

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

CIVIL ACTION NO: 2020-CP-21-02831

Candace Dowell, Individually and as the PR of
the Estate of Roger Alan Dowell,

RECEIVED

Aug 19 2021

SC Court of Appeals

Plaintiff,

**[PROPOSED] ORDER DISMISSING
PLAINTIFF'S COMPLAINT AS TO
BENTON CONCRETE & UTILITIES, LLC**

v.

Putzmeister America, Inc.; Concrete &
Materials Placement, LLC; R.E. Goodson
Construction Co., Inc; Mead & Hunt, Inc.;
Benton Concrete & Utilities, LLC; and
Thomas Concrete, Inc.,

Defendants.

This matter came before the Court on June 16, 2021, for a hearing on Defendant Benton Concrete & Utilities, LLC's ("Benton Concrete") Motion to Dismiss. Benton Concrete asserts that the Court lacks subject matter jurisdiction because it was the Decedent's statutory employer and, therefore, the claims against it are barred by the workers' compensation exclusivity doctrine. Ray Moore appeared on behalf of Benton Concrete. Nina Fields Britt and Caleb Hodge appeared for the Plaintiff. Andrew Lindemann and Geov Hanna appeared for Defendants R.E. Goodson and Putzmeister America, Inc., respectively. After considering the arguments of counsel, the memoranda and exhibits filed by both Plaintiff and Defendant Benton Concrete, as well as the applicable law, the Court hereby **GRANTS** Benton Concrete's Motion and the Complaint against Benton Concrete is hereby **DISMISSED**.

FACTUAL BACKGROUND

This case arises out of a workplace incident that occurred on August 28, 2018, when the decedent, Roger Alan Dowell, was fatally injured while operating a concrete pump truck at a construction site on South Pamplico Highway, near Pamplico, South Carolina. (Compl. ¶ 2).

Prior to filing this matter, Plaintiff brought a workers' compensation claim in North Carolina arising out of the incident and obtained benefits there.¹ Plaintiff then filed this matter alleging general negligence, survival, and wrongful death causes of action against all Defendants, including R.E. Goodson Construction Co., Inc., the general contractor for the project; Thomas Concrete, Inc., the supplier of the concrete and mixing truck; and Concrete & Materials Placement, LLC ("CMP"), the entity that supplied the concrete pump truck and the operator on the day of the incident. (Compl. ¶¶ 5, 6, & 9). Plaintiff also alleged product liability theories against Defendant Putzmeister, the manufacturer of the pump truck involved in the incident. (Compl. ¶4).

Benton Concrete timely answered the Complaint and raised issues of subject matter jurisdiction and the workers' compensation exclusivity doctrine. On March 5, 2021, Benton Concrete filed the instant Motion. Prior to the hearing, the parties participated in jurisdictional discovery pursuant to *Bailey v. Owen Elec. Steel Co. of S.C, Inc.*, 301 S.C. 399, 301 S.E.2d 399 (1990). This Motion is now ripe for consideration.

Decedent's fatal injury occurred while he was operating a concrete pump truck. At the time, Decedent was tasked by Benton Concrete with discharging and distributing concrete from a concrete pump truck into a drainage culvert next to the highway. In the process, the pump became plugged and, when Decedent attempted to clear the plug, he was struck by a piece of pipe that became detached from the truck. (Compl. ¶ 3).

Benton Concrete is a concrete construction company based in Conway, South Carolina. (Autry Benton Aff. ¶ 4). Its business is to perform commercial and residential construction projects, including concrete paving, pumping, pouring, stamping, and flatwork services. (Benton

¹ Benton Concrete had obtained workers' compensation insurance through Stonewood Insurance Company that was in effect on the date of the incident.

Aff. ¶ 5). Benton Concrete holds itself out as a “full service” concrete contractor. Prior to the incident, R.E. Goodson, the general contractor for the project, contracted with Benton Concrete to perform concrete construction work for the Highway 51 road-widening project, including part of the culvert where the incident occurred. Under the terms of the contract, Benton Concrete was also required to “procure and furnish all materials, labor, supervision, [and] equipment.”

