THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2022-000729

Thomas Rodriquis Nelson,……....……..……Respondent,

v.

Florence Concrete Products, Inc.,...…….……...Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from a declaratory judgment action in which this Court is asked whether Appellant Florence Concrete Products, Inc., owed a duty to Respondent Thomas Rodriquis Nelson. Nelson was rendered a quadriplegic in a motor vehicle accident with an oversize load hauling a 72-foot concrete slab manufactured, sold, and shipped by Florence Concrete. Nelson and Florence Concrete reached a settlement in which they agreed to a set of stipulated facts and to the existence of proximate cause and Nelson's damages. The settlement made payment dependent on the court's answers to two questions as to the existence of a duty and breach of a duty. Nelson filed a declaratory judgment action as to the two questions, and the lower court answered them in Nelson's favor. Florence Concrete appeals only the existence of a duty. Therefore, it is established that, if a duty exists, Florence Concrete breached it and that breach proximately caused Nelson's damages.

In the early morning hours of January 4, 2019, Nelson's vehicle collided with an eighteen-wheeler carrying the oversize load. The 72-foot concrete slab load belonged to Florence Concrete, who hired Nesbitt Transportation as an independent contractor to haul the load from Sumter, South Carolina, to North Carolina. (Cmplt. p. 5). On September 9, 2019, Nelson filed a Complaint against Nesbitt Transportation, its registered agent and owner of the

tractor-trailer, and Calvin Rouse, the driver. (Cmplt. -00296). On October 21, 2019, Nelson filed an Amended Complaint adding Florence Concrete as a defendant and asserting a negligence cause of action against it. (Am. Cmplt. -00296). Nelson eventually settled with and dismissed all defendants except for Florence Concrete.

On December 9, 2021, the lower court entered a Consent Order stating Nelson and Florence Concrete reached a settlement with the amount of damages determined by rulings on a declaratory judgment action. The order included a list of stipulated facts. (Consent Order). On January 4, 2022, Nelson filed an Amended Complaint for Declaratory Judgment. (Am. Cmplt. -02042). The parties filed cross-motions for summary judgment and memoranda in support of their motions. (Mots.).

On March 10, 2022, the lower court held a hearing on the motions. (Tr.). On April 29, 2022, the lower court entered an order granting Nelson's motion for summary judgment and finding Florence Concrete owed a duty to Nelson and breached that duty. (Order). Florence Concrete filed a notice of appeal. (Not.)

FACTS

Florence Concrete is in the business of manufacturing and shipping concrete slabs. (Consent Order). More than half of its products are longer than 60 feet. (Consent Order p. 2). The South Carolina Department of Transportation ("SCDOT") requires an oversize permit to transport a load that is over sixty-feet-long. *Id.* at p. 2; S.C. Code Ann. §§ 57-3-130, 56-5-4070. A SCDOT oversize permit restricts the time of day during which an oversize load is legally allowed on public roadways to daylight hours only on certain days of the week. (Consent Order p. 3; SCDOT Permit p. 1). Travel is permitted Monday through Saturday from half-an-hour after official sunrise until half-an-hour before official sunset. (SCDOT Permit). If the oversize load travels in a large urban area, the travel time is further prohibited from 7:00 a.m. to 9:00 a.m. and

3:00 p.m. to 6:00 p.m. on school days. (Consent Order p. 3; SCDOT Permit p. 1).

The load at issue in this case was a concrete slab that measured 72-feet long by 24-inches thick. (Consent Order p. 2). Because of its length, the load is classified as oversize by the SCDOT and required an oversize permit. Florence Concrete hired Nesbitt Transportation to transport the load from its manufacturing facility in Sumter, South Carolina, to a bridge construction project in North Carolina. *Id.* at p. 2. Nesbitt Transportation applied for and got an oversize permit for this load from the SCDOT. *Id.*; SCDOT Permit p. 1.

Florence Concrete preloaded the cement slab onto a Nesbitt Transportation trailer and put the trailer in Florence Concrete's lot to await pick-up by a Nesbitt Transportation tractor. (Consent Order p. 2). Florence Concrete got a copy of the oversize permit and attached the permit to the trailer. *Id.* at pp. 2-3. The SCDOT requires the permittee to sign the permit before it is valid. (SCDOT Permit p. 2).[1] Nesbitt Transportation did not sign the permit that it sent to Florence Concrete for this oversize load.

Florence Concrete did not secure the lot or monitor it to know when Nesbitt Transportation picked up the load. *Id.* at p. 2. On January 3, 2019, Calvin Rouse, a Nesbitt Transportation employee, picked up the oversize load from Florence Concrete's lot. *Id.* at p. 3. The parties agree that Florence Concrete's oversize load could not legally be on the roadway from 3:00 p.m. on January 3, 2019, until 9:00 a.m. on January 4, 2019.[2] (SCDOT Permit; Consent Order p. 3). Rouse picked up the load from Florence Concrete at 5:02 p.m., in violation of the permit. (Consent Order p. 3). Florence Concrete did not monitor or provide instructions as to when Nesbitt Transportation could move the load. *Id.* Rouse drove the load to Lynchburg,

[1] *Guidelines for Movement over South Carolina Highways of Oversize and Overweight (OSOW) Vehicles and Loads*, p. 7, ¶ F.2. https://www.scdot.org/business/pdf/osow/OSOW_Guidelinesfor_ movement.pdf?v=3 (accessed on Sept. 19, 2022); Tr. p. 48.

[2] Sumter is a large urban area, and January 3-4, 2019, were a Thursday and Friday.

South Carolina, and parked it in a commercial lot overnight. (Consent Order p. 3).

Around 6:10 a.m. on January 4, 2019, Nelson left his home in Lynchburg to drive to work. (Consent Order p. 3). Around 6:30, before sunrise, Nelson was involved in an accident with the tractor-trailer hauling Florence Concrete's oversize load. *Id.* The load was not legally allowed on the road until 9:00 a.m. *Id.* Nelson suffered severe injuries and was rendered a quadriplegic. *Id.* If the load left Florence Concrete's lot in Sumter after 9:00 a.m. on January 4, 2019,—when it was legally allowed on the road—it would not have been on the road in Lynchburg at 6:30 a.m. to injure Nelson.

Florence Concrete knew that shipment of this oversize load was subject to travel restrictions "imposed for the protection of the general public." (Consent Order p. 2). Florence Concrete's shipping manager "testified that being on the road with an oversize shipment at a time that is not allowable creates an **inherent risk** and danger to the public." *Id.* (emphasis added).

