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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Common Pleas Case No. 2018-CP-22-00824
Appellate Case No. 2021-000325

Evarista Juan Lorenzo, Appellant,

v.

Port City Elevator, Inc.; Alan Topper d/b/a All Construction; 2020 Custom Contractors a/k/a 2020 Custom Contractors, LLC; Citadel Site Management, LLC; DVBT Construction a/k/a DVBT Construction, LLC; DVBT Multiservices, LLC; Beverly Construction Group, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC; Enhanced Heating & Air Conditioning, LLC; Carlton Pender, and Joan Pender, Defendants,

Of Which, Alan Topper d/b/a All Construction; Citadel Site Management, LLC; Beverly Homes, LLC; Beverly Homebuilders, LLC; Strand Paint Contractors, LLC; Depaz Painting, LLC and Enhanced Heating & Air Conditioning, LLC are the Respondents.

APPELLANT'S INITIAL REPLY BRIEF

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RE-INTRODUCTION

In January 2017, the Appellant, Evarista Lorenzo ("Eva"), was left quadriplegic after falling down an unsecured elevator shaft while working as a painter on a construction project located in Murrells Inlet (the "Property"). In January of 2020, Eva brought this action against various parties alleged to be associated with the project, including Beverly Homes, LLC ("Respondent").

On February 21, 2020, Respondent moved for summary judgment claiming, among other things, it was entitled to immunity as Eva's statutory employer under South Carolina Worker's Compensation Act (the "Act"). (R. __). The circuit court, by Judge Culbertson, denied Respondent's motion for immunity in April and denied Respondent's subsequent motion to reconsider in June. (April 27 Order) (R. __) & (June 25 Order) (R. __). Shortly thereafter, on August 31, 2020, Respondent made a second motion for immunity under the Act—titled a "Motion to Dismiss." (R. __).[1]

This second motion was heard by Judge Nettles on December 4, 2020. (R. __). Although Respondent claimed it was not involved with the project—and notwithstanding that Judge Culbertson had already denied Respondent's claim to immunity—on January 13, 2021, Judge Nettles issued a lengthy order finding the circuit court lacked jurisdiction because Respondent was entitled to immunity under the Act as Eva's statutory employer. (R. __). Incongruously, although the circuit court found it lacked jurisdiction, it went on to rule on the merits of the case and *sua*

[1] Although the first motion was captioned a motion for summary judgment, the different titles of these two motions does not affect the analysis, each motion was properly a Rule 12(b)(1) motion. *See Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 217, 661 S.E.2d 395, 399 (Ct. App. 2008) (providing the "proper procedure [for claiming immunity under the Act] is to file a motion to dismiss pursuant to Rule 12(b)(1)" and explaining that "[i]f a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction [under the Act], the trial court should treat the motion as if it were a Rule 12(b)(1) motion to dismiss")

sponte granted summary judgment in favor of Respondent even though no such motion was before the court. (R. __). After the circuit court denied Eva's Rule 59 motion on March 1, 2021, this appeal followed.

Shortly after taking appeal, the South Carolina Supreme Court decided *Keene v. CNA Holdings, LLC*, Op. No. 28052 (S.C. Sup. Ct. filed Aug. 11, 2021) (Howard Adv.Sh. No. 7 at 50). This seminal decision, while not changing the law, reaffirms the rule and reasoning applicable to identifying a statutory employer under the Act and makes clear the circuit court's finding of immunity was error. Although Eva devoted an entire section of her brief to addressing *Keene*, Respondent offers no discussion of this seminal decision.[2]

Eva has asserted four issues on appeal—two concerning the grant of immunity and two concerning the *sua sponte* order of summary judgment. (App. Br. p. 2). On the other hand, Respondent addresses only three issues on appeal (Resp. Br. p. 3), and rather than offering argument in response to Eva's appeal, with very limited exception, Respondent's brief consists almost exclusively of copied and pasted excepts from the circuit court's erroneous order.