To complete its work, Benton Concrete subcontracted with Thomas Concrete to supply the concrete and a concrete mixing truck. (Benton Aff. ¶ 8). The mixing truck worked by dispensing concrete through a chute; however, the chute had a limited reach, and in this case, the culvert was located off the highway and down an embankment – out of reach of the mixing truck’s chute. (Compl. ¶ 19). Thus, Benton Concrete was unable to complete its work using only the mix truck.

Benton Concrete needed a concrete pump truck and operator to discharge and distribute the concrete from the mixing truck into the culvert. (Benton Aff. ¶¶ 8 & 9). As alleged in the Complaint, this was a “routine” concrete placement project. (Compl. ¶ 13). Benton Concrete routinely utilized pump trucks to complete its work and would use either its own pump trucks operated by its employees or a subcontractor. Benton Concrete had previously used its own pump trucks on the subject project, but Benton had sold its own pump trucks less than three months before the incident. (Benton Aff. ¶ 14). Therefore, Benton Concrete subcontracted with CMP to provide a pump truck and operator to help discharge and distribute the concrete into the culvert forms. As a result, CMP provided the pump truck and Dowell to serve as the truck’s operator.

A pump truck works by using a long, retractable boom to pump concrete into distant or hard-to-reach places like the subject culvert. (Compl. ¶ 21). Before operating the pump truck, the concrete mix provider must unload concrete from its mixing truck into a hopper attached to the rear of the pump truck. (Compl. ¶ 20). Next, the operator must discharge and distribute the

concrete through the truck's piping system (attached to the pump truck's boom) to a designated location. Here, because of the culvert's location off the highway, Benton Concrete could not have completed its work without the pump truck and operator. Both were necessary for the job.

STANDARD OF REVIEW

The determination of whether a worker is a statutory employee is a jurisdictional question. *Poch v. Bayshore Concrete Prod/SC, Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013). "The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCF, rather than a motion for summary judgment pursuant to Rule 56, SCRCF." *Edens v. Bellini*, 359 S.C. 433, 441, 597 S.E.2d 863, 867 (Ct. App 2004). The question of subject matter jurisdiction is a question of law for the court, not a jury question. *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993) (citation omitted). If the facts which give rise to a jurisdictional issue are in dispute, the court, not a jury, must find the facts. *Id*; see *Ramirez v. May River Roofing, Inc.*, (Ct. App. Adv. Sheet No. 21, Op. No. 5827, June 23, 2021) (stating: "whether an individual is an employee or independent contractor for the purposes of workers' compensation is jurisdictional; therefore [the] court may take its own view of the preponderance of the evidence.") (citations omitted). Affidavits and other evidence outside the pleadings may be considered to support a motion to dismiss based on lack of jurisdiction. See *Baird v. Charleston Cty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). "Any doubts as to a worker's status should be resolved in favor of including him or her under the Workers' Compensation Act." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 218-19, 661 S.E.2d 395, 400 (Ct. App. 2008). Deference in favor of inclusion under the Workers' Compensation Act (the "Act") does not change where, as here, a party's status as a "statutory employee" would bar his tort claims against a statutory employer. See *Olmstead v. Shakespeare*,

354 S.C. 421, 427, 581 S.E.2d 483, 486 (2003) (stating: “This Court has not previously adopted a different standard of review for cases in which the workers' compensation statute is used as a shield to liability under another theory and declines to do so now.”).

ANALYSIS

I. South Carolina law governs the application of the Worker’s Compensation Act’s statutory employer rule and the workers’ compensation exclusivity doctrine.

As an initial matter the Court must determine which state’s law governs. Plaintiff argues that North Carolina law applies because Plaintiff obtained workers’ compensation benefits there. However, South Carolina law applies in this case because (1) South Carolina courts follow the doctrine of *lex loci delicti*, and (2) South Carolina has a significantly stronger interest than North Carolina in the application of the Act’s tort immunity provisions.