Since the early 1990s, Florence Concrete used Nesbitt Transportation to haul its loads. (Consent Order p. 4). Florence Concrete had no evaluation or qualification criteria for choosing a transportation company to haul an oversize load. *Id.* Florence Concrete and Nesbitt Transportation did not have a written agreement or any policies and procedures in place. *Id.* Florence Concrete never looked into Nesbitt Transportation's publicly-available safety history or rating. *Id.* Florence Concrete's shipping manager testified that "if Nesbitt Transportation was issued an oversized permit from the Department of Transportation then that is all that Florence Concrete required." *Id.*

At the time of the accident, Nesbitt Transportation had only a conditional safety rating from the Federal Motor Carrier Safety Association ("FMCSA"). (Consent Order p. 3). A conditional safety rating means that a motor carrier lacks adequate management controls and

systems needed to safely operate. *Id.* However, it may still operate as a motor carrier. *Id.* at p. 4. In 2015 Nesbitt Transportation received a conditional safety rating after it failed an audit due to numerous safety regulation violations. *Id.* at p. 3. It never tried to correct or upgrade the safety rating. *Id.* at p. 4. Florence Concrete's shipping manager testified that "he did not know what a conditional safety rating is." *Id.*

On October 21, 2019, Nelson filed an amended complaint against Florence Concrete, Nesbitt Transportation, Robert Nesbitt (owner of the tractor-trailer), and Calvin Rouse. (Am. Cmplt., -00296). Nelson asserted a negligence action against Florence Concrete. *Id.* at pp. 15-18. Nelson alleged that Florence Concrete owed a duty to ensure the carrier shipped its load during a legally permissible time and a duty to exercise reasonable care in hiring a carrier of an oversize load. *Id.* at pp. 16-18.

Nelson eventually settled with and dismissed all defendants except for Florence Concrete. Nelson and Florence Concrete entered into a settlement agreement in which Florence Concrete agreed to proximate cause and damages but the amount of damages payable is dependent on the court's answers to two declaratory judgment questions—whether Florence Concrete owed a duty to Nelson and, if so, whether it breached a duty. (Consent Order; Am. Cmplt. p. 5 ¶ 8; Ans. to Am. Cmplt. p. 2 ¶ 8).

On December 9, 2021, the lower court entered a Consent Order stating facts stipulated to by the parties (the source of the facts stated in this brief) and an agreement for Nelson to file an amended complaint for declaratory judgment. (Consent Order). On January 4, 2022, Nelson filed an Amended Complaint for Declaratory Judgment asking the court to answer two questions:

> 1. Did Defendant Florence Concrete Products, Inc., as a shipper of oversized loads that require an oversize/overweight permit for travel over the highway, owe a duty of care to Plaintiff to take measures beyond verbally contracting for the shipment of the load, when the shipper contracts with a properly-insured independent contractor motor carrier that has U.S. Department of Transportation operating authority and where the independent contractor

motor carrier has secured the proper permits from the South Carolina and North Carolina Departments of Transportation for such oversize/overweight loads?

2. If Defendant Florence Concrete Products, Inc. owed a duty of care, did it breach that duty?

(Am. Cmplt. p. 4; Consent Order pp. 1-2). Nelson alleged that Florence Concrete owed a duty to ensure that its oversized freight was shipped during a time of day permitted by law and a duty to use reasonable care in selecting an independent contractor motor carrier. (Am. Cmplt. p. 6).

Florence Concrete answered by asserting "that once it contracted with a licensed and insured motor carrier that was lawfully operating under U.S. Department of Transportation operating authority, any duties owed to Plaintiff would be from the motor carrier that Florence contracted with, and not Florence"—*i.e.*, that the sole act of contracting with a licensed motor carrier as an independent contractor absolved it of all liability in any way related to the oversize shipment. (Ans. to Am. Cmplt. p. 2 ¶¶ 12-14). The parties filed cross-motions for summary judgment and memoranda in support. (Mots./Memos).

Nelson argued two independent grounds for finding Florence Concrete owed it a duty. (Pl.'s Memo. pp. 6-19). First, Nelson argued that Florence Concrete owed a duty to ensure that proper precautions were taken for the admitted inherently dangerous work of transporting an oversize load over public roadways. *Id.* at pp. 7-14. This is an exception to the general rule that a defendant is not liable for an independent contractor's work and is based on Florence Concrete's own negligence and not vicarious liability. *Id.* Second, Nelson argued that Florence Concrete owed him a duty to use reasonable care in the selection of an independent contractor. *Id.* at pp. 14-19. For both arguments, Nelson emphasized that the particular facts of this case support the existence of a duty.

On March 10, 2022, the lower court held a hearing on the cross-motions. (Tr.). Nelson argued that Florence Concrete already admitted it owed some duty because the first question in the declaratory judgment action asks if Florence Concrete owed a duty "**beyond** verbally contracting for the shipment" with an insured and licensed motor carrier who got an oversize permit. (Tr. pp. 12-15; Consent Order pp. 1-2) (emphasis added). Nelson explained that this case is not about strict liability or vicarious liability for Nesbitt Transportation or Calvin Rouse's conduct. (Tr. pp. 91-92). Nelson emphasized the unique facts of this case, including that Florence Concrete admitted it is inherently dangerous for an oversize load to be on the road at an illegal time and that liability is based on Florence Concrete's own negligence in letting the oversize load off of its lot at an illegal time. (Tr. pp. 93-94).

On April 29, 2022, the lower court entered an order granting Nelson's motion for summary judgment. (Order). The court held Florence Concrete owed a duty under the inherent danger exception to the general rule that an employer is not liable for the negligence of an independent contractor. *Id.* at pp. 5-14. It did not address the existence of a duty based on the negligent selection of an independent contractor. *Id.* at pp. 5-6.

The court held that the duty question—with language agreed to by the parties—"does presuppose that Florence Concrete owes some duty" because it asks whether Florence Concrete owes a duty of care "'beyond verbally contracting' with a shipper with operating authority, insurance, and a proper permit." (Order p. 6). The court found that Florence Concrete breached this duty because the SCDOT permit for this load was not signed and, therefore, "Nesbitt Transportation did not have a proper permit." (Order p. 14 fn.4). In addition to that duty and breach, the court also found a separate duty existed based on the inherent danger exception. *Id.*

The court listed four, independent bases for finding Florence Concrete owed Nelson a duty under the inherent danger exception. (Order pp. 7-10). First, the court held that Florence

Concrete agreed in the stipulated facts that an oversize load on the roadways at an illegal time "creates an ***inherent risk and danger*** to the public." (Order p. 7) (emphasis in original). Second, the court held that the statutory and regulatory law support a duty because the reasons for the General Assembly and SCDOT's regulation are public safety considerations that directly relate to the facts of this case involving the presence of an oversize load on a road at an illegal time. (Order pp. 7-8). Third, the court held that case law supports finding a duty under the inherent danger exception. (Order pp. 8-10). The court cited to two cases in which the South Carolina Supreme Court held a defendant may be liable for its own negligence in failing to ensure proper precautions were taken for inherently dangerous work. *Id.* at pp. 8-9.