CONCESSIONS IN RESPONDENT'S BRIEF CONFIRM THE CIRCUIT COURT'S GRANT OF IMMUNITY UNDER THE ACT IS REVERSIBLE ERROR

As a threshold matter, this Court must reverse the circuit court's grant of immunity because Respondent has conceded it "did not have worker's compensation insurance." (Res. Br. p. 35 at n. 4) (conceding "Beverly Homes did not have worker's compensation insurance"). As a matter of law, Respondent's failure to have worker's compensation insurance prohibits a grant of immunity

[2] Respondent's brief contains a single citation to this case, and the entirety of the discussion is the single sentence: "Appellant was not performing maintenance and repair work, as were being performed by the injured worker in the recent decision of *Keene.*" (Resp. Br. p. 35). However, as explained herein, the very holding of *Keene* is that the analysis does not change based on the type of work.

under the Act. *See Poch v. Bayshore Concrete Prods./South Carolina, Inc.*, 405 S.C. 359, 377, 747 S.E.2d 757, 766-67 (2013) (finding even where a party may otherwise be entitled to immunity under the Act, a party that "fails to secure the payment of compensation as prescribed in Section 42-4-20 loses its immunity under the Act's exclusive remedy provision") (underline original); *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 326, 523 S.E.2d 766, 772 (1999) (stating that under the Act, "immunity is part of a broader *quid pro quo*" which is provided in exchange for having worker's compensation insurance are required by the Act); S.C. Code Ann. § 42-1-540 (providing that only those who "have accepted the provision of this title, to pay compensation" are entitled to immunity). Therefore, by Respondent's own admission, there can be no dispute that the circuit court committed an error of law in finding Respondent was entitled to immunity under the Act and must be revered.[3] *See* (App. Br. Sec. II. C).

ARGUMENTS IN REPLY
Re: THE IMPROPER GRANT OF IMMUNITY UNDER THE ACT

Respondent opens its brief by claiming "Appellant's counsel invented the theory against [Respondent] that it was a 'general contractor' . . . then tried to abandon that argument against [Respondent] when the theory proved futile, and now complains that the trial court incorrectly dismissed [Respondent] from this lawsuit." (Resp. Br. p. 3). However, the record plainly reveals Respondent's rhetoric lacks substance.

The complaint makes clear that Eva's claim sounds in premises liability—a theory she surely did not "invent." (2d Am. Comp.) (R. __); *see generally e.g., Pope v. Carolina Theater,* 172

[3] At the hearing on their motion to dismiss, Respondent claimed it was entitled to immunity because "[Appellant's] remedy against them would be in worker's comp." (Trans p. 5). In theory this could be correct, but only if Respondent were a statutory employer **and** had worker's compensation insurance. (*Supra*) However, having admitted it has no worker's comp insurance, Respondent is not entitled to immunity under the Act.

S.C. 161, 164, 173 S.E. 305, 306 (1934) (recognizing, nearly a century ago, the general concepts of premises liability where a defendant knew or should have known of a dangerous condition). The discussion of Respondent acting like a general contractor relates to this issue—particularly Respondent's potential knowledge of the condition or control of the premises. The reference to there being evidence to suggest Respondent acted like a general contractor—even if it was not technically a general contractor—relates to this issue of premises liability and is not at all dispositive of immunity under the Act as Respondent assumes.

In truth, Respondent is the hopeful "inventor" here, fabricating (from whole cloth) the notion that the Act should magically bestow immunity on any litigant who may be referred to as a "general contractor." However, Respondent's cites no legal support for the proposition that simply referring to Respondent as a general contractor renders it *per se* immune as a statutory employer under the Act, and merely copying and pasting from the order on appeal does not make it so. To the contrary our Supreme Court has been quite clear, there is no universal formula for deciding the issue because a "case by case analysis" is required. *Olmstead v. Shakespeare*, 354 S.C. 421, 426, 581 S.E.2d 483, 486 (2003)