A. South Carolina courts apply the doctrine of *lex loci delicti*.

The Supreme Court addressed the application of choice-of-law in *Dillon v. Frazer*, in which the Court held that the doctrine of *lex loci delicti* governs issues involving the workers’ compensation exclusivity doctrine. 383 S.C. 59, 678 S.E.2d 251 (2009). The doctrine of *lex loci delicti* is well established in South Carolina. *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001); *Lister v. Nations Bank of Delaware*, 329 S.C. 133, 143, 494 S.E.2d 449, 454 (Ct. App. 1997); *Algie v. Algie*, 261 S.C. 103, 105, 198 S.E.2d 529, 530 (1973). “[T]he substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred.” *Boone*, 345 S.C. at 13, 546 S.E.2d at 193. For procedural matters, *lex fori*, or “the law of the forum,” is controlling. *Nash v. Tindall Corp.*, 375 S.C. 36, 39, 650 S.E.2d 81, 83 (Ct. App. 2007). Here, the accident occurred in South Carolina and thus South Carolina substantive law governs under *lex loci delicti*. Likewise, Plaintiff filed this case in South Carolina and, therefore, South Carolina procedural law governs as well.

B. South Carolina has a significantly greater interest than North Carolina in the application of the Act's tort immunity provisions.

Beyond application of *lex loci delicti*, South Carolina law should apply in this case because: (1) the accident occurred here (Compl. ¶ 2); (2) Dowell was a South Carolina resident at the time of his accident (Compl. ¶ 1); (3) Plaintiff filed the lawsuit in South Carolina; (4) all relevant parties were organized in South Carolina and/or transacting business here at the time of the injury (Compl. ¶ ¶ 5, 6, 8); (5) by transacting business in South Carolina, all parties subjected themselves and their employees to the laws and protections of this state; (6) both Dowell's employer and Benton Concrete carried workers' compensation insurance in South Carolina at the time of the injury and, therefore, Plaintiff could have pursued workers' compensation benefits here; (7) the contracts for the work associated with Dowell's accident were entered into in South Carolina and pertained to work to be performed here; and (8) Plaintiff did not plead application of foreign law.

Plaintiff argues that *Braxton v. Anco Elec, Inc.*, a North Carolina decision, controls. There, the court held that a North Carolina-resident injured in Virginia was entitled to protections afforded by North Carolina's workers' compensation law because "[the plaintiff's] temporary presence in Virginia...does not strip him of the rights he otherwise enjoys under the North Carolina's workers' compensation statute...." 330 N.C. 124, 127, 409 S.E.2d 914, 916 (1991). However, here, Dowell was a resident of South Carolina, he maintained a South Carolina driver's license, the injury occurred in South Carolina, and the relevant parties and the project were in South Carolina.

Further, Dowell's direct employer and Benton Concrete provided workers' compensation insurance to their employees in South Carolina. Plaintiff had the choice of whether to pursue workers' compensation in South Carolina or North Carolina and, therefore, this Court should not allow Plaintiff to avoid South Carolina's workers' compensation exclusivity provisions by filing a workers' compensation claim in another state. *Cf. Eades v. United States*, No. 97-2510, 1999

WL 25549 at *3 (4th Cir. 1999) (analyzing *Braxton* and holding that the location where a worker received workers' compensation benefits does not control the choice-of-law analysis, particularly when the employee had the choice of pursuing workers' compensation in different states).

All relevant contracts for the work performed were entered into in South Carolina and encompassed work to be performed in here. Prior to working for CMP, Dowell lived in Greenville, which was his place of residence when he applied with CMP, and his driver's license listed Murrell's Inlet as his residence at the time of the incident. Second, the general contract involving the South Carolina Department of Transportation, Florence County, and R.E. Goodson, all of whom are South Carolina-based entities, agencies, or municipalities, was for work to be performed solely in South Carolina. Likewise, the subcontract between R.E. Goodson and Benton Concrete, both South Carolina entities, encompassed work to be performed in South Carolina, and so did the agreement between Benton Concrete and CMP. All relevant parties were either organized and/or transacting business in South Carolina at the time of the incident.²

Finally, the Court notes that the Plaintiff did not plead application of North Carolina law and, therefore, it would be improper to apply foreign law at this stage. *See* S.C. Code § 19-3-170 ("No foreign law shall be received in evidence nor shall any court take judicial notice of any foreign law unless such . . . shall have been appropriately pleaded . . ."). Here, Plaintiff has not pled application of North Carolina law and thus, for this additional reason, the Court finds application of South Carolina law is proper.

