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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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

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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STATEMENT OF ISSUES ON APPEAL

1. Whether under South Carolina law, the lower court erred in finding Roger Alan Dowell was a statutory employee of Benton Concrete & Utilities, LLC, when Benton made the legitimate business decision to outsource the work Mr. Dowell was performing when he died?

STATEMENT OF THE CASE

On December 8, 2020, Candace Dowell sued Benton Concrete & Utilities, LLC (“Benton”) and other parties for the wrongful death of her husband at a highway construction site. On February 8, 2021, Benton claimed in its answer that the court lacked subject matter jurisdiction because Benton was the statutory employer of Mrs. Dowell’s deceased husband, and on March 5, 2021, Benton moved to dismiss Mrs. Dowell’s claims against it. On July 23, 2021, the lower court dismissed Mrs. Dowell’s claims against Benton, finding it lacked jurisdiction because Benton was the statutory employer of Mrs. Dowell’s husband. On August 19, 2021, Mrs. Dowell served her notice of appeal.

STANDARD OF REVIEW

The existence of a statutory-employer relationship is a jurisdictional question, and the Court “has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence.” *Keene v. CNA Holdings, LLC*, 426 S.C. 357, 365, 827 S.E.2d 183, 188 (Ct. App. 2019) (quoting *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013)). Jurisdictional questions are questions of law. *Brown v. S.C. Dep’t of Health & Hum. Servs.*, 393 S.C. 11, 16, 709 S.E.2d 701, 704 (Ct. App. 2011). Appellate courts must “review questions of law de novo, with no deference to trial courts.” *Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 840 (2018).

FACTS

This is a tragic, complex case with a single, straightforward issue on appeal. Roger Dowell spent his career operating concrete pump trucks. *See* Compl. ¶ 23; R. _____. On the morning of August 28, 2018, he was horrifically killed while operating one. *Id.* ¶ 2; R. _____. That morning, Mr. Dowell was tasked with using a concrete pump truck to pour concrete into a

drainage culvert at a highway construction project in Florence County, South Carolina (the “Project”). *Id.* ¶¶ 13, 23-24; R. _____. However, as Mr. Dowell tried to pump concrete through his truck, the truck plugged with hardened concrete mix. *Id.* ¶¶ 31-33; R. _____. When Mr. Dowell tried to remove the hardened concrete, a piece of steel pipe, under tremendous pressure from the plugged concrete, violently separated from the concrete pump truck and struck Mr. Dowell in the head, neck, and chest, sending him flying through the air and killing him. *Id.* ¶¶ 34-39; R. _____.

Benton is a company that procures or provides commercial and residential concrete construction services. *See* Benton Aff. ¶ 5; R. _____. Although Benton holds itself out as a “one stop shop” for concrete construction, *see* Benton Reply Aff. ¶ 4; R. _____, pouring concrete generally involves several distinct processes, each typically performed by separate, specialized entities, *see* Buonopane Aff. ¶¶ 5-6; R. _____. For example, some concrete companies specialize in building, forming, and finishing the structures into which concrete is poured. *See id.* ¶¶ 8-10; R. _____. Other concrete companies specialize in supplying raw concrete materials that are mixed at an off-site plant and delivered using a special concrete mix truck. *See id.* ¶¶ 11-12; R. _____. And still other concrete companies specialize in providing and operating concrete pump trucks, which use a long, robotic boom to place concrete into distant locations and require a trained operator. *See id.* ¶¶ 13-14; Compl. ¶ 20; R. _____. Concrete pump trucks are used when concrete cannot be discharged directly from a concrete mix truck into the intended location. *Id.*; R. _____.

Several distinct companies were involved in pouring concrete at the Project where Mr. Dowell died. Compl. ¶¶ 13-14; R. _____. The general contractor for the Project subcontracted with Benton to administer and oversee the Project’s concrete work. Benton Aff. ¶¶ 6-7; R. _____. Benton’s contract with the Project’s general contractor required Benton to procure all labor, materials, and equipment necessary for constructing the drainage culvert on the side of the

highway. Subcontract, at 1; R. _____. At that time, Benton was neither in the business of nor capable of supplying or pumping concrete itself. *See* Benton Aff. ¶¶ 8-9, 14; R. _____. Therefore, Benton subcontracted with a concrete supplier, Thomas Concrete, Inc., and a concrete pumping company, Concrete & Materials Placement, LLC (“CMP”), to perform their respective and distinct functions at the Project. Benton Aff. ¶¶ 8-9; R. _____. Notably, Benton’s contract with the Project’s general contractor required Benton to secure workers’ compensation insurance covering the workers of Benton’s subcontractors. *See* Subcontract, at 5; Benton Reply Mem. at 4, n.1; R. _____.

