FROM MARCHBANKS TO KEENE

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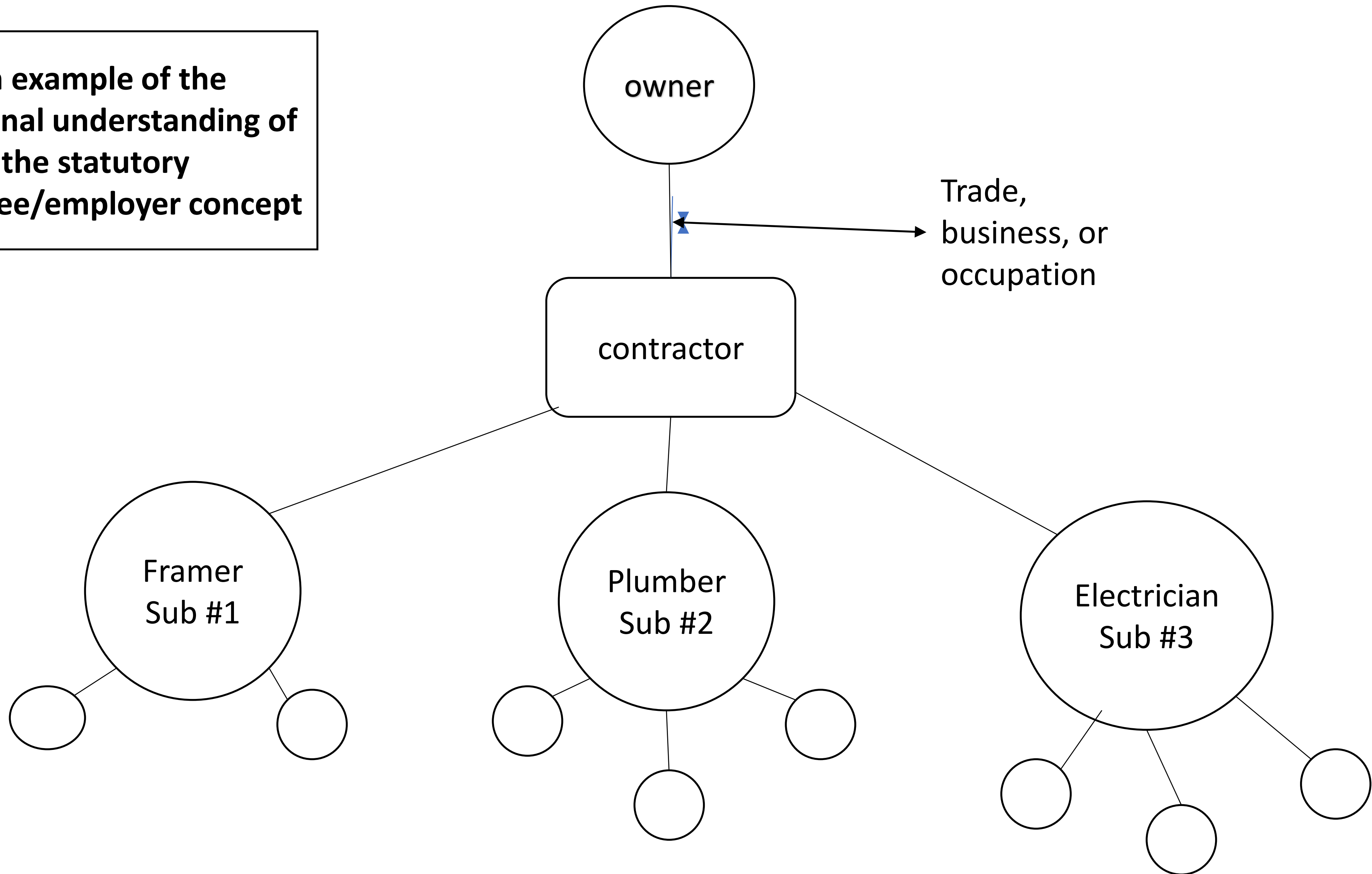
A QUICK REVIEW

- Worker’s compensation is the exclusive remedy an injured worker has against his employer for injury by accident arising out of and in the course of employment. § 42-1-540
- Ergo, the employer enjoys indemnity from a suit by employee, regardless of employer’s degree of negligence.
- An employer cannot use worker’s compensation as a shield for intentional acts.
- Employee cannot collect twice for the same injury.

THE STATUTORY EMPLOYEE/EMPLOYER RELATIONSHIP

- What is it? An employee/employer relationship crated by statute, not necessarily by the parties.
- What is its purpose? To ensure workers are protected by the workers' compensation act.
- How does it work? If the work being done is in the trade, business or occupation of the owner so owner is profiting off the sweat of a subcontractor's employee, the owner has the responsibility of providing the injured employee workers' compensation benefits if the immediate employer (the subcontractor) is not insured.