² *See also Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997) (applying South Carolina law, despite the plaintiff being a Texas resident who was injured in Washington, when the case was filed in South Carolina and the putative employers were South Carolina entities).

II. The statutory employer rule and workers' compensation exclusivity doctrine bar tort liability against Benton Concrete.

“The exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury.” *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. at 224, 661 S.E.2d at 403. The exclusivity provision “was enacted to balance the relative ease with which the employee can recover under the Act: the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee.” *Edens v. Bellini*, 359 S.C. at 442, 597 S.E.2d at 868. As a result, “the [Act] provides the exclusive remedy against an employer for an employee’s work-related accident or injury.” *Id.* (emphasis added). The Act reads:

The rights and remedies granted by this title to an employee when he and his employer have accepted the provisions of this title, respectively, to pay and accept compensation on account of personal injury or death by accident, *shall exclude all other rights and remedies of such employee*, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

S.C. Code Ann. § 42-1-540 (emphasis added).

The tort immunity conferred by the exclusivity provision applies to “direct” employers and “statutory” employers. *Edens*, 359 S.C. at 442, 597 S.E.2d at 868. The concept of a “statutory employee” is established by the Act, which provides:

When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as “owner,”³ undertakes to perform or execute any work *which is a part of his trade, business or occupation* and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as “subcontractor”) for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.

³ The Supreme Court has stated that the terms “owner” and “contractor” can be used interchangeably. *Collins v. Charlotte*, 412 S.C. 283, 289, 772 S.E.2d 510, 514 (2015).

S.C. Code Ann. § 42-1-400 (emphasis added). “If a worker is properly classified as a statutory employee, his sole remedy for work-related injuries is to seek relief under the [Act]. He may not maintain a negligence cause of action against his direct employer or his statutory employer.” *Edens*, 359 S.C. at 445, 597 S.E.2d at 869.

The statutory employment doctrine benefits both the injured worker and the statutory employer. As explained by the Supreme Court, the doctrine protects an injured worker by “convert[ing] conceded non-employees into employees for purposes of the [Act]. The rationale is to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment.” *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201, n.1 482 S.E.2d 49, 50 n.1 (1997). “In consequence, both the owner and the contractors whom he engages to do his work, are subjected to the requirements of the Act, and the workers receive double protection.” *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 73, 267 S.E.2d 524, 528 (1980). As a practical result, statutory employers “inevitably absorb the costs of providing protection for the workers.” *Id.* at 74, 267 S.E.2d at 528. Therefore, in return, the Act’s exclusivity provision shields statutory employers from an injured worker’s tort claims.⁴ *Id.*; see also *Glass*, 325 S.C. at 201 n.1, 482 S.E.2d at 50 n.1. Recently, the Court of Appeals reaffirmed this reasoning, explaining:

[T]he undisputed purpose of the [Act] is to protect workers, owners, and businesses by requiring a business covered by the Act to insure its workforce against the cost of industrial accidents. This structure was designed to build the costs of industrial accidents into the cost of goods and services and to ultimately pass those costs to the consumers

Ramirez, (Ct. App. Adv. Sheet No. 21, Op. No. 5827, June 23, 2021) (citations omitted).

⁴ Tort immunity applies to a statutory employer even when the injured employee obtained workers’ compensation benefits from another employer. See e.g., *Parker*, 275 S.C. at 74, 267 S.E.2d at 528.