The Project at issue required a concrete pump truck with a boom because the drainage culvert the parties were building was too far from the highway to simply pour concrete into it. Benton Aff. ¶ 8; R. _____. Benton itself had no concrete pump trucks or trained pump truck operators to use at the Project. *See id.* ¶ 14; Benton Mem. Supp. Mot. Dismiss, at 4; R. _____. Therefore, Benton outsourced the Project’s concrete pumping work to CMP, a specialized concrete pumping company. Benton Aff. ¶ 9; Buonopane Aff. ¶ 14; Compl. ¶ 21; R. _____. CMP then provided Mr. Dowell with a concrete pump truck and directed him to deliver and operate the truck at the Project where Mr. Dowell died. Compl. ¶¶ 23-24; R. _____.

After her husband’s death, Mrs. Dowell received full workers’ compensation benefits from Mr. Dowell’s employer. *See* Workers’ Comp. Award, at 9-10; R. _____. She then filed this lawsuit, alleging in relevant part that Benton negligently administered, coordinated, and oversaw the concrete work for the Project. Compl. ¶¶ 86-91; R. _____. Thereafter, Benton moved to dismiss Mrs. Dowell’s lawsuit, claiming it was immune from suit because it was Mr. Dowell’s statutory employer under South Carolina law. Benton Mot. Dismiss, at 1; R. _____. The parties then conducted limited jurisdictional discovery.

During discovery, Mrs. Dowell learned that, before Mr. Dowell's death, Benton had sold off its concrete pumping business and decided to no longer handle any concrete pumping operations with its own workforce. *See* Benton Resp. to Pl.'s 2d Set of Discovery, Interrog. Ans. Nos. 2-3, 5-6, RFA Resp. Nos. 1-2; R. _____. Although Benton used to own concrete pump trucks and employ trained pump operators, months before it hired CMP to perform the concrete pumping work for the Project, Benton made the legitimate business decision to divest its concrete pumping operations completely. *See* Benton Aff. ¶ 14; Benton Reply Aff. ¶ 7; R. _____. Benton has not owned a concrete pump truck since June 6, 2018, and no Benton employee has operated a concrete pump truck since April 5, 2018. *See* Benton Resp. to Pl.'s 2d Set of Discovery, Interrog. Ans. Nos. 2-3, 5-6, RFA Resp. Nos. 1-2; R. _____. Instead of performing concrete pumping work with its own workforce, since June 2018, Benton has simply outsourced its concrete pumping work to specialized concrete pumping businesses like CMP. *See* Benton Aff. ¶¶ 13-14; R. _____. Furthermore, as demonstrated by the fact that Benton continued to procure workers' compensation insurance covering its subcontractors' workers (like Mr. Dowell), *see, e.g.,* Benton Reply Mem. at 3; Proof of Insurance, at 1; R. ____, Benton's decision to sell its concrete pumping business and outsource pumping work to other companies had nothing to do with avoiding the cost of obtaining workers' compensation insurance, *see* Benton Mem. Supp. Mot. Dismiss, at 15; R. ____ (admitting that Benton sold its pump trucks "[f]or business reasons").

In briefing and oral argument on Benton's motion to dismiss, Appellant's counsel repeatedly argued that under this Court's holding in *Keene v. CNA Holdings, LLC*, 426 S.C. 357, 827 S.E.2d 183 (Ct. App. 2019), Benton was not Mr. Dowell's statutory employer because Benton previously sold its concrete pumping operations, meaning that concrete pumping was no

longer “part of” its business when Mr. Dowell died. *See, e.g.*, Pl.’s Opp’n to Benton’s Mot. Dismiss, at 17-19; Tr. at. 21:18 – 23:12, 27:3-22; R. _____. Benton, however, maintained that it is immune from suit because concrete pumping nonetheless remained important to and necessary for its business and because it previously performed concrete pumping work. *See, e.g.*, Benton Mem. Supp. Mot. Dismiss, at 8-17; Tr. at 11:12-23, 38:10-24; R. _____. In the end, the lower court found that Mr. Dowell was Benton’s statutory employee because concrete pumping was an important, necessary, essential, and integral part of Benton’s business and because Benton had previously performed concrete pumping work with its direct employees. *See Order Granting Benton Mot. Dismiss*, at 8-18 [hereinafter “Order”]; R. _____.

