that the Bayshore entities had a shared corporate identity based on testimony that the "Bayshore" designation was used "interchangeably" in signing documents, including leases, letterheads, benefits packages, and safety manuals used by both Bayshore Corp. and Bayshore SC. *See* 405 S.C. at 373, 747 S.E.2d at 764. Also pertinent to the court's analysis was testimony that "one [workers' compensation] policy covered all corporations[.]" *See id.*

Here, KapStone Paper and KapStone Charleston shared the "KapStone" corporate identity. Both used the registered "KapStone" trademark, which included the "KapStone" name, logo ("K-Box" logo"), and trade dress (colors). This logo was used on letterhead (KAPSTONE-000344, 345); employment related documents (KAPSTONE-000376, 3438), internal policies and procedures (KAPSTONE-000465), benefits packages (KAPSTONE-000149-192), employment applications (KAPSTONE-000378-383), and the shared "KapStone" website (KAPSTONE-000758-59). Many of the documents used by KapStone Charleston were labeled "KapStone Paper and Packaging Corporation" (KAPSTONE-000465, 684, 702-705, 741-744).

The same analysis applies to KapStone Kraft, the registered owner of the "KapStone" trademark. *See* KAPSTONE-000431-432. KapStone Kraft, like all other KapStone entities, utilized this trademark in commerce to identify itself as part of the "KapStone" business. This included use on letterhead on essentially every business-related document, including but not limited to employment applications (KAPSTONE-000378-383), benefits packages (KAPSTONE-000149-192), and the shared KapStone website (KAPSTONE-000758-59).

The KapStone entities also presented themselves publicly as a consolidated organization in public SEC filings and internal policies and procedures, referring to themselves collectively as "KapStone," "Our Company," "we," and "us." *See* KAPSTONE-000002-134, 1899, 1902, 1921,

1969, 2082, 2103, 2104 ("Unless the context otherwise requires, references to 'KapStone,' the 'Company,' 'we,' 'us' and 'our' refer to KapStone Paper and Packaging Corporation and its subsidiaries.")

In addition, KapStone Charleston and KapStone Kraft were all covered by a single workers' compensation policy procured and funded by KapStone Paper. *See* KAPSTONE-1223-1515, at 1229, 1244-45, 1251-52, 1255, 1257, 1268. It is this policy that provided Plaintiffs nearly four-million dollars in coverage for the injuries they incurred at KapStone Charleston's mill.

A preponderance of the evidence supports a conclusion that KapStone Paper, KapStone Kraft, and KapStone Charleston shared a corporate identity.

2. KapStone Paper, KapStone Kraft, and KapStone Charleston shared common officers, accounting, payroll, and legal departments; KapStone Paper and KapStone Kraft had overlapping Directors.

The second *Poch* factor considers whether the entities at issue shared common directors, officers, or other managers. *See* 405 S.C. at 372-73, 747 S.E.2d at 764-65. In *Poch*, the Supreme Court found that this factor was satisfied where the Bayshore entities shared overlapping Directors, officers, legal counsel, and other managers, and that all of these persons were paid by Bayshore Corp. *See id.* at 373, 747 S.E.2d at 764.

All of the members of KapStone Kraft's Board of Directors were also on KapStone Paper's Board. *See* KAPSTONE-001184-85. KapStone Charleston, an as LLC, did not have a Board of Directors. However, KapStone Kraft was the "sole managing member" of KapStone Charleston, and as such had direct managerial power over it. *See id.*

KapStone Kraft and KapStone Charleston each had five officers that also served as officers for KapStone Paper. These officers held generally identical roles across the three KapStone entities, as shown in the below table. *See also id.*

	KapStone Paper	KapStone Kraft	KapStone Charleston
Roger Stone	Chairman/C.E.O.	Chairman/C.E.O.	Chairman/C.E.O.
Matthew Kaplan	President/C.O.O.	C.O.O.	C.O.O.
Randy Nebel	V.P./President Mill Divisions	President	President
Andrea Tarbox	V.P. & C.F.O.	V.P. & C.F.O.	V.P & C.F.O.
Kathryn Ingraham	V.P. & Secretary	Secretary	Secretary

In addition to the managerial overlap between KapStone Paper, KapStone Kraft, and KapStone Charleston, all of the KapStone entities shared a single legal department headed by General Counsel Kathryn Ingraham (among other managerial departments, including accounting and payroll) based out of the KapStone shared headquarters at 1101 Skokie Blvd., Suite 300, in Northbrook, Illinois. As was the case in *Poch*, all of these personnel received compensation in the form of salaries and benefits funded by KapStone Paper. *See* KAPSTONE-000335-337; KAPSTONE-002510.