An example of the traditional understanding of the statutory employee/employer concept



WHAT DOES TRADE, BUSINESS OR OCCUPATION MEAN?

- Worker's activities are an important part of the trade or business of the employer;

- Worker's activities are a necessary, essential, and integral part of the business of the employer; or

- Worker's activities have been previously performed by employees of the employer.

Glass v. Dow Chem. Co., 325 S.C. 198, 201 S.E.2d 49 (1997).

DEVELOPMENT OF CASES

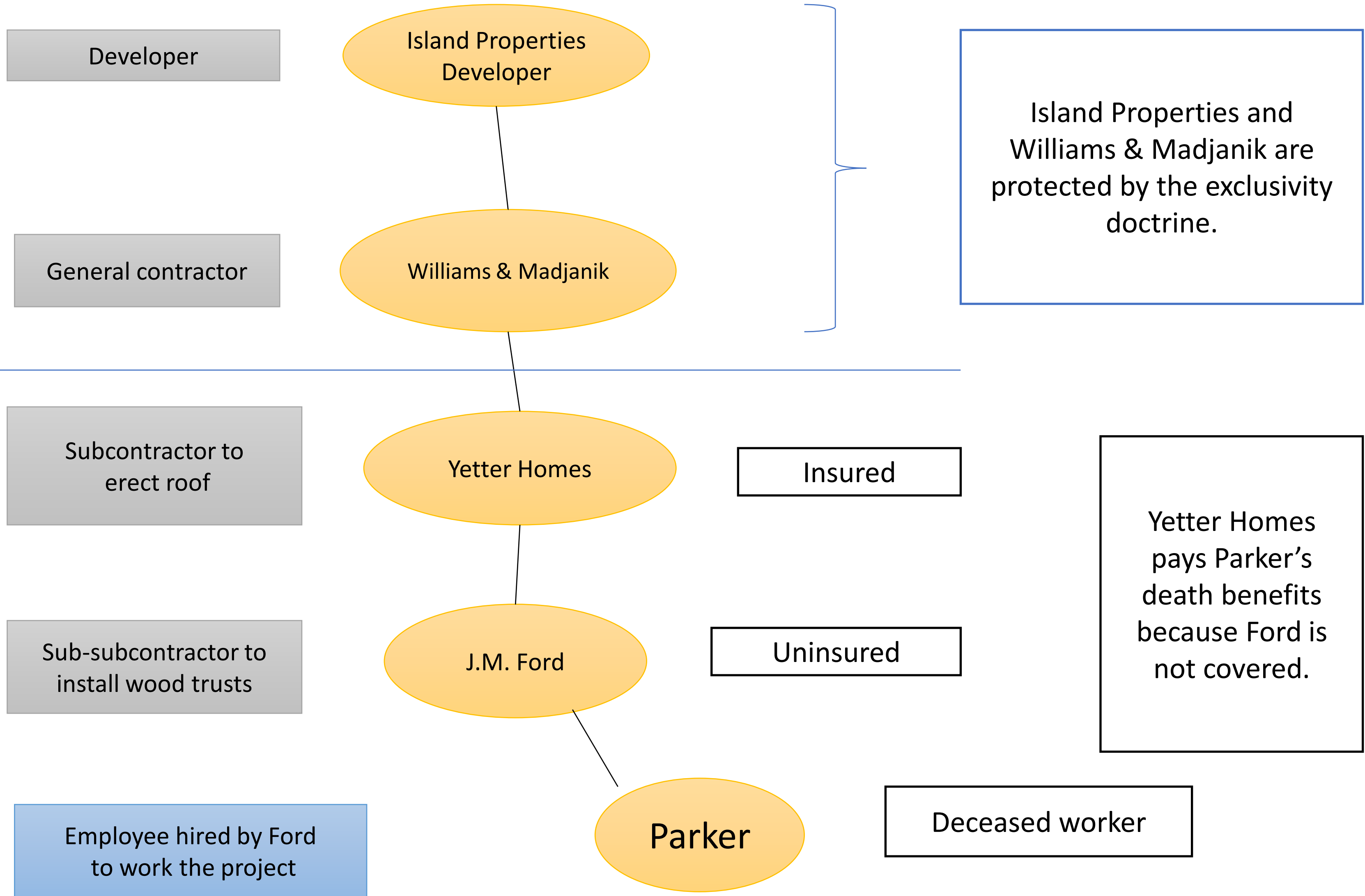
- Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825 (1939). Maintaining poles to transmit electricity was in the trade, business or occupation of a power company.
- Boseman v. Pacific Mills, 193 S.C. 479, 8S.E.2d 878 (1940). Maintaining a water tower to provide water in case of fire was in the trade, business or occupation of cotton mill.
- Bell v. South Carolina Electric & Gas Co., 234 S.C. 577, 109 S.E.2d 441 (1959). Moving lines from old poles to new poles was in the trade, business or occupation of electric company.
- Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963). A manufacturer of textile woolen goods owned its transition line and had a crew of certified electricians to maintain the line. Because the crew became overworked, an electrical company was brought in to do some of the work to rest the crew.
- Wilson v. Daniel Int'l Corp, 260 S.C. 548, 197 S.E.2d 686 (1973). Daniel bought concrete from outside source. Source employee injured. Ct. held worker was not statutory employee because relationship was that of vendor-vendee. Demonstrated importance of corporate decision making.
- Glass v. Dow Chem. Co., 325 S.C. 198,482 S.E.2d 49 (1997). Recognized not all work "necessary" for owner to carry on his business was part of his business. Dow agreed to replace cracked panels but had to hire a construction company to do the work. Injured construction worker deemed not Dow's statutory employee.