But the story does not end there. On August 11, 2021, just 19 days after the lower court’s ruling, the Supreme Court of South Carolina affirmed this Court’s decision in *Keene*. In so doing, our state’s Supreme Court clarified that the “key” question of the statutory employment analysis is whether the contracted-out work at issue is actually “part of” the contractor’s business. *See Keene v. CNA Holdings, LLC*, ___ S.E.2d ___, 2021 WL 3521085, at *6 (S.C. Aug. 11, 2021). Additionally, just as Appellant’s counsel argued to the lower court, the Supreme Court also clarified that when a company makes the legitimate business decision to outsource a particular type of work within its field, it has, for purposes of the statutory-employment analysis, “defined the scope of [the] company’s business to *not* include that particular work.” *Id.* (emphasis added). Recognizing the direct application of the Supreme Court’s ruling in *Keene* to the facts of this case, Mrs. Dowell filed her notice of appeal on August 19, 2021.

ARGUMENT

The sole issue on appeal is whether concrete pumping was a part of Benton's business when Roger Dowell died. If concrete pumping was a part of Benton's business, then Benton was Mr. Dowell's statutory employer and is immune from suit. However, if concrete pumping was *not* a part of Benton's business, then Benton was not Mr. Dowell's statutory employer and the lower court erred in granting Benton's motion to dismiss.

Months before Mr. Dowell's death, Benton intentionally decided to sell its concrete pumping operations and outsource all future concrete pumping work. With that decision, Benton signified its internal determination that its company's financial and business interests were best served by outsourcing concrete pumping work instead of performing pumping work with its own workforce. Moreover, as discussed below, Benton's decision was not motivated by a desire to avoid the cost of obtaining workers' compensation insurance. Accordingly, at the time Mr. Dowell died, concrete pumping was no longer part of Benton's business, and the lower court therefore erred in granting Benton's motion to dismiss.

A. In determining whether a statutory-employment relationship exists, the critical question is whether or not the contracted-out work at issue is an actual "part of" the putative statutory employer's business.

The statutory employee doctrine provides that for purposes of workers' compensation, upstream contractors are considered the employers of their subcontractor's workers when the subcontractor's workers perform an activity that is part of the contractor's "trade, business, or occupation." S.C. Code Ann. § 42-1-400. Therefore, under South Carolina's Workers' Compensation Law, if an injured worker is a statutory employee of an upstream contractor, the worker cannot maintain a negligence action against the contractor for injuries sustained while performing part of the contractor's business. *See id.*; S.C. Code Ann. § 42-1-540.

Initially, South Carolina developed three tests for determining whether an injured worker qualifies as a contractor's statutory employee. Those three traditional tests asked whether the worker was injured while performing: (1) an activity that is an important part of the owner's business or trade; (2) an activity that is a necessary, essential, and integral part of the owner's business; or (3) an activity that has previously been performed by the owner's employees. *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003). If any test were met, courts would find the injured worker to be a statutory employee. *Id.* At the outset, South Carolina used these tests to apply the statutory employer doctrine "quite broadly." *See Keene v. CNA Holdings, LLC*, ___ S.E.2d ___, 2021 WL 3521085, at *2 (S.C. Aug. 11, 2021).

Over time, however, the scope of the statutory employee doctrine narrowed. *Id.* at *4. This was because South Carolina realized the difficulty of laying down and applying hard rules regarding the statutory employee doctrine, especially given the increased frequency of corporate decision-making regarding the scope of a company's business. *See id.* at *4-5 (collecting cases). Thus, South Carolina's Supreme Court eventually narrowed the application of the statutory employee doctrine by distinguishing between activities that are *important to* or *necessary for* a company's business and activities that are actually *part of* a company's business, with only the latter creating a statutory employment relationship. *See id.* at *5; *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486. This shift in statutory employment law clarified the proper application of the statutory employee doctrine and essentially combined the three traditional tests into a single, determinative analysis of whether the injured worker was performing an activity that is part of the contractor's business. *See Keene v. CNA Holdings, LLC*, 426 S.C. 357, 370, 827 S.E.2d 183, 190 (Ct. App. 2019); *see also Keene*, 2021 WL 3521085, at *4 (recognizing modern statutory

employment law is inconsistent with decisions applying the older, broad interpretation of “trade, business, or occupation”).