Fourth, the court explained:

> The **unique facts peculiar to this case inform the Court's decision**. The case involves an oversize load regulated by the General Assembly and SCDOT, an activity that Florence Concrete admitted poses an inherent danger absent precautions, and the absence of any written contract, policy, or procedure between the employer and the independent contractor or any employer policy governing circumstances in which an oversize load may leave its premises. The Court holds that the [1] unique stipulated facts, [2] statutory and regulatory law, and [3] the case law, **individually and** [4] **cumulatively**, warrant the Court finding the inherent danger exception applies, and the answer to the first question is "yes."

(Order p. 9) (emphasis added). The court addressed and rejected each of Florence Concrete's arguments to the contrary. (Order pp. 10-14).

Finally, the court held that Florence Concrete breached its duty "to take precautions to ensure the oversize load left its lot at an allowable travel time." (Order p. 14).

On May 27, 2022, Florence Concrete filed a Notice of Appeal from the Order, appealing only the question of whether a duty exists. (Not.).

STANDARD OF REVIEW

[C]ross motions for summary judgments do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." *Mead*

v. Beaufort Cnty. Assessor, 419 S.C. 125, 131, 796 S.E.2d 165, 168 (Ct. App. 2016). "Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Quicken Loans, Inc. v. Wilson*, 425 S.C. 574, 579, 823 S.E.2d 697, 700 (Ct. App. 2019) (internal quotation marks omitted). "Questions of law may be decided with no particular deference to the trial court." *Wiegand v. United States Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011) (internal quotation marks omitted).

ARGUMENT

Florence Concrete's appellate strategy is as obvious as it is unavailing. It paints a picture of "breathtaking" "ramifications" that are "incalculable" by alleging that the lower court's holding means "anyone" or "every person" who hires a federally authorized motor carrier will be "personally liable for any resulting negligence" or "tortious conduct" of the motor carrier. (Br. of App. pp. 2, 9, 11). Florence Concrete represents to this Court that the lower court "broadly held" that the inherent danger exception categorically "applies to the transportation of o[versize] loads" and makes "any shipper" "vicariously liable for an independent contractor's negligence." (Br. of Resp't p. 17). That is absolutely **not** what the lower court held. To the contrary, the lower court made explicit that its decision is based on "the peculiar facts of this case"—not a categorical rule—and that Florence Concrete is "liable for its **own** negligent conduct"—not vicariously liable for the negligent conduct of Nesbitt Transportation. (Order pp. 10, 13) (emphasis added).

Florence Concrete stipulated to the existence of proximate cause. (Order pp. 5, 10). Based on that stipulation, Florence Concrete agreed that its alleged conduct is a proximate cause of Nelson's injuries. *See Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 590, 784 S.E.2d 670, 676 (2016) ("The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury."). Therefore, Florence Concrete is not (and cannot argue that

it is) being held liable for Nesbitt Transportation's negligence. Perhaps more importantly, Florence Concrete completely ignores the significant, possibly dispositive, fact that it agreed in the stipulated facts "that being on the road with an oversize shipment at a time that is not allowable creates an inherent risk and danger to the public." (Consent Order p. 2). Many of its arguments on appeal are a back-door attempt to renege on the stipulated facts that form the basis of the settlement agreement. This is improper and legally impossible at this procedural posture.

The Court should affirm the lower court's finding that Florence Concrete owed Nelson a duty for three independent reasons. First, Florence Concrete did not appeal the lower court's finding that the language of the duty question establishes that Florence Concrete owes a duty to contract with a shipper with operating authority, insurance, and a proper permit. That holding is the law of the case, and the Court should affirm on this basis alone. Second, the lower court correctly held that the inherent danger exception applies to the stipulated facts of this case. Third, as an additional sustaining ground, this Court should hold that Florence Concrete owed Nelson a duty to use reasonable care in the selection of an independent contractor. For any one of these reasons, the Court should affirm.

I. The Court should affirm because Florence Concrete did not appeal the lower court's holding that Florence Concrete owed Nelson a duty to contract with a shipper with operating authority, insurance, and a proper permit.

The parties negotiated a settlement that the lower court put into a consent order. Part of that settlement was the language of the two questions to be decided in a declaratory judgment action. The language of the duty question that the parties agreed to asks whether "Florence Concrete . . . owe[d] a duty of care to Plaintiff to take measures **beyond** verbally contracting for the shipment of the load, when the shipper contracts with a properly-insured motor carrier [with] . . . operating authority . . . [that] has secured the proper permits." (Consent Order pp. 1-2) (emphasis added). The lower court held that language establishes that Florence Concrete owed

Nelson a duty to contract with a shipper with operating authority, insurance, and a proper permit. (Order pp. 6, 14 n.4). Because the permit for this load was not signed, the lower court held it was not valid and "Nesbitt Transportation did not have a proper permit" to haul the load. (Order p. 14 n.4).

Florence Concrete did not appeal those findings. "An unappealed ruling is the law of the case and **requires** affirmance." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (emphasis added). Therefore, it is the law of the case that Florence Concrete owed a duty to Nelson to contract with a shipper with a proper permit and that Nesbitt Transportation did not have a proper permit in this case. Florence Concrete knew or should have known that the permit was unsigned because it put a copy of the permit on the trailer before Nesbitt Transportation picked it up. (Consent Order pp. 2-3).

Florence Concrete should not be allowed to agree in a settlement that it owes a duty to contract with a shipper with operating authority, insurance, and a proper permit but inconsistently argue that this case falls within the general rule that it has **no** liability because Nesbitt Transportation is an independent contractor. It either owes a duty or it does not. Here, the lower court found a duty to contract with a shipper with operating authority, insurance, and a proper permit. Because Florence Concrete did not appeal that finding, this Court must affirm.

II. The Court should affirm the lower court's application of the independent contractor rule and the inherent danger exception to this case.

The lower court's application of the independent contractor rule and inherent danger exception follows the law of South Carolina and correctly analyzes the facts of this case. Florence Concrete provides no legal or factual basis to overturn the lower court's decision.[3]

"Generally, an employer is not liable for the torts of an independent contractor committed in the performance of contracted work." *Duane v. Presley Constr. Co.*, 270 S.C. 682, 683, 244

[3] In this Argument section II., Nelson responds to Florence Concrete's Argument sections I.-II.

S.E.2d 509, 510 (1978). This is the general rule that Florence Concrete relies upon for its alleged absence of a duty in this case. However, as part of its mischaracterization of the lower court's holding, Florence Concrete tries to avoid the law that "[t]he owner is responsible, however, if the injury is caused by **his own negligence** in failing to take preventive measures." *Id.* at 684, 244 S.E.2d at 510 (emphasis added). An "exception to the general rule" that an employer is not liable for the negligence of an independent contractor is that "[l]iability cannot be evaded by employing an independent contractor to do work which is inherently or intrinsically dangerous unless proper precautions are taken." *Alexander v. Seaboard Air Line R.R. Co.*, 221 S.C. 477, 487-88, 71 S.E.2d 299, 303-04 (1952). The lower court correctly applied the exception to the facts of this case.