Based on the above, a preponderance of the evidence supports a conclusion that KapStone Paper, KapStone Kraft, and KapStone Charleston operated under a shared management structure.

3. KapStone Paper, KapStone Kraft, and KapStone Charleston transacted business from 1101 Skokie Blvd. and the Charleston Mill under shared management.

The third *Poch* factor is whether the entities transacted business from a common location with shared management. *See* 405 S.C. at 372-73, 747 S.E.2d at 764-65. In *Poch*, the Supreme Court noted that Bayshore SC and Bayshore Corp. were headquartered in different states and operated from separate locations, but concluded this factor was satisfied because Bayshore Corp.

oversaw contract formation, managed accounting, and retained the corporate and personnel files for Bayshore SC. *See id* at 373, 747 S.E.2d at 764.

At the time of the incident, each member of the KapStone corporate family was officially headquartered at the KapStone corporate office at 1101 Skokie Blvd., Suite 300, in Northbrook, Illinois. *See* KAPSTONE-000002-134. In addition to being the location of the officers, directors, and legal counsel for each KapStone entity, the corporate office was also the headquarters for several "shared departments" that managed a broad spectrum of operations for each KapStone entity, including accounting and sales, payroll management, insurance, compliance with SEC regulations, employee benefits, and legal issues. *See* Hulseman Dep. 20:23-21:7; 274:17-278:14; Niehus Dep. 76:7-18.

KapStone Paper and KapStone Kraft also entered into equipment leases on KapStone Charleston's behalf for machinery used at KapStone Charleston's mill. *See* KAPSTONE-003286-3300, 3301-3314, 3315-3324, 3325-3340, 3341-3356, 3387-3396, 3397-3435, 3436-3437. These leases were entered into at the KapStone corporate office. *See id*. The signatory for each lease, when on behalf of KapStone Paper and KapStone Kraft was Eric Choltco, a KapStone Paper employee. *See id.*

The KapStone corporate office was also the location of KapStone's "centralized purchasing system," which directed purchase orders for paper to KapStone Kraft, KapStone Charleston, or other KapStone entities best suited to handle the order. *See* Niehus Dep. 85:9-86:10. KapStone Paper processed invoices and made payments from the corporate office for service and deliveries to KapStone Kraft and KapStone Charleston's facilities. *See* KAPSTONE-002125-29. KapStone Paper also procured and funded employee payroll and benefits for KapStone Kraft and KapStone

Charleston employees from the corporate office, *see* KAPSTONE-000439, 335-337, 2510, 718, including the applicable workers' compensation policy. *See* KAPSTONE-000301-306.

These shared departments at the KapStone corporate office, overseen by KapStone Paper, also generated KapStone-wide policies that governed certain aspects of the day-to-day operations of KapStone Kraft and KapStone Charleston These included requiring KapStone Paper to review and approve certain contracts or leases (KAPSTONE-001969-79 and 1994-96), integration of the finances of the KapStone entities, (KAPSTONE-002243-2508), and implementing policies related to ethics, antitrust, inventory accounting, and financing. *See* KAPSTONE-001889-1942, 1959-2122. KapStone Kraft and KapStone Charleston had discretion as to their day-to-day operations within the confines of these KapStone-wide policies and procedures.

In addition to the shared operations that took place at the KapStone corporate office, a substantial volume of the workforce at the KapStone Charleston mill was comprised of employees of KapStone Paper and KapStone Kraft. *See* KAPSTONE-002596-2650. On the day of the incident, fifty-eight KapStone Paper and KapStone Kraft employees were working at KapStone Charleston's mill, comprising nearly ten percent of the total work force. *See id.* Similarly, fifteen percent of the work force at the KapStone corporate office was comprised of KapStone Kraft employees. *See id.*

Based on the above, a preponderance of the evidence demonstrates that KapStone Paper, KapStone Kraft, and KapStone Charleston all transacted business from 1101 Skokie Blvd. and the Charleston Mill under shared management.

4. KapStone Paper managed and funded payroll and benefits for KapStone Kraft and KapStone Charleston employees.

The fourth *Poch* factor is whether the entities hired and paid their own employees. *See* 405 S.C. at 372-73, 747 S.E.2d at 764-65. The Supreme Court held in *Poch* that this factor was satisfied

even though Bayshore SC hired and paid its own hourly employees, simply because Bayshore Corp. had hired, paid, and provided benefits to only *three* salaried employees at the South Carolina site and handled invoices for the temporary employees Bayshore SC had hired. *See id.* at 373-74, 747 S.E.2d at 764-65.