In *Keene*, this Court correctly recognized the shift in South Carolina’s statutory employment law. 426 S.C. 357, 827 S.E.2d 183. There, this Court realized the focus of statutory employment law had moved from the traditional, three-part analysis into a singular, guiding analysis of whether or not the activity at issue is part of what the putative statutory employer has established as its business. *See id.* at 369, 827 S.E.2d at 19.¹ Applying this modern understanding of the statutory employee doctrine, this Court found that a manufacturing company that made the business decision to outsource its maintenance and repair work to a sophisticated construction company was not the statutory employer of an injured maintenance worker. *See id.* at 374-76, 827 S.E.2d at 193. In so doing, this Court focused on the business decisions at play, including the nature of the contractor’s and subcontractor’s business and the fact the contractor hired a sophisticated subcontractor to perform specialized work the contractor was incapable of performing at the time. *See id.* at 374-75; 827 S.E.2d at 193. Ultimately, examining the contractor’s and subcontractor’s business, this Court found that even though the injured maintenance worker’s activity was “essential *for*” the contractor’s business, that did not mean that the maintenance worker’s activity was “a *part or process of*” the contractor’s business. *Id.* at 370, 827 S.E.2d at 190-91 (finding the legislative intent underlying S.C. Code Ann. § 42-1-400 “seeks to determine whether the type of work performed by the worker is the same type of work

¹ *See also Keene*, 426 S.C. at 370, 827 S.E.2d at 190-91 (“[T]he logic employed by the court in *Abbott* and *Olmstead* brought new clarity to the abundance of case law on this issue and this logic is binding in the present case.”) (finding the legislative intent underlying S.C. Code Ann. § 42-1-400 “seeks to determine whether the type of work performed by the worker is the same type of work ‘the owner’ *has established as its business . . .*” (emphasis added)).

‘the owner’ *has established as its business . . .*’ (emphasis added)). Thus, the contractor could not be the injured maintenance worker’s statutory employer. *Id.*

The contractor from *Keene* then appealed this Court’s decision to the Supreme Court of South Carolina, which affirmed this Court’s ruling. *Keene*, 2021 WL 3521085, at *7. Analyzing the history of the statutory employee doctrine, the Supreme Court of South Carolina found that this Court correctly determined that, over time, South Carolina’s statutory employer law had developed away from the three traditional tests and towards a focus on business decisions and corporate strategy, effectively collapsing the three traditional tests into a single, “key” question: whether the contracted-out work at issue is part of the contractor’s trade, business, or occupation. *Id.* at *2-6. To that end, the Supreme Court stated:

The question posed by section 42-1-400 today is the same key question we addressed in *Marchbanks*: whether the work contracted out is “part of [the contractor’s] trade, business or occupation. Over time, we developed what we called “tests” for courts and the workers’ compensation commission to use in answering the key question. While each test remains a valid consideration, today we refocus on the key question posed by the statute.

In answering the question posed by section 42-1-400—whether the work contracted out is “part of [the owner’s] trade, business or occupation”—the court should focus initially on what the owner decided is part of its business. Increasingly, business managers are outsourcing work that formerly was handled as a part of the business, and they are doing so to meet the ever-increasing competitive challenges businesses face. **In reality, therefore, what is or is not “part of” the [contractor's] business is a question of business judgment, not law.** If a business manager reasonably believes her workforce is not equipped to handle a certain job, or the financial or other business interests of her company are served by outsourcing the work, and if the decision to do so is not driven by a desire to avoid the cost of insuring workers, then the business manager has legitimately defined the scope of her company’s business to not include that particular work.

Id. at *6 (internal citations omitted and emphasis added).

In essence, in *Keene*, the Supreme Court of South Carolina clarified that under recent South Carolina law, while each remains a consideration, the three traditional tests for statutory

employment have effectively merged into a single, “key” question of whether the contracted work is part of the contractor’s business. *Id.* Thus, an upstream contractor can only be the statutory employer of a subcontractor’s worker if the worker was performing an actual part of the contractor’s business.² *See id.* More importantly, the Supreme Court of South Carolina also clarified that in determining what is or is not part of a contractor’s business, courts must look to the contractor’s deliberate corporate decision-making. *See id.* This is because if an upstream contractor has made the legitimate determination, unmotivated by avoiding the cost of obtaining workers’ compensation insurance, that its business interests are best served by outsourcing a particular type of work, then that type of work is not a part of the contractor’s business. *See id.*

B. The lower court erred in granting Benton’s motion to dismiss because concrete pumping was not a part of Benton’s business when Roger Dowell died.

The Supreme Court’s affirmation of this Court’s decision in *Keene* illustrates the lower court’s error in granting Benton’s motion to dismiss. In finding that Benton was Roger Dowell’s statutory employer, the lower court erroneously focused on the language of the three traditional tests for statutory employment instead of considering the “key” question of S.C. Code Ann. § 42-1-400: whether or not the concrete pumping work Mr. Dowell was performing when he died was actually part of Benton’s business. *See Keene*, 2021 WL 3521085, at *6.