A. The lower court correctly applied the independent contractor rule.

Florence Concrete's Argument section I. is not so much an issue on appeal as it is a recitation of law and an attempt to misdirect the Court's focus. At issue is the lower court's holding that Florence Concrete is liable for its own conduct in failing to ensure that the oversize load left its lot at a legally permissible time. Florence Concrete misrepresents the issue as whether it should be vicariously liable for Rouse's conduct in leaving at an impermissible time on the morning of the accident. These address two separate acts and two types of liability. The lower court did not rule on the latter argument, and it is not before this Court.

Florence Concrete first argues that the general independent contractor rule applies in this case because Nesbitt Transportation is an independent contractor. (Br. of App. pp. 12-14). That Florence Concrete hired Nesbitt Transportation as an independent contractor is not in dispute. A dispute is whether the facts of this case fall within an **exception** to the general rule. Regardless, Nelson disagrees with Florence Concrete's argument that it hired Nesbitt Transportation because it lacked expertise as a motor carrier. (Br. of App. p. 13). To the contrary, Florence Concrete is

registered as a federal motor carrier with the United States Department of Transportation. (Am. Cmplt. -00296 p. 15 ¶ 45; Ans. to Am. Cmplt. p. 5 ¶ 45).

Florence Concrete's recitation of exceptions to the nondelegable duty rule is also not applicable to the lower court's rulings. (Br. of App. pp. 14-15). The court based its decision on Nelson's argument "that Florence Concrete is liable for its own conduct in allowing the load to leave its lot at a prohibited time" and not on "vicarious liability." (Order p. 10).[4] Nondelegable duty relates to vicarious liability and not to the inherent danger exception or a defendant's liability for its own negligent conduct. *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) ("The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor."). Therefore, a discussion of nondelegable duty is inapplicable to the lower court's rulings and the true issues on appeal.

When Florence Concrete finally addresses the inherent danger exception, it immediately misstates South Carolina's law on the exception. (Br. of App. p. 15). First, as explained below, inherent danger is not the same as abnormal danger. *Contra* Br. of App. p. 15. Second, Florence Concrete represents to this Court that "[o]nly once has a South Carolina appellate court applied the inherently dangerous exception" and cites to *Alexander v. Seaboard Air Line R.R. Co.*, 221 S.C. 477, 71 S.E.2d 299 (1952). (Br. of App. p. 16). That is incorrect. The Supreme Court also applied it in *Duane v. Presley Constr. Co.*, 270 S.C. 682, 244 S.E.2d 509 (1978), to reverse summary judgment for a developer who failed to take proper precautions to guard against water runoff and silting in a construction project. *Id.* at 684, 244 S.E.2d at 510. The lower court cited to, discussed, and applied *Duane* to this case. (Order p. 9). Florence Concrete's failure to even

[4] Nelson stated at the motion hearing: "[I]t's not strict liability and it's also not vicarious liability, and the reason it's not vicarious liability is we are not saying that you're liable because Mr. Rouse pulled out the next morning. We're saying you're liable for your own conduct in letting it leave your lot at a time that was illegal. So that's why we've said it's not about nondelegable duty, it's not about vicarious liability. It's about your own negligence." (Tr. pp. 84-85).

cite to *Duane*, much less address the court's analysis of it, shows the weakness of its argument on South Carolina law regarding the inherent danger exception. As explained below, the lower court correctly decided that the exception applies in this case.

B. The lower court correctly held the inherent danger exception applies to the unique facts of this case.

For over seventy years, South Carolina appellate courts have held that, while an employer is generally not liable for the work of an independent contractor, there is an exception to the rule where an employer remains liable for injuries that occur for work that is inherently dangerous when done without proper precautions. "[T]here is a well established exception to the general rule of non-liability where injury results and the means or manner of the activity of the owner whether done by independent contractor or not, may be found to be inherently or intrinsically dangerous to others." *Allison v. Ideal Laundry Cleaners*, 215 S.C. 344, 350, 55 S.E.2d 281, 282 (1949). "[T]he determining factor is knowledge, actual or implied, on the part of the employer of the dangerous nature of the work. *Id.* at 351, 55 S.E.2d at 283. "Liability of the employer in such cases depends upon his antecedent knowledge of the danger inherent in the work or a finding that the average, reasonably prudent man or corporation should, in the exercise of due diligence, have known." *Id.* The key considerations are evidence of the defendant's knowledge of danger and failure to take proper precautions.

Florence Concrete cites to four factors from a North Carolina case as supposedly controlling the application of the inherent danger exception. (Br. of App. p. 18). The Court should reject that framework as an argument that is unpreserved and unsupported by South Carolina law. Florence Concrete did not cite to or discuss those factors in its arguments in the lower court and, therefore, it is not preserved. *See* Def. Memo. in Supp. of Summ. J.; *S.C. Dep't of Transp. v. First Carolina Corp.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("[A]n issue

cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Regardless, South Carolina has not adopted the four-part framework proposed by Florence Concrete.[5] The repeated considerations that South Carolina appellate courts use to decide whether the inherent danger exception applies are the defendant's knowledge of the danger and whether it took proper precautions. *Allison*, 215 S.C. at 351, 55 S.E.2d at 283; *Alexander*, 221 S.C. at 488-89, 71 S.E.2d at 304; *Duane*, 270 S.C. at 684, 244 S.E.2d at 510. That is the correct analysis the lower court used in this case. (Order pp. 6-14).

i. In this case, transporting an oversize load is an inherently dangerous activity unless proper precautions are taken.

The lower court correctly held that, under the facts of this case, transporting an oversize load is an inherently dangerous activity unless proper precautions are taken. (Order pp. 6-14). The proper precautions are those that can be taken by the employer defendant. Using this case as an example, Florence Concrete had the ability to require and ensure that Nesbitt Transportation left its lot with the oversize load at an allowable time of day.

The lower court gave four, independent bases for finding the inherent danger exception applied—(1) "Florence Concrete agreed in the stipulated facts 'that being on the road with an oversized shipment at a time that is not allowable creates an ***inherent risk and danger*** to the public'"; (2) the purpose of the General Assembly and SCDOT's regulation of the movement of oversize loads is for public safety and supports finding an inherent danger existed when Florence Concrete failed to take proper precautions; (3) in two appellate cases, courts applied the exception in similar situations where the employer knew about danger involved and did not take proper precautions; and (4) the cumulative effect of the three prior grounds satisfy the exception

[5] Florence Concrete's knowledge and conduct under the facts of this case would, however, satisfy even the four-part test, as is explained in this Argument section.

even if each individual ground does not. (Order pp. 7-10) (emphasis in original). The law and facts of this case support the lower court's holdings.

First, Florence Concrete challenges whether the activity is inherently dangerous. (Br. of App. pp. 18-25). As an initial matter, Florence Concrete does not challenge the lower court's holding that it "agreed" transporting a load at an illegal time is inherently dangerous. (Order p. 7). Therefore, the Court should affirm based on that unappealed law of the case. *See Ex parte Morris*, 367 S.C. 56, 65, 624 S.E.2d 649, 654 (2006) (stating an "unappealed ruling, right or wrong, is the law of the case and requires affirmance").