To qualify as a statutory employee, “workers must be engaged in an activity that ‘is a part of the owner’s trade, business or occupation.’” *Glass*, 325 S.C. at 201, 482 S.E.2d at 50 (citing S.C. Code Ann. § 42–1–400). South Carolina courts apply a three-part “disjunctive” test in determining whether an employee is engaged in an activity that is “part of the owner’s trade, business, or occupation”: (1) Is the activity an important part of the owner’s business or trade; (2) Is the activity a necessary, essential, and integral part of the owner’s business; or (3) Has the activity previously been performed by the owner's employees. *Collins v. Charlotte*, 412 S.C. 283, 289, 772 S.E.2d 510, 514 (2015); *Ost v. Integrated Prod., Inc.*, 296 S.C. 241, 243, 371 S.E.2d 796, 797 (1988); *Keene v. CNA Holdings, LLC*, 426 S.C. 357, 368, 827 S.E.2d 183, 189 (Ct. App. 2019), *reh'g denied* (May 13, 2019), *cert. granted* (Nov. 1, 2019). “If the activity at issue meets even one of these three criteria, the injured employee qualifies as the statutory employee.” *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003). Here, Benton Concrete satisfies each of the three tests and, therefore, Plaintiff’s exclusive remedy is under the Act.

A. Dowell qualifies as a statutory employee of Benton Concrete because his work was an “important part” of Benton Concrete’s business.

“The employee is to be excluded or included as a ‘statutory employee’ depending upon whether or not the person is performing or executing a part of the owner's general business.” *Revels v. Hoechst Celanese Corp.*, 301 S.C. 316, 318, 391 S.E.2d 731, 732 (Ct. App. 1990). The “focus thus becomes the nature of the work itself.” *Collins*, 412 S.C. at 291, 772 S.E.2d at 515. Benton Concrete is in the concrete business. Discharging and distributing concrete is an essential element of its work. At the time of the incident, Benton Concrete was contractually responsible for completing this concrete construction as part of the Highway 51 widening project and was required to procure and furnish all materials, labor, and equipment necessary to complete construction. Dowell was injured while actively participating in an essential part of Benton

Concrete's business – pouring and distributing concrete. Based on the location of the culvert, Benton Concrete could not complete its work without the use of the pump truck and an operator to discharge and distribute the concrete into the culvert. Therefore, Dowell's work as a pump truck operator was an important part of Benton Concrete's business.

In an analogous case, *Poch v. Bayshore Concrete Prod./S.C., Inc.*, the Supreme Court held that a concrete molding company was the statutory employer of two workers who were injured while dismantling concrete casting beds. 405 S.C. 359, 747 S.E.2d 757 (2013). Bayshore SC claimed that it was the statutory employer of the temporary employees, and the Supreme Court agreed, stating: "We find Bayshore SC qualifies as a statutory employer under one, if not all three of [the statutory employment] tests." *Id.* at 368, 747 S.E.2d at 762. Regarding the first test, the Court held that "the work being performed by [the temporary employees] was an important part of Bayshore SC's business activities." *Id.* The workers had been injured while attempting to dismantle a concrete casting bed. When Bayshore SC was making concrete molds for the project, its employees would routinely dismantle the casting beds to fit various size specifications. *Id.* at 364, 747 S.E.2d at 760. Without the ability to dismantle the beds, Bayshore SC would have been unable to change the form size of the concrete molds to meet the customers' needs and, therefore, would have been unable to complete its work. *Id.* at 368–69, 747 S.E.2d at 762. The Court determined that the first test was satisfied because the work performed by the temporary workers – dismantling casting beds – was an important part of Bayshore SC's business.

This reasoning is further supported by *Harrell v. Pineland Plantation*, 337 S.C. 313, 523 S.E.2d 766 (1999). There, the Supreme Court held that a putative employer satisfied the statutory employment tests even though its own employees had *never* engaged in the same work (maintaining a plantation) that injured the plaintiff. *Id.* The Court's decision in *Harrell*

demonstrates that Benton Concrete does not have to be actively pumping concrete with its employees to qualify as a statutory employer. The *Harrell* Court explained:

Focusing on the responsibilities Folk had in relation to Pineland, both the “important part of the trade or business” test and the “necessary, essential, and integral part of the business” test are met. Folk maintained every aspect of the daily operations of the plantation. *Without the work of Folk and Harrell, Pineland would have had to hire direct employees to complete those duties.* Their relationship is exactly the type that the statutory employer theory is meant to cover.

Id. at 325, 523 S.E.2d at 772 (emphasis added). In this case, just like in *Harrell*, the work performed by Dowell is so important and necessary to Benton Concrete’s work that, without Dowell, Benton Concrete would have to hire direct employees to complete the pump truck duties or subcontract with another company.