Respondent repeatedly asserts that it "did not have any role with the construction of the [] residence where [Eva]suffered her injuries." (R. __) (Resp. Br. p. 3). This is a fatal flaw in Respondent's claim that it is Eva's statutory employer. This flaw exposed by the simple question: If Respondent was not involved in the construction project, how then, can Respondent possibly be Eva's statutory employer on that project? Of course, logic commands Respondent cannot be Eva's statutory employer—just as Judge Culbertson found in response to Respondent's first request for immunity. This appeal exists because Respondent does not want to be constrained by logic (or the law). Instead, Respondent's position is that immunity is founded, not on fact, but on magic words

(*i.e.,* "general contractor"), that if uttered, will automatically bestow immunity. Respondent asks this Court to accept that these magic words lay, like landmines in the law, such that immunity becomes a game of linguistic "gotcha!" Unfortunately for Respondent the law simply does not, nor should it, support this approach to immunity under the Act.

I. Judge Nettles cannot overrule Judge Culbertson's prior ruling on Jurisdiction.

Eva's first issue on appeal asserts the circuit court's grant of immunity is error because the issue had already been decided by Judge Culbertson. *See Enoree Baptist Church v. Fletcher,* 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another."); Rule 43(l), SCRCP ("If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action."); *accord Belton v. State,* 313 S.C. 549, 554, 443 S.E.2d 554, 557 (1994) (finding that with regard to jurisdiction, "since the question was purely a legal one, [a circuit judge] was without authority to review [a different judge's] findings[that the court had jurisdiction]."); *Rice v. Doe*, No. 2021-UP-229, 2021 S.C. App. Unpub. LEXIS 246, at *7 (Ct. App. June 23, 2021) (citing *Belton,* for the proposition that "one judge d[oes] not have authority to overrule another judge's order regarding jurisdiction as the question of jurisdiction [is] purely a legal one") (internal quotations omitted).

Respondent does not argue that Judge Nettles was allowed to rule contrary to Judge Culbertson's prior ruling. Instead, Respondent claims this issue is not preserved, summarily stating that Eva never raised it. However, this is verifiably false. On page three of Eva's initial memoranda opposing Respondent's motion to dismiss, she argued: "[T]his Court has **already determined** that Plaintiff is a statutory employee of Beverly Construction Group, LLC [and] *not* Beverley Homes LLC [i.e., Respondent]" (R. __) (Memo p. 3) (internal punctuation omitted) (bold added italic

original). Similarly, on the very first page of both of Eva's supplemental memoranda opposing Respondent's motion to dismiss, Eva asserts "in fact [Respondent's] motion for summary judgment was already denied by the Court on April 23, 2020, and denied by the Court again on June 25, 2020, after [Respondent's] motion for reconsideration." (R. __) (Supp. Memo p. 1, Dec. 9, 2020) and (R. __) (2d Supp. Memo p. 1, Dec. 16, 2020) (stating the same); *see also* (Supp. Memo p. 10, Dec. 9, 2020) (stating "this Court has already determined that Plaintiff is a statutory employee of Beverly Construction Group, LLC [and] *not* Beverley Homes LLC [i.e., Respondent]") (internal punctuation omitted).

Respondent's falsely claim that Eva did not mention this point at the hearing on Respondent's motion to dismiss. Eva explicitly argued "Judge Culbertson has already discarded [this] issue when he denied their [first] motion for summary judgment which was based on all these same exact arguments regarding control [a]nd, in this matter, there was a filed motion to reconsider, in fact, of the denial of summary judgment. And then, Judge Culbertson, a few months later then denied it again, and again kept [Respondent] in the case." (R. __). (Trans p. 9).