Each KapStone entity generally hired its own local employees, both hourly and salaried, although as noted above, there was substantial employee overlap between locations. However, KapStone Paper managed and funded payroll for all KapStone employees through its payroll services department and third-party payment processor, ADP. *See* KAPSTONE-000439, 335-337, 2510, 718 (in that order). Hourly employees of KapStone Kraft and KapStone Charleston received benefits, including life insurance, health insurance, short and long-term disability insurance, employee assistance programs, tuition reimbursement, scholarships for employee dependents, workers' compensation policies, and 401(k)s, that were procured and funded by KapStone Paper. *See* KAPSTONE-000149-192, 403-05. KapStone Paper paid for these benefits and services through funds generated by the sales of products manufactured by the collective KapStone Mill and Container Divisions, collected and managed entirely by KapStone Paper. *See* KAPSTONE-000339.

Based on the above, while the KapStone entities generally hired their own local employees, a preponderance of the evidence shows that there was substantial employee overlap between locations, and all compensation and benefits for the employees of KapStone Kraft and KapStone Charleston were paid for directly by KapStone Paper.

5. KapStone Paper, KapStone Kraft, and KapStone Charleston held themselves out to their employees as "KapStone," a single kraft paper business.

The fifth *Poch* factor considers whether the entities held themselves out to their employees as separate corporate identities. In *Poch*, the Supreme Court held that this factor was satisfied

because Bayshore SC employees were provided with employment documents also used by Bayshore Corp. *See* 405 S.C. at 374, 747 S.E.2d at 765.

KapStone Paper, KapStone Kraft, and KapStone Charleston represented to their employees that they were interrelated as part of "KapStone." Internal employment-related documents show that KapStone employees, regardless of location, were provided with uniform benefits packages (KAPSTONE-000149-192) and retirement packages (KAPSTONE-000403-405) that exhibited the "KapStone" trademarked logo and identified "KapStone Paper and Packaging Corporation" as the source of the information therein. Internal documents for job openings were also uniform, both in terms of template and exhibiting the "KapStone" trademark. *See* KAPSTONE-000376, 3438.

KapStone Paper, KapStone Kraft, and KapStone Charleston used the same employment applications (KAPSTONE-000378-383), internal correspondence templates (*compare* KAPSTONE-000342 *with* KAPSTONE-000344), and policies and procedures (*see, e.g.*, KAPSTONE-000414-428). All of these documents uniformly exhibited the "KapStone" trademark logo.

All employment applications for positions within KapStone identified "KapStone Paper and Packaging Corporation" as the entity to whom the application was submitted. *See* KAPSTONE-000702-705, 741-744. Several company-wide policies and procedures identified KapStone Paper as the source of the document. *See, e.g.*, KAPSTONE-000465 (computer use policy), 2082 (code of conduct and ethics).

Both Appellants' applications for employment at KapStone Charleston show that the application was being submitted to KapStone Paper, and in fact both Appellants authorized for KapStone Paper to perform a background check on the them in order to obtain employment. *See* KAPSTONE-000702-705 (Lucas); 741-744 (Simerly). Both Appellants signed a KapStone

"DISCLOSURE AND CONSENT CONCERNING CONSUMER AND INVESTIGATIVE CONSUMER REPORTS" authorization that provides: "This form, which you should read carefully, has been provided to you because KapStone Paper and Packaging Corporation ("Company") may request Consumer Reports and/or Investigative Consumer Reports from a consumer reporting agency." *See* KAPSTONE-000698 (Lucas); 745 (Simerly).

When KapStone extended offers of employment to the Appellants, they did so on KapStone letterhead. In the letter to Mr. Lucas, the letter offered a position as a "General Mechanic in our Maintenance Department at the *KapStone Kraft* Division, North Charleston Mill." *See* KAPSTONE-000344 (emphasis added). In the letter to Mr. Simerly, the letter provided "On behalf of *KapStone Paper and Packaging Corporation*, I am delighted to extend an offer of employment." *See* KAPSTONE-000345 (emphasis added).