There is no dispute in this case that months before Mr. Dowell’s death, Benton deliberately decided to sell off its concrete pumping operations entirely. *See, e.g.*, Benton Aff. ¶ 14; Benton Reply Aff. ¶ 7; R. _____. There is also no dispute that Benton decided its business interests were best served by outsourcing all of its needed concrete pumping work, including the

² This was the law when the lower court granted Benton’s motion to dismiss. *See Keene*, 2021 WL 3521085, at *1 (stating that the Supreme Court’s decision in *Keene* was “following our more recent decisions on the statutory employee doctrine”).

concrete pumping work for the Project, instead of performing the work with its own workforce. *See, e.g.*, Benton Aff. ¶ 14; Benton Mem. Supp. Mot. Dismiss, at 15; R. ____ (“For business reasons, Benton Concrete sold its last pump truck on or about June 6, 2018 . . .”). Additionally, there is no dispute that Benton’s decision to sell its concrete pumping operations had nothing to do with avoiding the obligation of obtaining workers’ compensation insurance. *See, e.g.*, Benton Reply Mem., at 6; Subcontract, at 5; Coverage Verification, at 2; R. _____. Under South Carolina law, these facts conclusively establish that Benton was not Mr. Dowell’s statutory employer because concrete pumping was not a part of Benton’s business when Mr. Dowell died. *See Keene*, 2021 WL 3521085, at *6 (“If a business manager reasonably believes . . . the financial or other business interests of her company are served by outsourcing the work . . . then the business manager has legitimately defined the scope of her company’s business to not include that particular work.”).

Nevertheless, in granting Benton’s motion to dismiss, the lower court failed to address the recent shift in statutory employment law that this Court recognized in *Keene*. *See* Order, at 8-18; R. _____. Instead, the lower court exclusively focused on the three traditional tests for determining statutory employment, relying on historical precedent that is “confusing, often conflicting, and always difficult . . . to apply.” *See id.*; *Keene*, 2021 WL 3521085, at *1. For instance, the lower court’s order failed to include any meaningful discussion of this Court’s decision in *Keene* or any in-depth analysis of whether concrete pumping was an actual part of Benton’s business when Mr. Dowell died. *See* Order, at 8-18; R. _____. This was despite the fact that Appellant’s counsel repeatedly informed the lower court that it needed to consider Benton’s corporate decision-making and distinguish between activities that are important, necessary, or essential for Benton’s business and activities that are an actual part of it. *See, e.g.*, Pl.’s Opp’n to

Benton's Mot. Dismiss, at 12; R. ____ (citing *Keene*, 426 S.C. at 369, 827 S.E.2d at 190)).³ But the lower court ignored Appellant's arguments, stating only that:

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.

Order at 18; R. _____. However, as demonstrated by the Supreme Court's decision in *Keene*, the lower court's failure to consider Benton's business decisions and truly analyze whether concrete pumping was a part of Benton's established business was in error. *Keene*, 2021 WL 3521085, at *6-7.

When Mr. Dowell died, concrete pumping was clearly not a part of Benton's business operations. At that time, Benton owned no concrete pump trucks, had no employees operating concrete pump trucks, had no employees certified to operate concrete pump trucks, and was itself incapable of performing concrete pumping work. *See* Benton Resp. to Pl.'s 2d Set of Discovery, Interrog. Nos. 2-3, 5-6; Benton Mem. Supp. Mot. Dismiss, at 4-5, 15; R. _____. Therefore, Benton outsourced the Project's concrete pumping work to a sophisticated concrete pumping company

³ *See also, e.g.*, Tr. at at 22:9-23:2; R. ____ ("Well, Your Honor, yes, they did. They had a pump, pump trucks previously but for whatever reason, a business decision presumably, . . . they decided that they no longer wanted to have those and divested themselves of those operations. So the *Keene* case makes clear that you've gotta have, even under those tests, and each one of those tests talks about something being part of the defendant's business. It's just not important to or necessary for, it's actually got to be a part of it. The case law also says that 'there's no easily applied formula for determining whether the work in a particular case meets those three tests and that the three tests don't eliminate the need for an individual determination.' Now, with all of that in mind, the critical issue for the court to consider, in our opinion and under the case law, is whether the work Mr. Dowell was doing when he was injured, and that was operating the concrete pump truck, was something that was part of Benton's business.").

that provided a concrete pump truck and a trained operator (Mr. Dowell) to perform the specialized work Benton needed done. Benton Aff. ¶ 14; Buonopane Aff. ¶¶ 13-14; R. ____.

Moreover, in the years since Mr. Dowell's death, Benton has continued to outsource all of its needed concrete pumping work. See Benton Resp. to Pl.'s 2d Set of Discovery, Interrog. Nos. 2-3, RFA Nos. 1-2: R. ____.

Thus, concrete pumping is still not a part of Benton's business operations.

