

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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Case No. 2020-CP-21-02831  
Appellate Case No. 2021-000899

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Candace Dowell, individually and as the PR of the Estate of Roger Alan Dowell,  
Appellant,

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,

of which Benton Concrete & Utilities, LLC is the Respondent.

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REPLY IN SUPPORT OF APPELLANT'S MOTION FOR REMAND  
OR, ALTERNATIVELY, FOR LEAVE TO ALLOW THE LOWER COURT TO DECIDE  
PLAINTIFF-APPELLANT'S PENDING RULE 60(b) MOTION

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Appellant has moved to remand this action so that the lower court may decide Appellant's Rule 60(b) motion that was pending at the time Appellant filed her notice of appeal. Respondent's return argues that the Court should not remand this action because Appellant's Rule 60(b) motion is improper. Respondent is wrong.

First, Respondent's argument is premature. "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004). And this Court's role is limited to determining whether the trial court abused its discretion in deciding a Rule 60(b) motion. *See id.* Here, Judge Nettles has

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yet to hear, let alone decide, Appellant's Rule 60(b) motion.<sup>1</sup> Once Judge Nettles decides the Rule 60(b) motion, Respondent may petition this Court for review if it believes Judge Nettles abused his discretion. *See Perry v. Heirs at L. of Gadsden*, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003).

Second, Respondent misunderstands Appellant's Rule 60(b) motion. Appellant is seeking to remand this action so that Judge Nettles may consider the impact of the South Carolina Supreme Court's recent ruling in *Keene v. CNA Holdings, LLC*, No. 2019-000816, 2021 WL 3521085 (S.C. Aug. 11, 2021) that business managers' legitimate business decisions define the scope of their company's trade, business, and occupation in determining whether an injured worker is a statutory employee. As Respondent correctly points out, *Keene* is not technically new law. Rather, it is newly-issued guidance on how to apply old principles in determining whether contracted-out work is part of a company's trade, business, or occupation. *See id.* at \*6 ("[T]oday we refocus on the key question posed by the statute.") ("[W]hat is or is not 'part of' the owner's business is a question of business judgment, not law."). Given this recent guidance from our Supreme Court, it would be inequitable for Judge Nettles' underlying order to prospectively apply to the parties in this case. This is especially so considering that Appellant, consistent with what *Keene* clearly illustrates is the law, repeatedly argued to the lower court that Respondent's legitimate business decisions defined the scope of its trade, business, and occupation. *See CMH Aff.*, Ex. 1 at 5-6.

Rule 60(b)(5) of the South Carolina Rules of Civil Procedure provides that a lower court may relieve a party from a final judgment if "it is no longer equitable that the judgment should

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<sup>1</sup>Judge Nettles was in fact willing to hold a hearing on Appellant's pending Rule 60(b) motion, but the hearing could not be scheduled until the deadline for filing this appeal would have already passed. *See CMH Aff.* ¶ 9.

have prospective application.” Here, Judge Nettles’ dismissal order, which is the subject of Appellant’s Rule 60(b) motion, found that a business may still be a statutory employer even when it has made the legitimate business decision to divest itself of the contracted-out business at issue. *See* CMH Aff., Ex. 1, at 4 (quoting the lower court’s order). Because this a multi-defendant case, Judge Nettles’ order could become the law of the case and estop Appellant from arguing before the lower court that other defendants, who also have raised a statutory employer defense, are not statutory employers because they previously divested their concrete pumping operations. *See Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 572, 776 S.E.2d 397, 403 (Ct. App. 2015) (“[A] decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation” (quotation omitted)); *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 556, 684 S.E.2d 779, 783 (Ct. App. 2009) (stating that “collateral estoppel prevents the relitigation of issues”). Alternatively, under the newly-issued guidance in *Keene*, Judge Nettles could potentially rule that another defendant in this case (other than Respondent) is not a statutory employer because it divested itself of its concrete pumping business, thereby creating inconsistent rulings and unnecessary judicial inefficiency in this litigation. Therefore, Judge Nettles’ underlying order is an order with prospective application, and it would be inequitable to let the order stand. *See Kirksey v. City of Jackson*, 714 F.2d 42, 43 (5th Cir. 1983) (indicating that an order of dismissal may have prospective application under some circumstances). Accordingly, Appellant’s pending Rule 60(b) motion is proper.

In sum, given the newly-issued guidance in *Keene*, and its direct application to the arguments Appellant raised before the lower court, the easiest, quickest, and most efficient action would be for this Court to remand this proceeding back to the lower court for reconsideration of

whether Respondent was a statutory employer under the standards outlined by the Supreme Court of South Carolina in *Keene*.

Respectfully submitted,

*s/ Nina Fields Britt*

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Thomas Concrete, Inc., Defendants,

of which Benton Concrete & Utilities, LLC is the Respondent.

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PROOF OF SERVICE

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The undersigned hereby certifies that on September 10, 2021, the foregoing reply was served on all counsel of record in this action by mailing a copy of the reply by United States Mail, postage prepaid, and electronic mail to the following addresses:

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