Upon taking the job offers, Appellants reviewed and signed the "KapStone Paper and Packaging Corporation Code of Conduct and Ethics," which is required of all KapStone employees. *See* KAPSTONE-000694 (Lucas); 736 (Simerly). Appellants also reviewed and signed a "Computer User Policy User Agreement" that bore a KapStone Paper and Packaging Corporation designation. *See* KAPSTONE-000464. When Mr. Lucas needed to submit a "Personal Data Change Form," he did so on a form that bore a KapStone Paper and Packaging Corporation designation. *See* KAPSTONE-000684. Mr. Lucas' "Hourly Payroll Change Notice" also exhibited the KapStone logo and trade dress. *See* KAPSTONE-000688.

KapStone Kraft and KapStone Charleston employees were also subject to several shared policies that applied to entities in the KapStone "Mill Division." These included the "Storeroom Assets" policy, which "appl[ied] to all mills of the Company," (KAPSTONE-001902-1909) and the "Liquor Inventory" policy, which "appl[ied] to the Charleston and Roanoke Rapid paper

mills." *See* KAPSTONE-001901. KapStone Kraft and KapStone Charleston's operations were subject to several other policies in addition to the above. *See* KAPSTONE-0001910-1913 (Periodic Physical Verification of Fixed Assets), 1914-1917 (Capitalization and Expensing of Fixed Assets), 1918-1920 (Capitalization of Interest Cost), 1921-1923 (Computer Software Policy), 1924-1933 (Long-term Lease Policy), 1934 (Charges Related to Acquisition of Fixed Assets), 1935-1936 (Project Managers and Other Internal Costs), 1937-1939 (Wood Fiber Procurement), 1940-1942 (Asset Retirement Obligations).

Several KapStone policies also expressly applied to all KapStone entities' employees, including those of KapStone Paper, KapStone Kraft, and KapStone Charleston. *See, e.g.*, KAPSTONE-001943-1944 (Financial Derivatives Policy), 1945-1946 (Investment Policy), 1947 (Revenue Recognition), 1950-1958 (Amended and Restated Employee Stock Purchase Plan), 1959-1963 (Anti-Bribery Policy), 1964-1968 (Antitrust Policy), 1969-1979 (Contract Review and Signing Authority Policy), 1980-1981 (Service Organization Control Report Review), 1982-1983 (Service Organization Control Review Policy), 1985-1993 (IT-3 Data Transmission), 1994-1996 (Financial Accounting and Approval of Leases Policy), 1997-2081 (IT Policies Portfolio); 2082-2094 (KapStone Code of Conduct), KapStone-002103 (Environmental Policy), 2104-2106 (Financial Accounting and Approval of Lease Policy).

Based on the above, a preponderance of the evidence demonstrates that KapStone Paper, KapStone Kraft, and KapStone Charleston held themselves out to their employees as "KapStone," a single-purpose kraft paper business.

6. KapStone Paper, KapStone Kraft, and KapStone Charleston operated together as "KapStone," a single-purpose kraft paper company.

The sixth *Poch* factor considers whether the entities engaged in different business activities. *See* 405 S.C. at 372-73, 747 S.E.2d at 764-65. The Supreme Court held in *Poch* that

this factor was satisfied based on evidence that both Bayshore entities were engaged in the business of providing concrete forms for construction sites and used the same processes to perform the work. *See id.* at 374, 747 S.E.2d at 765.

KapStone Kraft and KapStone Charleston both operated kraft paper mills that generated kraft paper products from wood pulp using the "kraft" method of production. *See* KAPSTONE-000002-134, at 6-21. Both KapStone Kraft and KapStone Charleston were part of the KapStone "Mill Division." *See id.* Other KapStone entities, like KapStone Container Corporation, would manufacture packaging supplies out of the kraft paper the "Mill Division" entities generated. *See id.* These KapStone entities were part of KapStone's "Container Division." *See id.* KapStone also had a "Distribution Segment" that would deliver KapStone products to customers. *See id.* KapStone Paper oversaw the finances, accounting, payroll, contracts, sales, and performed administrative and managerial tasks for the various KapStone divisions necessary for their continued operation. To this end, the KapStone entities functioned collectively as divisions of a single company collectively engaged in the manufacture, sale, and distribution of kraft paper products. "KapStone" was a brand of kraft paper products not associated with any particular mill or factory, but with the corporate identity these companies shared in developing the final product it then sold to customers.

The "operational reality" is that the KapStone entities were reliant on each other for continued operations. None of the KapStone entities were standalone companies that could operate or continue to exist if severed one another. This interrelation is analogous to several components of a machine, the disassembling of which would result in various inert components, but when combined, result in a functional and productive machine.