Even if the Court addresses the merits, Florence Concrete misstates the law of the inherent danger exception and confuses it with an abnormally dangerous activity. Florence Concrete also improperly analyzes the issue as whether all oversize loads are inherently dangerous. (Br. of App. p. 20). The lower court did not categorically rule that all oversize loads are inherently dangerous. Rather, it ruled based on the unique facts of this case, which is required by South Carolina law. *Allison v. Ideal Laundry & Cleaners*, 215 S.C. 344, 354, 55 S.E.2d 281, 284 (1949) (stating that "virtually every case has to be considered on its own peculiar facts").

An inherently dangerous activity is one in which danger is "[a]n inseparable quality or part of" the activity or is "intrinsic" to it.[6] *Ballentine's Law Dictionary*. The Supreme Court explained the exception as: "Liability cannot be evaded by employing an independent contractor to do work which is inherently or intrinsically dangerous unless proper precautions are taken." *Alexander v. Seaboard Air Line R.R. Co.*, 221 S.C. 477, 487-88, 71 S.E.2d 299, 304 (1952). Therefore, an inherently dangerous activity is one that is dangerous in-and-of-itself unless proper

[6] For example, courts discuss inherent dangers in the doctrine of implied assumption of the risk. "The risk of a hockey spectator being struck by a flying puck is inherent to the game of hockey and is also a common, expected, and frequent risk of hockey." *Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 38, 637 S.E.2d 560, 562-63 (2006).

precautions are taken. An oversize load driven on public roadways (at dark and busy times of day) is inherently dangerous. For example, its turning radius generally requires it to enter into and block additional lanes of traffic or it may block other drivers' views. However, if it is driven at less congested and brighter times of day, the danger is reduced.

Two South Carolina appellate cases that found evidence of inherently dangerous activities are instructive. In *Alexander*, 221 S.C. 477, 71 S.E.2d 299, the Supreme Court held a railroad company could not avoid liability for spraying weed killer that ruined a nearby cotton crop. The defendant railroad hired a contractor to spray weed killer on the track bed and right-of-way near a cotton field. *Id.* at 482, 71 S.E.2d at 301. The property owner sued the railroad for the cotton crop, alleging it knew the spray would destroy growing plants and that it placed the spraying under the control of a negligent entity. *Id.* at 480, 71 S.E.2d at 300. The jury ruled in the plaintiff's favor, and the railroad appealed, arguing that it was entitled to a JNOV because it hired an independent contractor for whom it was not liable. *Id.* at 481-82, 71 S.E.2d at 301.

In deciding whether the inherent danger exception applied, the Supreme Court considered whether the railroad "kn[e]w or could they have learned" "of the injurious effect" the spray would have on growing cotton if it blew from the right-of-way. *Id.* at 488-89, 71 S.E.2d at 304. The Court found evidence of the defendant's knowledge of the danger and that proper precautions were not taken because the wind was blowing "pretty high" on the day the contractor sprayed. *Id.* at 489, 71 S.E.2d at 304-05. The Supreme Court affirmed the judgment against the railroad. *Id.* at 491, 71 S.E.2d at 305.

In *Duane v. Presley Construction Co.*, 270 S.C. 682, 244 S.E.2d 509 (1978), the plaintiff filed an action against a property developer for water concentration and silting damages to his property caused by the development of an adjacent subdivision. *Id.* at 683, 244 S.E.2d at 509. The developer hired an independent contractor construction company to clear the land. *Id.* The

developer argued the independent contractor caused the damage, and the trial court granted summary judgment for it. *Id.*

The Supreme Court reversed and found an employer who hires an independent contractor "is responsible[] if the injury is caused by his own negligence in failing to take preventive measures," and that "[i]f the washing of silt into the pond was foreseeable, [the developer] may be liable for ordering the improvements without taking proper precautions." *Id.* at 683-84, 244 S.E.2d at 510.

Alexander and *Duane* addressed activities that involved danger to property that the employer could reduce or eliminate with proper precautions. The unique facts of this case involve danger to persons that Florence Concrete could have eliminated by taking the proper precaution of ensuring that the load left its lot at a legal time. Florence Concrete does not even address *Duane* in its brief. Its only attempt to address *Alexander* is a statement that the "inherent dangers" of spraying a toxic chemical from a plane "are obvious" but oversize loads are carried "every day" "without incident."[7] (Br. of App. p. 21). That a load transports without incident does not mean that the transportation is not inherently dangerous. A toxic chemical spray and land clearing for property development may be done without incident as well, but the Supreme Court found evidence to support applying the inherent danger exception to those activities. As the lower court held in this case, the consideration is whether, under the peculiar facts of the case, the activity poses an inherent threat absent proper precautions by the employer. Here, there is evidence that, without the proper precaution of ensuring that the 72-foot-load leaves Florence Concrete's lot at a legal time of day, it is inherently dangerous to other drivers on the roadways. Further, *Alexander* is similar to this case in that both involve facts of danger related to timing. In

[7] Florence Concrete cites to statistics of the numbers of permits issued in various states. (Br. of App. p. 20). That evidence is not in the stipulated facts and was not presented to the lower court. Therefore, it cannot be part of this Court's consideration on appeal.

Alexander, the spraying was dangerous when done at a windy time of day. In this case, hauling the load was dangerous when done at a dark or busy time of day.

Florence Concrete cites to cases it alleges are factually similar to this case. (Br. of App. pp. 21-24). They are not, and the lower court properly rejected many of them.

As to *Norris v. Bryant*, 217 S.C. 389, 60 S.E.2d 844 (1950), in that case, Norris rode in a truck with his legs hanging over the side. *Id.* at 393-94, 60 S.E.2d at 845. When that truck met a truck and trailer hauling logs, it severed one of Norris's legs. *Id.*at 394, 60 S.E.2d at 845. The log truck worked as an independent contractor for a lumber company, and Norris sought to hold the lumber company liable for his injuries. *Id.* The Supreme Court found the inherent danger exception did not apply to those facts:

> It is true that a truck negligently operated on the highway is a dangerous instrumentality, but no case has been cited which holds that hauling logs by truck is so inherently dangerous as to make the owner liable **for the negligence of the independent contractor**.

Id. at 400, 60 S.E.2d at 848 (emphasis added). The lower court correctly held "[t]his case is distinguishable from *Norris*." (Order p. 13). Norris wanted to hold the employer vicariously liable for the independent contractor's conduct, while Nelson seeks to hold Florence Concrete liable for its own conduct.