Further still, Eva reiterated this point again in her Rule 59 motion. *See* (R. __). (Rule 59 Mot. p. 3, Jan 25, 2021) ("[Respondent's] motion [] was already denied by the Court on April 23, 2020, and denied by the Court again on June 25, 2020, after [Respondent's] motion for reconsideration" was denied); (Rule 59 Mot. p. 24, Jan 25, 2021) (arguing "[m]oreover, this Court has already determined that Plaintiff is a statutory employee of Beverly Construction Group, LLC [and] *not* Beverley Homes LLC [i.e., Respondent]") (internal punctuation omitted). Finally, at the outset of the hearing on her Rule 59 motion, Eva's counsel reiterated that although the circuit court *sua sponte* granted summary judgment, "there was no pending motion for summary judgment [by Respondent properly before the Court]. In fact, when [Respondent] did have a motion [before the

Court], it was denied by [Judge Culbertson] on April 23rd of 2020 and then denied again by the Court on June 25th of 2020 after [Respondent's] motion for reconsideration" was filed. (R. __). (Rule 59 Trans. p. 5-6) (arguing this was a "back-door effort" to bring an improper motion for the same thing already decided). Nothing more was required.

It is well settled that the rules of issue preservation do not require any magic language, instead all that is necessary is that the circuit court be given a fair opportunity to appreciate the issue. *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010) ("error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review[i]nstead a litigant is only required to fairly raise the issue to the court, thereby giving it an opportunity to rule on the issue."); *accord White v. S.C. Dep't of Health & Envtl. Control,* 392 S.C. 247, 255, 708 S.E.2d 812, 816 (Ct. App. 2011) (demonstrating that preserving a question of statutory interpretation required no specific argument where interpretation of the statue was clearly implicated by the lower court's ruling) (overruled on other grounds). Here, Eva asserted over and over that Respondent's motion to dismiss should be denied because Judge Culbertson had already ruled on this issue. (*Supra*). The rules of issue preservation require nothing more. Respondent's reliance on issue preservation is misplaced and should be rejected.

II. The circuit court's ruling is inconsistent with *Keene,* and Respondent completely fails to address the *Keene* opinion and instead cites only to one case which is not analogous to this matter.

In August of 2021 (shortly after the circuit court issued the order on appeal in this matter) the Supreme Court issued its decision in *Keene v. CNA Holdings, LLC*, Op. No. 28052 (S.C. Sup. Ct. filed Aug. 11, 2021) (Howard Adv.Sh. No. 7 at 50). Eva discusses the import of this opinion in her second issue on appeal, outlining in detail how the circuit court's reasoning runs contrary to

what the Supreme Court explained is required of the statutory employer analysis. *See* (App. Initial Br. pp. 8-19).

In over 45 pages of briefing, Respondent makes only a passing reference to *Keene,* stating only that Eva "was not performing maintenance and repair work, as was being performed by the injured worker in the recent decision of *Keene.*" (Resp. Br. p. 35). Without any analytical discussion of any kind, this conclusory statement fails to explain why *Keene* is not controlling.

While it is unclear, it seems from Respondent's one-sentence argument it is implying the rational and holding of *Keene* are limited by the industry or type of work being done by the injured party. If that is Respondent's argument, it is wrong. In fact, this was one of the primary points addressed in *Keene,* which confronted the question of whether the reasoning from cases concerning one industry should apply to others—i.e., "addressing the [] argument over whether [the Supreme Court's reasoning in cases concerning the transportation industry should] apply outside the transportation context." *Keene* p. 15. After conducting a thorough analysis of the history and progression of the law on this point across all industries, the *Keene* Court stated, "We agree . . . the concepts we discussed in [our] prior cases [from various industries] are relevant to the analysis of this case **and all statutory employee cases**." *Id.* p. 16 (emphasis added).

The only "argument" Respondent offers in support of the circuit's court's finding of immunity consists of a paragraph it copied and pasted from the circuit court's own order which cites only one case—*Freeman Mech. v. J.W. Bateson Co.,* 316 S.C. 95, 447 S.E.2d 197 (1994). However, *Freeman* offers no support for the notion that simply referring to a party as a "general contractor" or "co-general contractor" entitles them to *per se* immunity under the Act. (App. Br. p. 15, n. 6); *see also Olmstead*, 354 S.C. at, 426, 581 S.E.2d at 486 (holding the question of whether

a party is statutory employer requires "an individualized determination of the facts of each case in which statutory employment is alleged" and there is no universal "formula").