Under this Court's decision in *Keene* and other governing precedent, Benton's legitimate business decisions establish that, even though concrete pumping may have remained *important to* or *essential for* Benton's business, as of July 2018, concrete pumping itself was no longer *a part of* Benton's business. See *Keene*, 426 S.C. at 370, 827 S.E.2d at 191 (finding the Court bound by precedent to determine what a company has established as its business); see also *Keene*, 2021 WL 3521085, at *1 (following recent decisions on the statutory employee doctrine in finding that courts should defer to a company's business decisions in determining the scope of the company's business).

It does not matter that Benton previously employed pump operators and owned concrete pump trucks. See *Keene*, 2021 WL 3521085, at *6 (noting that the traditional tests for statutory employment are mere "consideration[s]" and recognizing that "[i]ncreasingly, business managers are outsourcing work *that formerly was handled as a part of the business*, and they are doing so to meet the ever-increasing competitive challenges businesses face" (emphasis added)). Rather, in determining the scope of a contractor's business, the contractor's legitimate business decisions govern. *Id.* By deliberately deciding to sell off its concrete pumping operations and outsource its concrete pumping work, Benton "legitimately defined the scope of [its] company's business to not include that particular work." *Keene*, 2021 WL 3521085, at *6. Accordingly, concrete

pumping was not an actual part of Benton's business when Mr. Dowell died, and the lower court therefore erred in finding that Benton was Mr. Dowell's statutory employer. *See id.*

C. The lower court improperly applied South Carolina's statutory employee doctrine.

The lower court erred in rejecting Appellant's arguments regarding the application of the statutory employee doctrine. Appellant's counsel repeatedly argued to the lower court that Benton's decision to divest its concrete pumping operations meant that concrete pumping work was not a part of Benton's business when Roger Dowell died. For example, Appellant's counsel argued in its opposition to Benton's motion to dismiss that:

- Recent cases clarify that a statutory-employment relationship exists only when the activity performed by the injured worker is "part of" the contractor's business and something its own employees "would normally do." *See Keene*, 426 S.C. at 369, 827 S.E.2d at 190 (individuals not doing work the employer "would normally do" are *not* statutory employees) (citing *Harrell*, 337 S.C. at 323, 523 S.E.2d at 771); *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486 (distinguishing between activities important to a business and those that are an important "part of" that business); *Abbott v. The Limited, Inc.*, 338 S.C. 161, 163, 526 S.E.2d 513, 514 (2000) (same). Mr. Dowell was operating a concrete pump truck when he died. Thus, this Court must decide whether the operation of concrete pumping services was "part of" Benton's business and something Benton's own employees "would normally do." Here, the facts show that, at the time of Mr. Dowell's death, concrete pumping services were neither part of Benton's business nor something Benton's employees would normally do. Therefore, Benton was not Mr. Dowell's statutory employer.

Pl.'s Opp'n to Benton's Mot. Dismiss, at 12; R. ___;

- [I]t is critical to distinguish "between an activity that is **important to, or necessary for**, the defendant's operation" and one "that is actually **part of** that operation" because only the latter gives rise to a statutory-employer relationship. *Keene*, 426 S.C. at 373, 827 S.E.2d at 192 (citing *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486); *see also Antoine*, 2020 WL 2214160, at *5 ("[M]ore recent decisions of the South Carolina courts consider . . . whether the activity itself is an *important part of the putative employer's business*.").

Id. at 16; R. ___;

- [P]rior to Mr. Dowell's death, Benton sold all of its concrete pump trucks. Although Benton contends that concrete pumping services are an important part

of its business, at some point before Mr. Dowell's death, Benton apparently determined that its business does not, in fact, depend on its ability to operate its own concrete pump trucks. Benton's actions—taken outside of the litigation context—should serve as dispositive proof that operating pump trucks is not an “important part of” Benton's business.

Id. at 17; R. ____ (citations omitted);

- Benton's memorandum and affidavit assert that because a pump truck and operator were necessary for the project, such services are a necessary part of its business. But simply because Mr. Dowell's skills and services were necessary for Benton to perform its obligations to Goodson does not mean the operation of concrete pump trucks was a necessary or essential “part of” Benton's business.

Id. (citation omitted); R. ____ (citing *Keene*, 426 S.C. at 373, 827 S.E.2d at 192).

The above are just a few examples. In addition, Appellant's counsel argued the following at the hearing on Benton's motion to dismiss:

- Now, in terms of the test that [Benton's counsel] has put up, we don't dispute that those are the tests. I think how we differ is how those tests are to be applied in this case. But I also do think that it is important to note that courts that have recently examined statutory employer relationships [have] clarified that simply showing that an activity is important to or necessary for the defendant[']s operation is not enough under those test[s]. Rather to meet the test[s] a worker must be performing “an activity that is actually part of the defendants operation and that activity [is] an activity that the putative statutory employer would normally do.”