As to *Fike v. Peace*, 964 So.2d 651 (Ala. 2007), in that case, a manufacturer hired an independent contractor to transport an oversize load of equipment to one of its plants. The truck's brakes failed and caused a collision. *Id.* at 653. A certified question asked the court to determine whether "the **mere contracting** for the hauling of an oversize load make[s] the shipper **vicariously liable** for the negligence of the independent contractor trucking company?" *Id.* at 652 (emphasis added). The language of the question shows that *Fike* is inapplicable to this case because it involved vicarious liability and this case involves Florence Concrete's own

negligence. Further, *Fike* equated "inherently dangerous" activities to "ultrahazardous" and "abnormally dangerous" activities, which is contrary to South Carolina law on the inherent danger exception. *Id.* at 661 (internal quotation marks omitted).

In South Carolina, the inherent danger exception applies to "work which is inherently or intrinsically dangerous unless proper precautions are taken." *Alexander v. Seaboard Air Line R.R. Co.*, 221 S.C. 477, 487-88, 71 S.E.2d 299, 303-04 (1952). There is a distinct legal difference between an inherent danger and an abnormal danger. A principal is **strictly** liable for an abnormally dangerous activity but liable for its own **negligence** for an inherently dangerous activity. *Compare Ravan v. Greenville Cnty.*, 315 S.C. 447, 460-62, 434 S.E.2d 296, 304-05 (Ct. App. 1993) (discussing "abnormally dangerous" activity under a strict liability theory), *with Alexander*, 221 S.C. at 487-89, 71 S.E.2d at 304-05 (discussing inherent danger exception under a negligence theory); *Allison v. Ideal Laundry Cleaners*, 215 S.C. 344, 349, 55 S.E.2d 281, 282 (1949) (same). *Fike* is neither applicable nor persuasive.

As to the remaining out-of-state cases cited by Florence Concrete, it does not state that any of them involve the peculiar facts in this case, namely that the employer admitted it is inherently dangerous for an oversize load to be on the road at a prohibited time, liability is based on the employer's own negligence in letting the oversize load off of its lot at a prohibited time, there is no written contract or procedure between the employer and independent contractor, and the oversize load is regulated by the state legislature and department of transportation for public safety. (Br. of App. pp. 23-24). Therefore, those cases are not persuasive in this appeal.

Second, Florence Concrete argues that the lower court erred in finding the General Assembly and SCDOT's regulation of oversize loads supported applying the inherent danger exception. (Br. of App. p. 25). Florence Concrete again misstates the lower court's ruling. It did not make an "*ipso facto*" holding that the activity is inherently dangerous just because it is

regulated or requires a permit. (Br. of App. pp. 25-26). Instead, the court looked to the reason for and nature of the permitting regulations at issue and in light of the facts of this case.

The General Assembly granted SCDOT the power to issue permits for oversize loads "in the public interest for **safety** on the highways." S.C. Code Ann. § 57-3-190 (emphasis added). The General Assembly specified that, as a prerequisite to issuing a permit for an oversize load, there must be "good cause being shown that it is in the **public interest**." S.C. Code Ann. § 57-3-130(A) (emphasis added). The reason for the regulation is the public's safety on highways, and the nature of an oversize permit is that it is issued only when it serves the public interest. To ensure public safety, SCDOT determined that an oversize load may travel on the roads only during certain hours of certain days, prohibiting travel during times of darkness, certain school hours, and additional hours in large urban areas with greater population. (SCDOT Permit). The lower court held "[t]hese restrictions exist for the safety of the traveling public that may share a roadway with an oversize load," and Florence Concrete does not challenge that holding. (Order p. 7). The purpose and nature of the regulations at issue in this case support the lower court's holding that hauling the oversize, 72-foot-load in this case is inherently dangerous to the traveling public unless proper precautions are taken. The lower court did not make an "incredibly expansive interpretation" (Br. of App. p. 26) but, instead, reviewed the applicable law and regulations, and applied them to the peculiar facts of this case. The Court should affirm.

Third, Florence Concrete argues that the lower court erred in applying the inherent danger exception to danger created by the independent contractor's negligence. (Br. of App. pp. 27-31). Again, this argument misstates the lower court's ruling. The court ruled on Florence Concrete's liability for its **own** conduct and negligence. (Order pp. 10-13). "Florence Concrete owed a duty to take preventive measures to ensure an oversize load left its lot at an allowable travel time." (Order p. 9).

The court aptly rejected Florence Concrete's argument about liability for Rouse's conduct.

> Florence Concrete's argument is really that Nesbitt Transportation's employee is the proximate cause of Nelson's injuries, or at least the "intervening" cause, as it argued at the hearing. Those arguments are off point because the parties stipulated to proximate cause and damages. The Court is presented with only the issues of duty and breach.

(Order p. 10). The danger at issue in this appeal did not arise from Nesbitt Transportation or Rouse's conduct, and it is established as a matter of law in this case that Florence Concrete's failure to monitor is a proximate cause of Nelson's injuries. Florence Concrete's argument that an independent contractor's negligence does not make an activity inherently dangerous is irrelevant because it is inapplicable to the facts, the duty alleged, and the lower court's rulings.

Florence Concrete changes its argument on appeal about the specific work analyzed in deciding whether to apply the inherent danger exception. In the lower court, "Florence Concrete argued that it is in the business of manufacturing concrete, and that business is not inherently dangerous" (Order p. 10), and asked the court to use that conduct in its inherent danger exception analysis. On appeal, Florence Concrete argues the lower court "focused on the negligent act to find an inherent danger instead of focusing on the nature of the work itself." (Br. of App. p. 31). This is incorrect and, again, misstates the lower court's rulings.

The court held that the "focus of the inherent danger exception is the work that the employer hires the independent contractor to perform." (Order pp. 10-11). For example, in *Alexander v. Seaboard Air Line R.R. Co.*, 221 S.C. 477, 71 S.E.2d 299 (1952), when deciding the inherent danger exception, the Supreme Court analyzed the danger of the spraying weed killer on a right-of-way—the work that the defendant hired the independent contractor to perform. The lower court did the same in this case. It analyzed whether the oversize load at issue "posed an inherent danger to persons traveling the public roadways" in the absence of proper precautions.

(Order p. 9). That is the nature of the work that Florence Concrete hired Nesbitt Transportation to perform.

Florence Concrete relies on *S.C. Natural Gas Co. v. Phillips*, 289 F.2d 143 (4th Cir. 1961), for its argument. (Br. of App. pp. 30-31). *Phillips* is distinguishable from this case. Phillips, a general contractor, hired a subcontractor to get dirt for a construction site, and the subcontractor broke a gas pipeline while operating an earthmover. *Phillips*, 289 F.2d at 145. Gas and electric companies who suffered damages sued only the general contractor, and the jury returned a defense verdict. *Id.* On appeal, the question was "whether Phillips, the general contractor, is responsible for the acts of King, the subcontractor, which caused the damage." *Id.* The plaintiffs argued that the general independent contractor rule should not apply because the "employer ought not to be allowed to procure immunity from liability." *Id.* at 147. The Fourth Circuit analyzed the nondelegable duty for "ultrahazardous work." *Id.* The Court held that the danger of using equipment near a gas line "was not inherent in the work and the ultrahazardous exception" did not apply. *Id.*at 148.