To be clear, although *Freeman,* collaterally touches on the issue of statutory employer, the underlying dispute in *Freeman* was about indemnity as between a statutory employer and a direct employer—the injured worker was not even a party to the action. *Freeman,* 316 S.C. 95, 447 S.E.2d 197. In *Freeman,* the plaintiff was a sub-contractor and direct employer of the injured worker. *Id.* After the sub-contractor paid the worker's compensation benefits to its employee, it sought indemnity from the defendant (prime contractor) because the prime contractor would have been "liable under the Act for workers' compensation benefits" had the plaintiff not paid these benefits to its own employee. *Id.* at 95, 447 S.E.2d at 199 (rationalizing its holding as being in service of the general "rule that one who has obligations under the Act enjoys immunity under the Act."). The holding in *Freeman* is limited to the proposition that a statutory employer does not owe an indemnity obligation to a direct employer because the direct employer has primary liability under the Act. *Id.* The *Freeman* Court never addressed the question of whether the prime contractor was a statutory employer. Thus, it has no bearing to the case at hand. *See* (App. Br. p. 15, n.6) (explaining the same).

Even if *Freeman* were germane here (which it is not), Respondent's reliance on this case would still fail because, by Respondent's own admission, it does not have worker's compensation insurance. *See* (Resp. Br. p. 35, n. 4). Thus, unlike the defendant in *Freeman,* Respondent was not "potentially liable under the Act [to pay] worker's compensation benefits" to Eva. *Id.* (discussing that prime contractor in *Freeman* was a statutory employer because it was potentially liable under the Act had the direct employer lacked worker's comp. insurance). Therefore, Respondent cannot enjoy immunity under the Act in the same manner as the defendant in *Freeman. See supra*

(discussing the effects of Respondent's concession about the failure to obtain worker's comp. insurance).

Ultimately the factual test for a statutory employer is neither set out nor discussed in *Freeman* because it was a non-issue.[4] Similarly, nowhere in Respondent's copied and pasted argument does it ever mention the test for determining a statutory employer. As Eva explained in her initial brief this inquiry is three-fold: (1) Does Respondent meet the prerequisite of being an "upstream" employer? (2): If so, is the work Eva was performing part of Respondent's "trade, business, or occupation"—what the *Keen* Court called the "key question?" And (3) if all other requirements are met, did Respondent lose immunity by failing to provide proof of worker's compensation insurance? (App. Br. p. 10). Respondent utterly fails to articulate how it satisfied this test.

Respondent's reasoning seems to be: Eva called Respondent a "general contractor," and a general contractor typically oversees the type of work Eva was performing (*i.e.*, painting); therefore, Respondent is a statutory employer. *See* (Resp. Br. p. 35) (claiming the painting that Eva was performing "was an important part of the trade of and business of a general contractor (and any general contractor) performing residential or multi-family housing").

However, as explained more fully in Eva's Initial Brief, this reasoning fundamentally neglects that the test requires a case-by-case analysis. As the *Keene* Court made clear, the question

[4] Furthermore, to the extent *Freeman,* (which was decided in 1994) could possibly be interpreted to create a universal rule that all prime contractors or general contractors are *per se* entitled to immunity as statutory employers (which it does not), such an interpretation of *Freeman* has been specifically overruled by the Supreme Court *See Olmstead,* 354 S.C. 421, 427, 581 S.E.2d 483, 486 (finding that the Supreme Court's decision in *Abbot* on January 10, 2000 "represente[d] a change in this state's jurisprudence on what activity constitutes 'part of the [litigant's] trade, business, or occupation' [and a]s such, **we now overrule all prior cases** to the extent they are in conflict with our holding in *Abbott* and in this case.") (emphasis added).