Likewise, here, discharging and distributing concrete into hard-to-reach places like the culvert is an important part of Benton Concrete’s business and important to its fulfillment of the Highway 51 project. Dowell was injured during a “routine concrete placement” project where the concrete mixing truck’s chute, alone, could not distribute the concrete for construction. (Compl. ¶¶ 13, 19). A pump truck and operator were needed, which Benton Concrete routinely utilized to complete its work. Dowell was injured while participating in an important part of Benton Concrete’s work – discharging and distributing concrete. Without a pump truck and operator, Benton Concrete could not complete its work and would fail to satisfy its contractual obligations.

In another analogous case, *Johnson v. Jackson*, the Court of Appeals held that a temporary worker tasked with loading/unloading goods from a truck was a statutory employee of a transportation company. 401 S.C. 152, 735 S.E.2d 664 (Ct. App. 2012). There, the employer was in the transportation business and, for large jobs, hired temporary workers to assist its drivers. *Id.* at 156, 735 S.E.2d at 666. The plaintiff, a temporary worker, was injured when he was hit by a car while helping load goods onto truck. *Id.* at 157, 735 S.E.2d at 666. The court held that loading

goods was an important part of the transportation business because, without employees loading/unloading trucks for delivery, “Tantara’s financial profitability and customer base would undoubtedly diminish.” *Id* at 163, 735 S.E.2d at 669. Likewise, in this case, Benton Concrete’s financial profitability and customer base would undoubtedly diminish if it could not unload and distribute concrete to complete construction in areas like the culvert.

B. Dowell qualifies as a statutory employee of Benton Concrete because his work was a “necessary, essential, and integral part” of Benton Concrete’s business.

Plaintiff’s Complaint confirms the necessity of Dowell’s work as a pump truck operator. First, Plaintiff admits that Thomas Concrete’s mixing truck “was necessary for the Project,” and Plaintiff further acknowledges that because of the culvert’s location, “the concrete mix could not simply be discharged from Thomas Concrete’s mix truck.” In order to transmit the concrete from the mixing truck to the culvert site, the pump truck and the operator were a necessity.

In *Revels v. Hoechst Celanese Corp.*, the Court of Appeals held that a temporary worker charged with monitoring chemicals being pumped into a tanker-truck was a statutory employee of Celanese. 301 S.C. 316, 391 S.E.2d 731 (Ct. App. 1990). The court first acknowledged that distribution of chemicals “necessarily” involves their transportation. *Id.* at 318, 391 S.E.2d at 732. However, before they can be transported, “the chemicals must first be pumped or loaded into tankers.” *Id.* As a result, the court “[had] no difficulty in deciding that [the plaintiff] was Celanese’ ‘statutory employee’ when he was injured. The work then being performed, *i.e.*, checking the levels of the chemicals being loaded into the tanker, was a part of Celanese’ general business.” *Id.* Similarly, here, Dowell was injured while attempting to distribute concrete from the pump truck into the culvert. Before the concrete can be formed or finished, a pump operator must distribute the concrete into the concrete forms. It is a necessary, essential, and integral step in the operation.

In another similar case, *Jones v. SSA Cooper*, the United States District Court held that a statutory employment relationship existed where the employee’s activities were so important and essential that, without them, the employer’s operations “would grind to a halt.” No. CV 2:08-3824, 2010 WL 11643510, at *5 (D.S.C. Feb. 4, 2010). In *Jones*, the statutory employer, SSA Cooper, was a stevedoring company in the business of “loading and unloading ships as well as the stripping and stuffing of containers and flat racks for shipment.” *Id.* at *1. When performing its business, SSA Cooper used vehicles known as “yard dogs,” a type of truck that was created for inter-terminal shipping operations to expedite the loading and unloading of cargo. *Id.* SSA Cooper subcontracted with Terminal Services to supply the yard dogs for use in the shipping yard. *Id.* Whenever SSA Cooper needed to service a ship, SSA Cooper retained a longshoreman who would then use the yard dog to complete the assigned task. *Id.* The plaintiff in *Jones* was the lead operations supervisor for Terminal Services. *Id.* at *2. On the date of the incident, SSA Cooper assigned a longshoreman to obtain a yard dog from Terminal Services. *Id.* As the longshoreman was removing the yard dog from the yard, he accidentally ran over the plaintiff, injuring him. *Id.*