In *Phillips*, the question was vicarious liability—whether the general contractor was liable for the actions of the subcontractor—and the Court analyzed a nondelegable duty—ultrahazardous, abnormally dangerous activities. Those facts are not present in this case. The question here is Florence Concrete's liability for its own actions. The analysis here is the inherent danger exception and not the nondelegable duty of an abnormally dangerous activity. *Phillips* does not support Florence Concrete's argument.

The lower court correctly applied the law to the facts of this case to hold that the inherent danger exception applies, and this Court should affirm.

ii. The lower court correctly found Florence Concrete had knowledge of the danger of transporting an oversize load during a prohibited time.

Florence Concrete's final argument is that it did not have prior knowledge "that **Mr. Rouse** was likely to create a danger by transporting the load outside of permitted times." (Br. of App. pp. 31-36) (emphasis added). Its prior knowledge of the independent contractor's negligence **is not the issue** and is not what the lower court's ruling is based upon. The lower court found this "argument is really that Nesbitt Transportation's employee is the proximate cause of Nelson's injuries" and held that the argument is "off point because the parties stipulated to proximate cause and damages" and asked the lower court to decide only duty and breach. (Order p. 10). Florence Concrete does not challenge that holding, and it is the law of the case.

Because it is established as a matter of law that Florence Concrete's conduct is a proximate cause of Nelson's injuries, all arguments regarding Rouse's conduct are improper and inapplicable. The Court must reject Florence Concrete's entire Argument II.D. on this basis alone or it will be, in effect, changing the terms of the parties' settlement agreement without authority or jurisdiction to do so.

As to the merits, Florence Concrete improperly attempts to renege on the stipulated fact that its shipping manager admitted that being on the road with an oversize shipment at a prohibited time creates an inherent risk and danger to the public. (Br. of App. p. 33; Consent Order p. 2). That is a stipulated fact that the parties, represented by counsel, negotiated in a hard-fought settlement. It is indisputable. "A stipulation is an agreement, admission, or concession made in judicial proceedings by the parties or their attorneys and is binding upon those who make them. The court must accept stipulations as binding upon the parties." *McCrea v. City of Georgetown*, 384 S.C. 328, 332, 681 S.E.2d 918, 921 (Ct. App. 2009).

Even if the Court could disregard a binding admission, Florence Concrete's attempt to analogize it to the evidence in *Allison v. Ideal Laundry Cleaners*, 215 S.C. 344, 55 S.E.2d 281 (1949), misinterprets the Supreme Court's analysis in that case. In *Allison*, the defendant

Laundry replaced its coal boilers with a propane gas system, and they exploded within a few days of installation. *Id.* at 348-49, 55 S.E.2d at 281-82. When adjoining property owners with damage sued the Laundry, the lower court granted a directed verdict for the Laundry because the gas system was installed by an independent contractor and there was "no evidence of negligence" on the part of the Laundry. *Id.* at 349, 55 S.E.2d at 282.

On appeal, the Supreme Court addressed the inherent danger exception. *Id.* at 350, 55 S.E.2d at 282. It stated that "[l]iability of the employer in such cases depends upon his antecedent knowledge of the danger inherent in the work or a finding that the average, reasonably prudent man or corporation should, in the exercise of due diligence, have known." *Id.* at 351, 55 S.E.2d at 283. "Obviously, the determining factor is knowledge, actual or implied, on the part of the employer of the dangerous nature of the work." *Id.* The court then analyzed evidence of the Laundry owner's knowledge of danger. *Id.* at 351-52, 55 S.E.2d at 283.

It considered evidence that no city ordinance regulated the installation or use of gas. *Id.* at 353, 55 S.E.2d at 284. The court said the "only evidence in the record that any official or employee of the laundry knew, or had reason to believe, that the use of the gas would be 'inherently' dangerous" is the owner's trial testimony that the gas "would be dangerous unless it was properly installed." *Id.* at 354, 55 S.E.2d at 284. The court found that testimony "unworthy of the weight necessary to ascribe to it" to create liability. *Id.* It noted that "virtually every case has to be considered on its own peculiar facts." *Id.*

Allison involved only the owner's testimony that the use of gas is dangerous if not properly controlled and handled. This case involves the **stipulated fact** of inherent danger. In *Allison*, the Court specified that the activity was not regulated. In this case, transporting an oversize load is regulated. In *Allison*, the owner did not have personal experience installing gas or have possession of applicable regulations and restrictions. Here, Florence Concrete is itself a

motor carrier and had possession of the oversize permit and its terms. Further, in *Allison*, the work was a one-time installation for a new commercial gas system. Here, over half of Florence Concrete's products are oversize loads that it shipped on a regular basis for decades. (Consent Order p. 2). Unlike in *Allison*, the "peculiar facts" of this case fall within the exception because Florence Concrete had knowledge of the dangers of transporting an oversize load without proper precautions.

III. The Court should affirm on the additional sustaining ground that Florence Concrete owed Nelson a duty to use reasonable care in the selection of an independent contractor.

As a separate, additional sustaining ground for affirming, the Court should find that Florence Concrete owed a duty to use reasonable care in the selection of Nesbitt Transportation as an independent contractor under the circumstances of this case. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

For over 150 years, South Carolina has recognized an owner's duty to use reasonable care in the selection of an independent contractor in certain circumstances. An owner is liable for an independent contractor where a contractor entrusted with "a work involving danger to others" is "known to be unworthy of trust." *Conlin v. City Council of Charleston*, 15 Rich. 201, 211-12 (Ct. App. 1868). Mr. Conlin fell through open trap doors in a church steeple and died. He worked as a steepleman for a steeple controlled by the Charleston City Council. *Id.* at 202. City Council hired an alleged independent contractor to put up a bell in the steeple, and the contractor left the trap doors open into the night when Conlin came to work. *Id.* at 203. Conlin fell through the doors to the ground floor of the church and died. *Id.* at 204. His widow brought an action against City Council, and a jury returned a verdict in her favor. *Id.* at 205.

On appeal, the Supreme Court granted a new trial because the court instructed the jury that the contractor must have had exclusive possession of the steeple to qualify as an independent contractor, when the law required only that he had enough control to do his job. *Id.* at 212. In the independent contractor discussion, the Court stated that "under suitable allegations the owner might be made responsible for the misconduct or negligence of a contractor known to be unworthy of trust, to whom a work involving danger to others was entrusted." *Id.* at 211-12. Importantly, the Court made this statement about owner liability in an opinion remanding the case for a new trial. Therefore, it meant for the parties to rely on its statements of the law.

The facts of this case come within the holding in *Conlin*. It is undisputed that the work of transporting an oversize load involves danger to others. (Consent Order p. 2). Florence Concrete entrusted this work to Nesbitt Transportation. Nelson alleges that Florence Concrete knew or should have known that Nesbitt Transportation was unworthy of trust because of its conditional FMCSA safety rating.