is not whether the work Eva was performing is part of the trade, business, or occupation, of a typical general contractor, but whether it was part of the trade, business, or occupation *of Respondent.* (App. Br. pp. 12-16). On this issue, Respondent has conceded it is not a general contractor and never does this type of work. *See* (Resp. Br. p. 35 n. 4) (stating Respondent "was not a contractor [and] did not perform contracting duties"); *see also* (Resp. Br. p. 5) (Respondent conceding it "is not a licensed general contractor, has never been a general contractor. . .and has never been [involved in building] a residence"). Therefore, by its own concession, there can be no question that Respondent cannot satisfy the test for statutory employer.

ARGUMENTS IN REPLY
Re: THE IMPROPER *SUA SPONTE* ORDER OF SUMMARY JUDGMENT

III. Respondent offers no support for the proposition that the circuit court can *sua sponte* grant summary judgment as it did here.

The only motion before the circuit court was Respondent's motion to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1). Nonetheless, without a motion by either party, the circuit court *sua sponte* granted summary judgment against Eva and in favor of Respondent.[5] In her Initial Brief, Eva asserted the circuit court lacks the authority to *sua sponte* grant summary judgment for Respondent. Instead of addressing this issue in its brief, Respondent merely offers a footnote for the summary conclusion that it "disagrees with [the] contention that the circuit court could not act *sua sponte* in this matter." (Resp. Br. p. 37, n. 4). Without discussion, Respondent cites to this Court's unpublished opinion in *Reliford v. Mitsubishi*, for the proposition that the circuit court may

[5] Neither the circuit court nor Respondent have asserted there was a motion for summary judgment before the court. Instead, both the circuit court and Respondent incorrectly and summarily state the court had the power to grant summary judgment *sua sponte.* (Order p. 9) (R. __); (Resp. Br. p. 37, n. 5); *see also* The Law Dictionary, *sua sponte,* Anderson Pub. Co. (2002) (defining a *sua sponte* order as one "made by a court without motion by either party").

sua sponte "grant[] summary judgment to **a non-moving party**." (Resp. Br. p. 37, n. 4); *Reliford v. Mitsubishi Motors Credit of Am., Inc.*, No. 2004-UP-537, 2004 S.C. App. Unpub. LEXIS 556, at p. *3 (Ct. App. Oct. 21, 2004) (emphasis added). However, Respondent overlooks that Eva, is the "non-moving party," not Respondent. Thus, even if this unpublished opinion had any import here, it would only support the *sua sponte* grant of summary judgment in favor of Eva (the non-moving party) and against Respondent (the moving party), not in favor of Respondent and against Eva as the circuit court did here. *Id.* at p. *3.[6] But Respondent has another problem too.

In *Stevens Aviation, Inc. v. DynCorp Int'l LLC,* our Supreme Court recognized that other jurisdictions have found that where one party has moved for summary judgment, **an appellate court** can, under certain circumstances, *sua sponte* grant summary judgment "**to the non-moving party**." *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 421, 756 S.E.2d 148, 155 (2014) (emphasis added). However, it is paramount that in *Stevens* the Supreme Court specifically declined to adopt such a rule and reversed the lower court's *sua sponte* order of summary judgment. *Id.* ("We need not decide whether to adopt the rule from these other jurisdictions because the limited circumstances wherein an appellate court may grant summary judgment are not present here."). Eva discussed the *Stevens* opinion at length in her Initial Brief. Respondent ignored it. Regardless, even if this Court were to adopt the rule after the *Stevens* Court declined to,