Tr. at 21:18-22:4; R. ____;

- Well, Your Honor, yes, they did. They had a pump, pump trucks previously but for whatever reason, a business decision presumably, . . . they decided that they no longer wanted to have those and divested themselves of those operations. So the *Keene* case makes clear that you've gotta have, even under those tests, and each one of those tests talks about something being part of the defendant's business. It's just not important to or necessary for, it's actually got to be a part of it. The case law also says that “there's no easily applied formula for determining whether the work in a particular case meets those three tests and that the three tests don't eliminate the need for an individual determination.” Now, with all of that in mind, the critical issue for the court to consider, in our opinion and under the case law, is whether the work Mr. Dowell was doing when he was injured, and that was operating the concrete pump truck, was something that was part of Benton's business.

Id. at 22:9-23:2; R. ____;

- But again just going back to what the *Keene* case says, and the *Keene* case is not making any new law on that, the *Keene* case is citing *Olmstead* and *Abbott*, cases that have been decided by our Supreme Court. And just saying to be clear, it's not whether the activity is important to or necessary for the defendant's operation but rather whether it's actually part of that operation. And again, also, from the South Carolina Supreme Court the *Glass* decision, "when work is of the sort which the employer is not equipped to handle with his own workforce it's not part of the business." So here Benton did not own any pump trucks. Didn't have any employees who could operate pump trucks. It had not used its own employees to operate pump trucks in the months prior to selling his last pump truck. It had no employees who had operated a concrete pump truck in the months leading up to Mr. Dowell's death and it had no employees certified to operate a pump truck. To this day, it doesn't, to my knowledge, own any pump trucks and is not capable of performing pump truck services itself.

Id. at 27:3-22; R. ____;

Nevertheless, despite Appellant's arguments, in granting Benton's motion to dismiss, the lower court incorrectly found that Benton was Mr. Dowell's statutory employer because the concrete pumping work Mr. Dowell was performing was *important to* and *necessary for* Benton's work on the Project.⁴ As Appellant's counsel made abundantly clear to the lower court, that is not the law. *See Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486; *Keene*, 426 S.C. at 373, 827 S.E.2d at 192. Rather, for a statutory-employment relationship to exist, the contracted-out work must be an actual, material part of the upstream contractor's business, not just work that is important, essential, or necessary for the completion of the contractor's work. *Id.* Objectively, concrete pumping was not a part of Benton's business when Mr. Dowell died because, for

⁴ *See, e.g.*, Order at 11 (finding Mr. Dowell's work was an important part of Benton's business because Benton could not complete its work on the Project without it), 12 (finding Mr. Dowell's work to be "so important and necessary to" Benton's work on the Project because Benton would have had to hire someone else to perform the work without it), 13 (finding Mr. Dowell's concrete pumping work to be "a necessary, essential, and integral step" in pouring concrete into the culvert), 13 (finding Mr. Dowell's concrete pumping work to be an important part of Benton's business because Benton would be less profitable if it could not "unload and distribute concrete"), 15 (finding that Mr. Dowell's work was a necessary part of Benton's work because concrete pumping was necessary for completing Benton's work on the Project); R. ____.

business reasons, Benton had previously decided to sell its pumping operations and outsource all of its needed concrete pumping work. *Keene*, 2021 WL 3521085, at *6. Therefore, the lower court erred in finding that Mr. Dowell’s concrete pumping work was an important, necessary, essential, and integral part of Benton’s business.

The lower court also erred in finding that Benton was Mr. Dowell’s statutory employer simply because it had previously owned concrete pump trucks and employed concrete pump truck operators. As Appellant argued before the lower court, at the time of Mr. Dowell’s death, Benton “did not, and could not provide concrete pumping services with its own direct employees.” Pl.’s Opp’n to Benton’s Mot. Dismiss, at 21; R. _____. And as the Supreme Court of South Carolina has clarified, in determining statutory employment, it is not dispositive that a contractor once had workers performing the contracted-out work at issue. 2021 WL 3521085, at *6 (“Increasingly, business managers are outsourcing work *that formerly was handled as a part of the business*, and they are doing so to meet the ever-increasing competitive challenges businesses face.” (emphasis added)). Instead, if a contractor legitimately decides to sell off its former operations and outsource a particular type of work, then, for purposes of workers’ compensation, the contractor “has legitimately defined the scope of [its] company’s business to not include that particular work.” *Id.* Therefore, the lower court erred in finding that Benton was Mr. Dowell’s statutory employer simply because “it previously performed the same work with its employees.” Order at 17; R. _____.