The Mill Division entities (KapStone Charleston and KapStone Kraft) manufactured kraft paper but did not have the infrastructure to operate independently of input and services from KapStone Paper. They also relied in part on the Container Division entities to process the kraft paper into packaging products, and the Distribution Segment to deliver them. Equally, KapStone Paper did not directly manufacture products, but was engaged in the logistics of sales and delivery of the Mill and Container Divisions' products, and the management of assets and liabilities of those entities. To this end, these companies functioned as multiple components of a larger system designed to act as a single kraft paper company.

Federal agencies such as OSHA and the EPA recognized the KapStone entities each as being involved in the same business of manufacturing paper products. *See* Order, p. 15 (citing EPA, *Economic Impact Analysis* (Oct. 2016) https://www.epa.gov/sites/production/files/2016-12/documents/subpart_mm_eia_10_31_2016_ final. Pdf). In a 2016 report, the EPA identified KapStone Paper as one of the "Largest U.S. Pulp and Paper Companies" in 2015. *See id.*

Based on the above, a preponderance of the evidence supports a conclusion that the KapStone entities, including KapStone Paper, KapStone Kraft, and KapStone Charleston, were collectively engaged in the business of manufacturing, selling, and distributing kraft paper products.

7. KapStone Paper maintained KapStone Charleston's books, accounts, payroll records, and production and sales records.

The seventh *Poch* factor is whether the entities maintained separate books, bank accounts, and payroll records. *See* 405 S.C. at 372-73, 747 S.E.2d at 764-65. In *Poch*, the Supreme Court found this factor was satisfied because, even though Bayshore SC and Bayshore Corp. maintained separate books, Bayshore SC contributed to Bayshore Corp.'s gross revenues and Bayshore Corp. was "responsible" for the financial operations of the subsidiary. *See id.* at 374, 747 S.E.2d at 765.

KapStone Paper maintained consolidated electronic books and accounting records for all of the KapStone entities. These consolidated books included all of the KapStone entities' cumulative profits and losses, amalgamated into a single "P&L" chart, as well as records of products manufactured and sold, cost of goods sold, costs of incoming materials, unit average selling price, and employee headcount for the entire KapStone enterprise, all of which could be selectively segmented for a review of the same information for each division or KapStone subsidiary. *See* KAPSTONE-003462-3480.

The KapStone subsidiaries had individual bank accounts, but these were "zero balance accounts" that served only as temporary holding place for funds that were ultimately swept nightly into the KapStone "Master Account," controlled by KapStone Paper's shared services. *See* KAPSTONE-000339; Lester Aff. ¶¶ 79-81. KapStone Paper used this capital to fund the operations of its subsidiaries, including but not limited to employee payroll; employee benefits (including the workers' compensation policy that paid for Appellants' injuries); contracts and leases entered on behalf of its subsidiaries; to pay accounts payable for materials, goods and services rendered to the subsidiaries; and other operating costs. *See* Niehus Dep. 84:6-8; Lester Aff. ¶ 67.

The KapStone entities, including KapStone Paper, KapStone Kraft, and KapStone Charleston, were also party to the KapStone "Receivables Purchase Agreement" and "Receivables Sales Agreement." Under these agreements, ownership of every "accounts receivable" generated by KapStone subsidiaries was transferred to KapStone Receivables, LLC, which would sell the accounts receivables to a "purchaser" (under the terms of the contracts, Wells Fargo Bank), for ninety-nine cents on the dollar. *See* KAPSTONE-002243-2488. KapStone Receivables, LLC, would then transfer the funds obtained from the sale of its accounts receivable to KapStone Paper's

"Master Account," from which KapStone Paper would then fund the operations, payroll, benefits, and other costs of its subsidiaries, including KapStone Kraft and KapStone Charleston.

KapStone Paper maintained consolidated payroll records for its subsidiaries' employees. Payroll was processed by KapStone Paper employees at the KapStone corporate office, after which KapStone Paper would submit payroll instructions and funds to ADP, a third-party vendor, who would process payment, draft, and distribute funds pursuant to KapStone Paper's instructions, for either direct deposit or distribution by paper check to KapStone employees. *See* KAPSTONE-000439, 335-337, 2510, 718.

A preponderance of the evidence supports a conclusion that KapStone Paper maintained consolidated books and accounts on behalf of itself, KapStone Kraft, and KapStone Charleston.

8. KapStone Paper filed a consolidated federal tax return and other consolidated financial statements that included KapStone Charleston.