In *Anderson v. West*, 270 S.C. 184, 241 S.E.2d 551 (1978), the trial judge submitted to the jury a cause of action for negligent selection of an independent contractor. Geer Drug Company contracted with West to deliver prescription drugs to its customers. *Id.* at 187, 241 S.E.2d at 553. West hit Anderson's vehicle while Anderson was stopped at a red light, and Anderson died. *Id.* at 186, 241 S.E.2d at 552. Anderson's widow brought a wrongful death action on two theories—that West was Geer Drug's agent or, if West was an independent contractor, that Geer Drug "was negligent in selecting West" because of his "unusually poor driving record." *Id.* at 187, 241 S.E.2d at 553. The trial judge submitted both theories to the jury. The jury returned a general verdict for the plaintiff, and Geer Drug appealed. *Id.*

The Supreme Court found sufficient evidence to submit West's employment status to the jury. *Id.* Geer Drug raised issues about the admission of negligent selection evidence but failed

to object to the trial court's submission of the negligent selection theory to the jury. *Id.* at 188, 241 S.E.2d at 553. Because the trial court properly submitted the issue of employment to the jury, the Court did not reach the issues about negligent selection under the two-issue rule. *Id.* *Anderson* shows that trial courts accept negligent selection of an independent contractor as the law of South Carolina.

Based solely on South Carolina law, Florence Concrete owed a duty to Nelson to use reasonable care in the selection of an independent contractor because the work of hauling an oversize load involves danger to others and Nesbitt Transportation had a publicly-available conditional safety rating.

It is established in this case that Florence Concrete owed a duty to Nelson to select an independent contractor with operating authority, insurance, and a proper permit. *See* Argument I. Florence Concrete failed to do that because Nesbitt Transportation's permit was unsigned and invalid. *Id.* This supports a finding of a duty to use reasonable care in the selection of an independent contractor.

Restatement (Second) of Torts § 411 (1965) also supports finding a duty. It states:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

Restatement (Second) of Torts, § 411 (1965). This case falls within § 411(a) because the work of hauling an oversize load involves a risk of physical harm unless it is skillfully and carefully done. (Order p. 2 ¶ 8.c.). Although no South Carolina case expressly adopts § 411, it has been

the law in South Carolina since the *Conlin* case in 1868.[8] The Court may rely on § 411 as persuasive and as confirming the widespread acceptance of existing state law. *See, e.g.*, *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 484, 623 S.E.2d 373, 377 (2005) (citing as "persuasive" a Restatement section and cases from other jurisdictions that relied on its reasoning).

Based on the unappealed law of the case, South Carolina case law, or § 411, individually or cumulatively, the Court should find that, under the particular facts of this case, Florence Concrete owed Nelson a duty to use reasonable care in the selection of an independent contractor to do work that involves danger to others.

Florence Concrete appealed only whether it owed a duty. (Br. of App.). Therefore, if the Court finds that it owes a duty to use due care in the selection of an independent contractor, then it is the law of the case that Florence Concrete breached that duty and its breach proximately caused Nelson's damages.

Florence Concrete worked with Nesbitt Transportation since 1992. They never entered into a written contract or operated under a set of policies or procedures. (Consent Order p. 4). In the 27 years from 1992 until 2019, Florence Concrete never looked into Nesbitt Transportation's publicly-available safety rating. *Id.* The shipping manager did not know about FMCSA safety ratings, despite the fact that Florence Concrete is a registered federal motor carrier. *Id.*; Am. Cmplt. -00296 p. 15 ¶ 45; Ans. to Am. Cmplt. p. 5 ¶ 45.

[8] *Ruh v. Metal Recycling Servs.*, 2022 WL 203744 (4th Cir. 2022) is on certification to the South Carolina Supreme Court on this issue: "Under South Carolina law, can an employer be subject to liability for harm caused by the negligent selection of an independent contractor?" *Id.* at *1. The Court held oral argument on September 13, 2022. *Ruh* asks generally about liability for negligent selection of an independent contractor and, here, it is established as unappealed law that Florence Concrete owed and breached a duty to select a shipper with operating authority, insurance, and a proper permit.

Florence Concrete had no evaluation or qualification process or criteria for choosing a motor carrier for its oversize loads. (Consent Order p. 4). It required only that Nesbitt Transportation obtain an oversize load permit. *Id.* The fact that a load may be legally transported has nothing to do with the trustworthiness or ability of the transportation company to safely haul the load. *See* S.C. Code Ann. § 57-3-130(B)(3)(a) (acknowledging an oversize permit does not ensure driver safety by stating that "[t]he granting of a[n oversize] permit . . . does not waive the liability or responsibility of the applicant . . . for personal injuries").

If Florence Concrete looked, it would have found that Nesbitt Transportation held only a conditional safety rating from the FMCSA for four years before Nelson's injuries. (Order pp. 3-4). The conditional safety rating meant Nesbitt Transportation "lack[ed] adequate management controls and systems necessary to operate safely which could lead to a number of safety violations." *Id.* If Florence Concrete looked, it would have found a conditional safety rating that indicated Nesbitt Transportation is "known to be unworthy of trust." *Conlin v. City Council of Charleston*, 15 Rich. 201, 211-12 (Ct. App. 1868).

There ought to be a duty of the party hiring an independent contractor to do so reasonably. In the absence of such a duty, a company who hires an independent contractor can stick its head in the sand and either ignore or remain ignorant of dangers because there would never be repercussions for its decision. For example, an employer could hire the cheapest independent contractor, regardless of its safety record, procedures, or whether it has the proper equipment, because the employer will not bear liability for an injury related to that work.

Based on the unique, stipulated facts of this case, the Court should find that Florence Concrete owed a duty to Nelson to use reasonable care in the selection of an independent contractor to haul an oversize load.

CONCLUSION

For any one of these independent reasons, this Court should affirm the decision of the lower court.

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September 28, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2022-000729

Thomas Rodriquis Nelson,……....……..……Respondent,

v.

Florence Concrete Products, Inc.,...…….……...Appellant.

PROOF OF SERVICE

The undersigned certifies that a copy of Initial Brief of Respondent and Respondent's Designation of Matter to be included in the Record on Appeal have been served upon counsel for Appellant via electronic mail at the email addresses stated in the Attorney Information System as set forth below on September 28, 2022.

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Sep 28 2022
SC Court of Appeals

September 28, 2022

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Re: *Thomas Rodriquis Nelson v Florence Concrete Products, Inc.*, Appellate Case No. 2022-000729
Respondent's Initial Brief and Designation of Matter

Dear Mrs. Kitchings:

Attached for filing is the (1) *Initial Brief of Respondent*, (2) *Respondent's Designation of Matter to be included in the Record on Appeal*, and (3) *Proof of Service*. By electronic copy of this letter, I am serving all counsel of record as stated below.

If you have any questions, please do not hesitate to contact me. Thank you.

With kind regards, I am,

s/Kathleen C. Barnes

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