[6] In *Reliford*, the plaintiff moved for summary judgment, the circuit court denied this motion, and *sua sponte* granted summary judgment in favor of the defendant—*i.e.,* the non-moving party. *Id.* at p. * 3. Although this Court affirmed, it did not address the merits of the issue. Instead, the question of whether the circuit court erred in granting summary judgment was found not to be preserved. *Id.* This point aside (and even assuming an unpublished opinion had any presidential value) the *Rediford* Court did not confront whether the circuit court can *sua sponte* grant summary judgment where **neither party** moved for summary judgment. In *Rediford,* the party against whom summary judgment was entered had actually moved for summary judgment. *Id.* Thus, at the very least, the issue of summary judgment was before the court in *Rediford.* The same cannot be said here as neither party moved for summary judgment.

it would not save the circuit court's *sua sponte* order here because the rule only applies to appellate courts, and it only applies where the party *against whom* summary judgment is entered made a motion for summary judgment. *Id.* Neither of these conditions are present here.

IV. Respondent's argument in support of the circuit court's grant of summary judgment is simply a copy and paste of the order on appeal, thus no reply is necessary.

Respondent offers no actual argument in support of the circuit court's *sua sponte* order of summary judgment or in response to Eva's arguments about the errors of this order (*i.e.,* Eva's fourth issue on appeal). Instead, and except for only a few words, Respondent's brief on this point is nothing more than a copy and paste of the relevant portions of the circuit court's erroneous order. Merely reciting *what* the circuit court ruled does not explain to this Court *why* the ruling should be affirmed. That Respondent would merely transcribe this allegedly erroneous order rather than address Eva's arguments is indicative that there is no support for the circuit court's conclusions. Eva has already briefed why the grant of summary judgment was error. Since Respondent simply repeats this order, any reply would been needlessly duplicative of the arguments Eva has already made.[7]

[7] In the section of Respondent's Brief addressing summary judgment, Respondent begins by incorporating an excerpt from the circuit court's order that makes reference to judicial estoppel and cites *Quinn v. Sharon Corp.*, 343 S.C. 411, 418, 540 S.E.2d 474, 478 (Ct. App. 2000). However, the circuit court included this excerpt in the section regarding immunity under the Act, not summary judgment. *See* (Order p. 9) (R. __). Thus, it is not entirely clear how this excerpt relates at all to summary judgment. To the extent Respondent intended to paste this excerpt into section regarding immunity under the Act, the concept of judicial estoppel has no bearing there either. Presumably, the allusion to the concept of judicial estoppel was to suggest that because Eva had previously suggested Respondent behaved like a general contractor she should therefore be estopped from suggesting Respondent is not a general contractor. However, as explained above the title "general contractor" is not dispositive of whether Respondent is a statutory employer, but instead this determination is based on the specific facts. Respondent's complaints about Eva's waffling on this are a complete red herring. Even if Eva were estopped from denying that Respondent was a general contractor this would not matter to the analysis of immunity under the Act. Further still, our Supreme Court has established that the application of judicial estoppel

CONCLUSION

For the reasons stated above, this Court should reverse and remand.

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requires five elements, three of which being that (1) the party must have been successful in the position previously; (2) the inconsistent statement must be part of an intentional effort to mislead the court; and (3) the alternate positions must be "totally inconsistent." *See Simpson v. Simpson,* 404 S.C. 563, 575, 746 S.E.2d 54, 61 (Ct. App. 2013).

Here, it cannot be said that Eva has been successful in maintaining that Respondent is a general contractor, because if she had, the court's *sua sponte* grant of summary judgment would have been denied. Second, the only "effort" undertaken here is by Respondent to thoroughly misrepresent the concepts to the circuit court. And finally, as explained above, the law certainly allows a scenario in which a party could be a general contractor but not entitled to immunity. Thus, the two positions are not "completely inconsistent." Therefore, while it remains unclear what import the reference to judicial estoppel has here, it is ultimately a non-issue because it does not impact the analysis of either immunity under the Act or summary judgment.

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PROOF OF SERVICE

The undersigned certifies that she served a copy of the foregoing **Appellant's Initial Reply Brief** to all counsel of record on March 9, 2022, by mailing a copy of same, electronically or with proper postage affixed thereto, as follows:

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