The court held that both the first and second elements of the statutory employment test were satisfied. First, the use of yard dogs was common in the industry and necessary to complete the type of work performed by SSA Cooper. The plaintiff’s job responsibility – the provision and maintenance of equipment – was “certainly ‘important’ and ‘essential’ to SSA Cooper’s stevedoring operations.” *Id.* at *3. Similarly, in this case, the Plaintiff’s Complaint admits that the concrete mixing truck was a “necessity” for the project and that, because of the location of the culvert, “the concrete mix could not simply be discharged from Thomas Concrete’s mix truck at the Pamplico Site.” (Compl. ¶¶ 17, 19). For this “routine concrete placement” project, a pump truck and operator were a necessity. (Compl. ¶ 13; Benton Aff. ¶ 8).

Further, Dowell's work was not insignificant or incidental. In *Jones*, the court emphasized that the plaintiff was not simply a "vendor" who delivered equipment to a job site, stating that the plaintiff was involved in "'something more' than the simple delivery of yard dogs to SSA Cooper." *Id.* at *4. The court further held that the plaintiff's work was so substantial that, without operating yard dogs, SSA Cooper's operations "would grind to a halt." *Id.* at *5.

Likewise, here, Dowell was involved in much more than simply delivering a pump truck. The pump truck was a tool and Dowell its operator. His job was to discharge and distribute concrete to the culvert location. If the concrete does not get to the culvert, the work could not be completed. Dowell worked at the direction of Benton Concrete's foreman, who told him where to operate the truck and discharge the concrete, and alongside Benton Concrete's employees, who "would spread, level, and smooth the concrete mix after it was pumped to ensure that the concrete was properly formed and hardened into drainage structures." (Compl. ¶ 21). Like SSA Cooper's business in *Jones*, without the pump truck and the operator in this case, Benton Concrete's work "would grind to a halt." Therefore, the first and second statutory employment tests are satisfied because Dowell's work was an important and necessary part of Benton Concrete's business.

C. Dowell qualifies as a statutory employee of Benton Concrete because Benton Concrete's direct employees had previously performed the same type of work that Dowell was performing at the time of the incident.

Benton Concrete had previously used its own pump trucks and employees to pour and discharge concrete, which was the same type of work being performed by Dowell when the accident occurred. For this reason, the third statutory employment test is satisfied.

Prior to the incident, Benton Concrete owned pump trucks that were operated by its employees. (Benton Aff. ¶ 14). Benton Concrete sold its last pump truck on or about June 6, 2018 – less than three months before Dowell's accident. However, prior to its sale, a Benton Concrete employee operated the pump truck between June 8, 2017 and April 5, 2018. In fact, on

several occasions a Benton Concrete operator used its pump truck for *the same project* on which Dowell's injury occurred. Prior to that, another employee operated the pump truck between April 14, 2016 and November 9, 2017, and, before him, yet another employee had operated a pump truck between August 8, 2013 and June 9, 2016.

In *Poch*, supra, the Supreme Court held that the third statutory employment test was satisfied because there was evidence that the work performed by the injured employees was the same type of work previously performed by Bayshore SC's direct employees. 405 S.C. 359, 369, 747 S.E.2d 757, 762 (2013). As that project reached its final stages, Bayshore SC began cleaning up the worksite and dismantling the casting beds. *Id.* at 364, 747 S.E.2d at 760. To complete this work, it hired temporary workers because many of its direct employees had left to seek other employment. *Id.* at 364, 747 S.E.2d at 760. The Court held that the third test was satisfied because "there is evidence that the dismantling of the concrete forms and the worksite cleanup had previously been performed by Bayshore SC employees for several months prior to leasing Poch and Key." *Id.* at 369, 747 S.E.2d at 762.