PROTECTING UPSTEAM OWNERS AND CONTRACTORS

- Up the chain owners and contractors who have exposure for workers' compensation benefits also enjoy the protection of the exclusivity doctrine.

Parker v. Williams and Madjanik, Inc.

267 S.E.2d 524 (1980)



MORE RECENT DECISIONS

- Abbott v. The Limited, Inc., 338 S.C. 161, 526 S.E. 2d 513 (2001).
  - The fact that it is was important to a retailer to receive goods does not render the delivery of goods an important part of the retailer's business.

- Olmstead v. Shakespeare, 24 S.C. 421, 581 S.E. 2d 483 (2003).
  - As long as transportation of goods is not the primary business of the company from whom good are being delivered, the delivery of goods is not an important part of the company business.

AND NOW ON WITH THE SHOW.

KEENE V. CNA HOLDINGS

- FACTS: Hystron Fibers (now CNS Holdings) hired Daniel to build a polyester fiber plant in 1965. The plant opened in 1967 and Hystron retained Daniel to provide all maintenance and repair workers at the plant. Deceased worked for Daniel at the plant from 1971 to 1980. Deceased regularly exposed to asbestos while repairing piping, valves, etc. Later diagnosed with mesothelioma and died. Dependents received worker’s compensation death benefits from Daniel. Wife sued CNS for negligence and failure to warn. CNA argued throughout the litigation that the deceased was a statutory employee.
- HELD: Deceased was not CNS’s statutory employee.

KEENE V. CNA HOLDINGS

- ANALYSIS:
  - Trade, business, occupation (TBO) initially interpreted broadly.
  - TBO meant any work deemed necessary for the owner's business.
  - In 1973, began to recognize importance in owner's corporate decisions in deciding what is in the owner's TBO. Wilson v. Daniel Int'l Corp
  - In 1997, recognized that not all work "necessary" for owner to "carry on its business" was "part of his business" under § 42-1-400. Glass v. Dow Chem.
  - In 2000 and in 2003, recognized that, while it is important for retailers to receive and send goods did not render the sending and receipt of goods as an important part of the retailer's business. Abbott v. The Limited, Inc. and Olmstead v. Shakespeare.

KEENE V. CNA HOLDINGS

- Analysis Cont.
  - Focus now should be on what the owner decided is part of its business.
  - What is or is not “part of” the owner’s business is a question of business judgment, not law.
  - In this case, owner made a legitimate business decision to outsource its maintenance and repair work.
  - Owner had no intention of avoiding the cost of insuring the workers who did the work against work-related injuries.
  - Therefore, deceased was not CNA’s statutory employee and could sue CNA Holdings.

KEENE V. CNA HOLDINGS

- DISSENT
  - Abbott and Olmstead were transportation cases and should be limited to transportation. No non-transportation cases were overruled.
  - Disagrees interpretation of TBO became narrower with Bridges and White.
    - Reasoning for difficulty of laying down hard and fast rules was same as in Marchbanks.
    - Bridges focused on third test for TBO, not first two. Had employees who performed the same work as the sub.
    - Wilson was a case of vendee-vendor, not one of corporate decision-making.
    - Glass is another example of a case-by-case approach, not a recognition of the importance of decisions make by “corporate managers.”

SOME OBSERVATIONS

That was then

- When the WC Act was passed in 1935:
  - The law was elective. An employer or an employee could opt out of the system.
  - Employers with less than 15 employees were exempt from the law.
  - Ergo, there were many fewer employers who had coverage. Broad interpretation was necessary to achieve the law's intent.
  - Worker's compensation system of timely benefits and compensation was preferred to lengthy litigation.

This is now

- Now:
  - Law is mandatory with few exceptions.
  - Employers with 4 or more are presumed to come within the system.
  - Every employer with 4 or more employees must have coverage.
  - Ergo, the broad interpretation of TBO is no longer necessary to ensure workers are covered.
  - There is a greater interest in businesses not hiding behind the worker's compensation law to avoid liability for wrongs.