The final *Poch* factor is whether the entities filed a single, joint tax return. *See* 405 S.C. at 372-73, 747 S.E.2d at 764-65. There, the Supreme Court noted that the filing of a single tax return was a "weighty" factor, yet concluded that although the Bayshore entities had filed separate tax returns, they had still shown sufficient evidence that they were integrated under a *Poch* analysis. *See id.* at 374, 747 S.E.2d at 765.

KapStone Paper filed a consolidated federal tax return on behalf of all of its subsidiaries, including KapStone Kraft and KapStone Charleston. *See* KAPSTONE-002668, 2684. In addition to filing a single, consolidated federal tax return, KapStone Paper, as a publicly traded company, filed its Annual Report and financial statements on a single, consolidated basis (as one economic entity with its subsidiaries, including KapStone Kraft and KapStone Charleston), with the Securities and Exchange Commission. *See, e.g.*, KAPSTONE-000002-134. In general, consolidated financial statements are presented by a parent company to provide financial

information about the activities of the group (i.e., the economic entity). *See* Accounting Standard (AS) 21, Consolidated Financial Statements, Objective. Consolidated financial statements are " . . . intended to present information about a parent and its subsidiary(ies) as a *single economic entity* that show the economic resources controlled by the group, the obligations of the group, and the results the group achieves with its resources." *See id.* (emphasis added).

A preponderance of the evidence shows that KapStone Paper, KapStone Kraft, and KapStone Charleston filed consolidated federal tax returns, and KapStone Paper filed public disclosures identifying KapStone Kraft and KapStone Charleston's finances and operations are part of its own as a consolidated single entity.

B. The "One KapStone" program demonstrates the KapStone entities already functioned as a single-purpose entity with a shared corporate identity, consolidated books, overlapping management, and unified operational goals.

The "One KapStone" documents do not stand for what Appellants use them to argue.[6] The "One KapStone" program, under which KapStone Paper implemented a policy to "centralize"

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[6] In the hearing on the KapStone Defendants' Motion to Dismiss, the trial court reached the same conclusion:

> Okay. Let me stop you just for a minute. . . . We're using the word integration in a legal sense in this courtroom today. You're citing this Deloitte [One KapStone] study to integrate the company back in 2017. Is it your position that the way they used integrate is the same we're talking about today because when I look at these, I mean to be frank I haven't looked at this yet.
>
> But as I'm looking at it now for example on like Bates label Kapstone 003543 . . . . they're talking about a different type of integration tha[n] like the legal sense that we're talking about today. They're talking about they need to integrate the mill and container systems to get them on the same page.
>
> I don't know that they are contemplating integrating the corporate status through this Deloitte company. So correct me if I'm wrong I guess that's just where I'm just looking at this and I'm like I don't

(make more uniform) the operations of KapStone entities in the "Mill Division" and "Container Division" is further evidence of pre-existing integration within the KapStone corporate family. In addition to various other KapStone-wide policies (*see* Section II.b.5), the "One KapStone" program is evidence that the KapStone entities maintained shared books and accounting records, had overlapping management, had a shared corporate identity, and were collectively and interdependently engaged in the paper business with one another.

Out of over three-hundred pages of "One KapStone" documents that demonstrate pre-existing integration, Appellants selectively cite and quote language from only six pages that they believe supports their position. *See* App. Br. 37-39. A review of all of the "One KapStone" documents in the record, as instructed by the Supreme Court in *Poch*, shows that these documents actually support a finding of integration.

The "One KapStone" program was first developed in April 2016, prior to the incident at issue, and was initiated in order to reduce unnecessary costs (identified as an "EBITDA gap" realized in KapStone's joint books and records) resulting from inconsistent operational "systems" between the Mill and Container Divisions. *See* KAPSTONE-3483-3531, at 3512, 3518. The genesis of the program – that "KapStone" identified "a $150M EBITDA gap" that could be remedied by greater operational consistencies among the Mill and Container Divisions – arose from the fact that KapStone Paper's accounting services team maintained complex consolidated books for all of the "KapStone" entities that showed profits and losses, production, materials use, sales, and various other relevant data across all KapStone entities. *See* KAPSTONE-003543. This

> think they're using integration the same way that we are sort of using the word integrate.

Trans. of Record, 71:24 – 72:23.

is how KapStone Paper identified the "EBITDA gap" in the first place and diagnosed the operational inconsistencies KapStone Paper believe that caused it. If the KapStone entities had maintained separate books and accounting records, the "EBITDA gap" would not exist, and its cause would not have been identifiable. As such, the fact that KapStone identified the losses and their cause is evidence of preexisting consolidated books and records.