For purposes of the third test, the facts in *Poch* are parallel to this case for two main reasons. First, just as the temporary workers were working alongside Bayshore SC's direct employees when the accident occurred, Dowell was also working alongside Benton Concrete's employees when his accident occurred. As alleged in the Complaint, had Dowell's accident not occurred first, "after CMP's concrete pump truck [operated by Dowell] placed the concrete mix at the Pamplico Site, a concrete finishing crew from Benton Concrete was to spread, level, and smooth the concrete mix to ensure that it properly formed and hardened into drainage structures." (Compl. ¶ 21). Thus, as in *Poch*, employees here were working together to complete their task when the accident occurred.

Second, just as Bayshore SC’s employees had previously performed the work that injured the plaintiffs, so did Benton Concrete’s employees previously perform the same type of work that injured Dowell. Benton Concrete has a long history of operating company-owned pump trucks as part of its business. On several occasions, Benton Concrete’s employees operated a Benton Concrete pump truck *on the same Highway widening project* where Dowell’s accident occurred. If Benton Concrete did not use its own pump trucks and employees to perform the work, it would contract with subcontractors (like CMP) to provide a pump truck and operator (like Dowell). Therefore, the third statutory employment test is satisfied.

Plaintiff argues that for Benton Concrete to be a statutory employer, Dowell must have been engaged in work that Benton Concrete was capable of and that it “would normally do” at the time of the accident, and because Benton Concrete recently sold its pump trucks, Dowell could not be doing work that it was capable of or “would normally do.” Plaintiff’s argument is unavailing and unsupported by the well-developed law in this state. First, a plain reading of the third statutory employment test highlights the problem with Plaintiff’s argument. Under the test: “The activity is considered ‘part of the owner’s trade, business, or occupation’ for purposes of the statute if it ... (3) has *previously* been performed by the owner’s employees.” See *e.g.*, *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003)(emphasis added). The word “previously” speaks for itself.⁵ A plain reading of this test does not require Benton Concrete to be actively performing concrete pump truck work at the time of Dowell’s accident. Rather, Benton Concrete has satisfied the plain reading of this test because it previously performed the same work with its employees.

In a similar vein, Plaintiff argues that the sale of Benton Concrete’s pump trucks “should serve as dispositive proof that operating pump trucks is not an ‘important part of’ Benton’s

⁵ Benton sold its last pump truck 16 months after entering the Subcontract. (Reply Aff. ¶ 6).

business.” (Pltf. Memo. p. 17). However, again, Plaintiff’s argument is unavailing because, as established in *Harrell, supra*, a statutory employer does not have to be actively engaged in the same type of work that injured the putative employee. This reasoning is sound because, as explained in *Harrell*, if courts were to focus on the specific activity of the employee at the time of the injury rather than the “nature” of the employer’s work, “employees of a subcontractor would constantly move in and out of workers' compensation coverage throughout the workday based on the type of work they were engaged in at that very moment.” *Harrell*, 337 S.C. at 324, 523 S.E.2d at 771. Benton Concrete does not have to own and operate pump trucks for Dowell’s work to meet the criteria of the three-part statutory employment test. Plaintiff argues that because Benton Concrete “divested” itself of its concrete pump trucks, it no longer has the benefit of the exclusivity provision. However, a ruling that employees are no longer covered by the Act when their work is subcontracted would erode the very purpose of the statutory employment rule that provides protection for workers who are an important or necessary part of the business, but who are no longer direct employees. Such a result would encourage businesses to divest themselves of workers to avoid application of the Act and its related costs. A ruling that “divested” employees are not protected by the Act would contravene the Act’s policy as explained by the Supreme Court in *Parker, supra*, and by the Court of Appeals recently in *Ramirez, supra*.

CONCLUSION

For the foregoing reasons, Dowell’s exclusive remedy against Benton Concrete lies in the Workers’ Compensation Act and Plaintiff’s claims against Benton Concrete are hereby **DISMISSED**.

Electronic signature to follow

Judge Michael G. Nettles



Florence Common Pleas

Case Caption: Candace Dowell , plaintiff, et al VS Putzmeister America Inc ,
defendant, et al
Case Number: 2020CP2102831
Type: Order/Dismissal

So Ordered

s/ The Honorable Michael G. Nettles #2140