In *Keene*, the Supreme Court of South Carolina clarified that under binding statutory employment law, a company’s legitimate business decisions govern the determination of the scope of a company’s business, because “what is or is not ‘part of’ the owner’s business is a question of business judgment, not law.” 2021 WL 3521085, at *6. Thus, to determine what is or

is not part of a company's business, courts must look to what a company has established as part of its business through corporate decision-making. *Id.*; *Keene*, 426 S.C. at 370, 827 S.E.2d at 190-91 (courts must “determine whether the type of work performed by the worker is the same type of work ‘the owner’ *has established as its business . . .*” (emphasis added)). Accordingly, the lower court erred in failing to consider Benton's legitimate business decisions in determining whether the concrete pumping work Mr. Dowell was performing was a part of Benton's business.

D. The policy behind the statutory employee doctrine supports the finding that Benton was not Roger Dowell's statutory employer.

Policy considerations support the finding that Roger Dowell was not Benton's statutory employee. In granting Benton's motion to dismiss, the lower court incorrectly found that “[a] ruling that ‘divested’ employees are not protected by the [statutory employee doctrine] would contravene the [Workers’ Compensation Law’s] policy” Order at 18; R. _____. However, here, Benton divested its entire concrete pumping business, not just a single employee. *See* Benton Aff. ¶ 14; Benton Resp. to Pl.’s 2d Set of Discovery, Interrog. Ans. Nos. 2-3, 5-6, RFA Resp. Nos. 1-2; R. _____. Moreover, as our state's Supreme Court declared, “[t]he applicable public policy . . . is to ensure that workers are covered under the Workers’ Compensation Law.” *Keene*, 2021 WL 3521085, at *6. The statutory employee doctrine is not meant to provide blanket, perpetual immunity to any business that at one point performed the contracted-out work at issue. *See id.* (“[T]he public policy at issue here is not to provide civil immunity to [contractors]”).

As Appellant’s counsel argued below,⁵ the original purpose of the statutory employee doctrine is not served by ignoring a company’s legitimate business decisions and granting them perpetual immunity, especially where, as here, the relevant business decisions have nothing to do with avoiding the costs of workers’ compensation insurance. *Keene*, 2021 WL 3521085, at *7 (noting that the purpose of statutory employee doctrine “has nothing to do with outsourcing work for legitimate business reasons”).

There is no policy reason for protecting Benton from suit. Benton decided to divest its concrete pumping operations, and that decision had nothing to do with avoiding obtaining workers’ compensation insurance. *See, e.g.*, Benton Mem. Supp. Mot. Dismiss, at 15; R. ____ (admitting that Benton sold its pump trucks “[f]or business reasons”). In fact, to its credit, Benton actually had workers’ compensation insurance covering Mr. Dowell’s injuries. *See* Subcontract, at 5; Benton Memo Supp. Mot. Dismiss, at 1, n.1; Benton Reply Mem. at 3, 4, n.1; Proof of Insurance, at 1; R. _____. Yet because Benton outsourced its concrete pumping work to a sophisticated construction company with workers’ compensation insurance, Mr. Dowell’s estate was able to recover full workers’ compensation benefits from his direct employer. *See* Workers’ Comp. Award, at 9-10; R. _____. Thus, the purpose of the statutory employee doctrine was served, and refusing to grant Benton immunity from its wrongful conduct “in no way frustrate[s] the policy of the statutory employee doctrine or the Workers’ Compensation Law.” *See Keene*, 2021 WL 3521085, at *6.

⁵ *See* Pl.’s Opp’n to Benton’s Mot. Dismiss at 24-25; R. ____ (“Affording Benton the protection of the South Carolina Workers’ Compensation Act would eviscerate the Act’s benevolent purpose by allowing Benton to shield itself from liability at the expense of Mr. Dowell, even though Benton deliberately divested itself of the equipment and personnel necessary to perform the functions Dowell was hired to perform.”).

The policy behind the statutory employee doctrine has no bearing on Benton's legitimate business decision to outsource concrete pumping work, particularly where Mr. Dowell's direct employer already provided workers' compensation benefits. *Id.* at *7. Therefore, by ignoring Benton's deliberate business decision to divest its concrete pumping operations, the lower court erred in finding that Mr. Dowell was Benton's statutory employee.

CONCLUSION

For the reasons stated herein, Appellant respectfully requests that this Court reverse the judgment of the lower court. Alternatively, Appellant requests that the Court vacate the lower's court decision and remand this issue back to the lower court for reconsideration under *Keene v. CNA Holdings, LLC*, ___ S.E.2d ___, 2021 WL 3521085 (S.C. Aug. 11, 2021).

Respectfully submitted,

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