The "One KapStone" documents themselves provide an example of the shared "KapStone" corporate identity. *See, e.g.*, KAPSTONE-0003742-3775, 3536-3572. The presentations Appellants' cite consistently utilized the KapStone trademark and a collective singular reference to the "Company" as one entity: "Becoming a More Integrated Company" (KAPSTONE-003741), "KapStone today – How are we doing?" (KAPSTONE-003742), "Our Principles in action" (*Id.*), "We take care of our partners" (KAPSTONE-003743), "We do business the right way" (*Id.*), "We treat our customers and employees like a small, family-oriented company" (KAPSTONE-003744), "Our vision: becoming the safest company in the paper and packaging industry" (KAPSTONE-003748). These documents illustrate that the KapStone entities already considered themselves a single company in terms of corporate identity and function. They held themselves out to their customers as a single company, and they held themselves out to their employees as a single company.

The nature of the "One KapStone" program – that the KapStone entities would collectively engage in efforts to develop greater operational consistency under the leadership of KapStone Paper, all aimed at the goal of saving money for "KapStone" as a whole – illustrates pre-existing integration in terms of finances, operations, and management. Shared financial interests and overlapping management is the only explanation for how KapStone Paper could implement a policy that would directly affect the operations of other KapStone entities without question or

pushback from the affected entities. "One KapStone" could arise only because the KapStone entities were already financially, operationally, and managerially integrated.

Importantly, review of the "One KapStone" documents shows that these companies operated with a unified goal, under unified and identical leadership and officers that could make this decision on behalf of all of the entities without violating any fiduciary duties because all of the entities had identical interests. There was no internal conflict regarding the "One KapStone" program, because these companies were already integrated in terms of goals.

The "One KapStone" documents also demonstrate that the KapStone entities considered themselves to function as a single company by taking collective ownership of data from across the KapStone corporate family as representative of the whole:

KapStone Today

U.S. manufacturer operating in global markets

Founded in 2005

- ~ $3 billion in annual sales
- ~ 2.7 million tons of paper
- ~ 13.5 billion square feet of corrugated products
- ~ 5th largest producer of containerboard and largest producer of Kraft paper in North America

Leading producer of:

Containerboard
Unbleached kraft paper
Specialty paper products
Corrugated packaging products

Our company:

4 paper mills: 11 paper machines
24 converting plants
65-plus distribution centers (Victory)
6,000 employees (including Victory)

KAPSTONE

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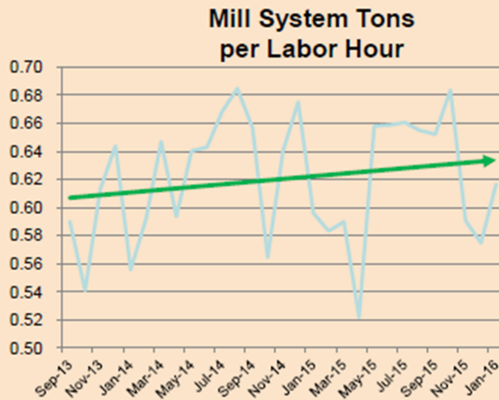
KAPSTONE-003757

17

See KAPSTONE-003757.

We are making progress…

Productivity gains in our mills



We are becoming more productive

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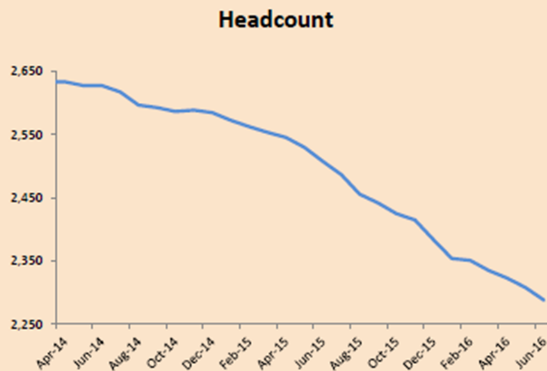
KAPSTONE-003758 18

See KAPSTONE-003758.

We are making progress…

Reducing labor costs in our mill system



Headcount reductions adjusted for current market conditions.

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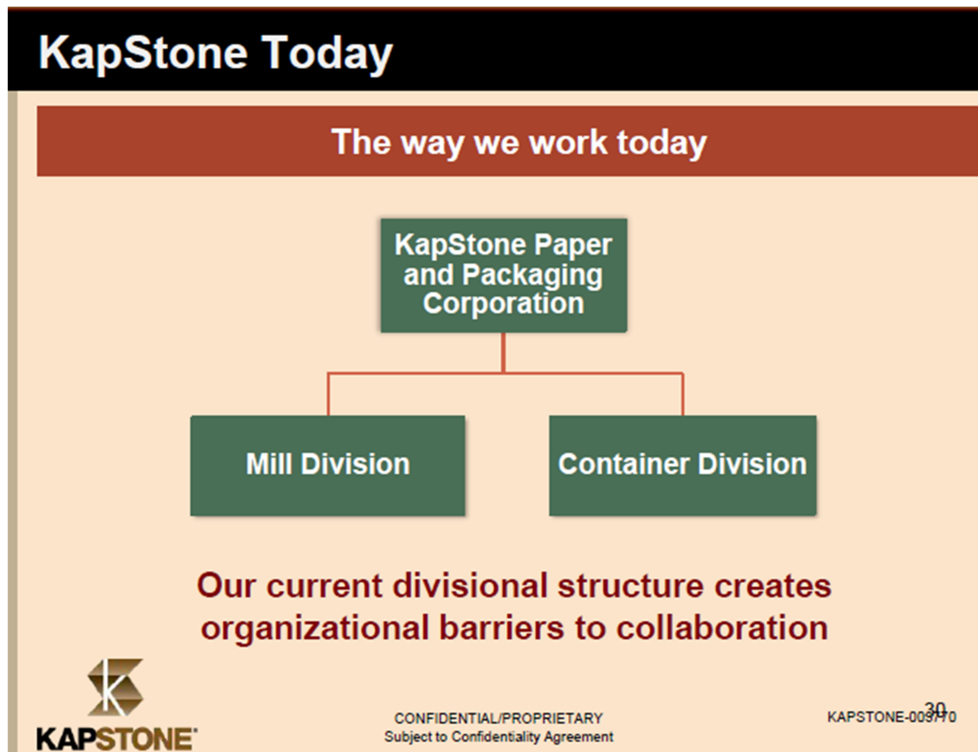
KAPSTONE-003759 19

See KAPSTONE-003759.



See KAPSTONE-003770.

The "One KapStone" documents do not support Appellants' argument. The program arose from pre-existing financial, managerial, and operational integration and could be implemented only as a result of such integration. "One KapStone" focused on eliminating costly operational redundancies and inconsistencies between the KapStone mill and container entities' interdependent systems. The *Poch* test does not inquire into the operational efficiency of entities, or whether they could reduce the costs of their symbiotic operations – it simply asks whether the entities are integrated. Here, the KapStone companies were integrated – the "One KapStone" program is irrefutable evidence of this integration.

Even if the Court does consider operational inefficiencies to be relevant to this *Poch* inquiry, a preponderance of the evidence in the "One KapStone" documents still shows that KapStone Paper and its subsidiaries were integrated in terms of a shared corporate identity, shared

management, engaging in the same business activities, and the maintenance of shared books and records.

<u>**Conclusion**</u>

The law as stated by the Supreme Court in *Poch* is clear: a court must resolve "any doubt" in favor of including parties within the scope of the Workers' Compensation Act; in making such a determination, the court must consider the entire record through the lens of each of the eight *Poch* factors. Appellants' arguments to the contrary, that a *Poch* inquiry is a form of discouraged "veil piercing," or that certain *Poch* factors should be excluded or given more weight during analysis are without support and, in fact, are directly contradicted by the *Poch* opinion.

The trial court correctly applied the *Poch* test pursuant to the Supreme Court and reached the only factually supportable conclusion based on the preponderance of the evidence: that the KapStone entities were so integrated as to function as a single entity for purposes of workers' compensation. This conclusion may be reached under a one-to-one analysis of each KapStone Defendant to KapStone Charleston, or by considering the integration of the KapStone entities under an operational analysis. As such, the trial court's order should be affirmed.

[Signature block on the following page.]

Respectfully submitted,

BOWMAN AND BROOKE LLP

By: *s/ Richard H. Willis*

Richard H. Willis
S.C. Bar No. 6159
Richard.Willis@bowmanandbrooke.com
Derek D. Tarver
S.C. Bar No. 103289
Derek.Tarver@bowmanandbrooke.com
1441 Main Street, Suite 1200
Columbia, SC 29201
Tel.: 803-726-7420
Fax: 803-726-7421

Attorneys for Respondents KapStone Paper and Packaging Corporation and KapStone Kraft Paper Corporation

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