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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge
Civil Action No. 2021-CP-21-02042

Appellate Case No. 2022-000729

Thomas Rodriqueis Nelson.....Respondent,

v.

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

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	CASE NO. 2021-CP-21-02042
	)	
Thomas Rodriquis Nelson,	)	
	)	
Plaintiff,	)	ORDER GRANTING PLAINTIFF'S
	)	MOTION FOR SUMMARY
v.	)	JUDGMENT
	)	
Florence Concrete Products, Inc.,	)	
	)	
Defendant.	)	
	)	

This matter came before the Court on the parties' cross-motions for summary judgment. The parties to this declaratory judgment action reached a settlement agreement of the underlying litigation that is dependent upon the Court answering two questions of law regarding the duty Defendant Florence Concrete, Inc., owed to Plaintiff Thomas Rodriquis Nelson and whether it breached a duty. The parties agreed to stipulated facts. They filed cross-motions for summary judgment and supporting memoranda.

The Court held a hearing on March 10, 2022. Present for Plaintiff Nelson were Ashley B. Nance, Kathleen C. Barnes, and Linward C. Edwards. Present for Defendant Florence Concrete were Anthony W. Livoti, Cordes B. Kennedy, and John R. Owen. After carefully considering the parties' memoranda, hearing argument of counsel, and reviewing the applicable law, the Court grants Plaintiff's motion for summary judgment, answering "yes" in favor of Plaintiff with regard to the two questions presented. This Court denies Defendant's motion.

STANDARD

"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). "Cross 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) (internal quotation and alteration marks omitted).

FACTS

The facts are taken directly from the stipulated facts that the parties agreed to as part of their settlement and this declaratory judgment action.¹

Florence Concrete hired Nesbitt Transportation to haul a 72-foot-long cement slab that it manufactured. The length of the slab required a special oversize permit that restricted the transportation time to daylight hours only. When Nelson drove to work in the dark around 6:30 a.m., he came upon the tractor trailer hauling the oversize load. The vehicles collided, and the accident rendered Nelson a quadriplegic.

Nelson sued Florence Concrete for his injuries. He alleged its negligence in failing to ensure its oversize load was transported during an allowed time of day under the permit and in selecting Nesbitt Transportation to transport the load because of a poor safety rating. (Am. Cmplt. pp. 6-7). Florence Concrete defended on the basis that it hired an independent contractor that is solely liable for Nelson’s injuries. (Order p. 2 ¶ 8.c.; Ans. to Am. Cmplt.).

Florence Concrete manufactures concrete slabs. More than half of its products are longer than 60 feet. (Order p. 2 ¶ 8.a., c.). A load that is over 60-feet-long is not supposed to be on the public roadways unless the transporter of the load applies for and receives an oversize permit from the South Carolina Department of Transportation (“SCDOT”). *Id.* at ¶ 8.a; S.C. Code Ann. §§ 57-

¹ At the hearing, both parties alleged the other presented the Court with facts outside of, and in one instance, contrary to the stipulated facts. In reaching its decision, the Court considered only the stipulated facts.

3-130, 56-5-4070. A SCDOT oversize permit restricts the time of day that the permittee can travel to only daylight hours. Travel is restricted to only Monday through Saturday from half-an-hour after official sunrise until half-an-hour before official sunset. (SCDOT permit). If the oversize load is traveling in a large urban area, travel is further prohibited from 7:00 a.m. to 9:00 a.m. on all days and from 3:00 p.m. to 6:00 p.m. on school days.

The cement slab that injured Nelson was 72-feet-long and 24-inches-wide and required an oversize permit. (Order p. 2 ¶ 8.a.). Florence Concrete verbally contracted with Nesbitt Transportation to haul the slab from its Sumter, SC, manufacturing facility to a bridge construction project in North Carolina. *Id.* at p. 2 ¶ 8.a-b. Nesbitt Transportation applied for and received oversize load permits from SCDOT and NCDOT. *Id.* at p. 2 ¶ 8.c.

Under the permit terms, the parties agree that the oversize load could not be on the road from 3:00 p.m. on January 3, 2019, until 9:00 a.m. on January 4, 2019.² (Order p. 3 ¶ 8.d.). Florence Concrete knew the permit for this oversize load contained “travel restrictions imposed for the protection of the general public.” *Id.* at p. 2 ¶ 8.c.

Florence Concrete put the cement slab onto a Nesbitt Transportation extended trailer located at Florence Concrete’s facility in Sumter. *Id.* at p. 2 ¶ 8.b. Florence Concrete attached to the trailer the SCDOT and NCDOT permits that stated the restricted travel times. *Id.* at p. 3 ¶ 8.c. The SCDOT permit states in capital letters that it “shall be signed.” SCDOT guidelines for oversize loads state: “An Oversize/Overweight Permit is not valid until signed by an authorized representative of the permittee.” The oversize permit for this load is not signed.

On January 3, 2019, a Nesbitt Transportation employee came to Florence Concrete’s facility and picked up the oversize load at 5:02 p.m.—a travel time prohibited by the permits. *Id.*

² Sumter is a large urban area, and January 4, 2019, was a school day.

at ¶ 8.d. Florence Concrete did not monitor its lot or know when this load left the lot. *Id.* at ¶¶ 8.b., -e.

The driver took the oversize load to a commercial parking lot in Lynchburg, SC, left it overnight, and then got on the road the next morning around 6:30 a.m.—a travel time still prohibited by the permits. *Id.* at ¶ 8.d.-e. Around 6:30 a.m., before sunrise, while Nelson drove to work, he came upon the truck and trailer hauling the oversize cement slab. (Order p. 3 ¶ 8.f.). The vehicles collided in the dark, and Nelson suffered injuries and became a quadriplegic. *Id.*

Starting in 1992, Florence Concrete regularly hired Nesbitt Transportation to haul loads. *Id.* at p. 4 ¶ 8.k. They did not have a written agreement or operate under any policies or procedures. *Id.* Florence Concrete did not have a qualification process for evaluating a commercial motor carrier's fitness before selecting it to haul a load, including oversize loads. *Id.* Florence Concrete never looked into Nesbitt Transportation's safety rating. *Id.* at ¶ 8.j.-k.

At the time of the collision, the Federal Motor Carrier Safety Administration ("FMCSA") rated Nesbitt Transportation's safety as "conditional." *Id.* at p. 3 ¶ 8.h. Nesbitt Transportation lost a satisfactory safety rating in 2015 after a failed safety audit showed it violated numerous regulations. *Id.* A conditional safety rating means the FMCSA found Nesbitt Transportation lacked "adequate management controls and systems necessary to operate safely which could lead to a number of safety violations regulated by the FMCSA." *Id.* at p. 4 ¶ 8.h. Nesbitt Transportation could still operate as a motor carrier and haul an oversize load with a conditional safety rating. *Id.* at ¶ 8.i.

In 2019, Nelson filed a negligence action against Florence Concrete. (2019-CP-31-00296). Florence Concrete's shipping manager admitted "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." (Order

p. 2 ¶ 8.c.). After extensive litigation and mediation, the parties reached a settlement agreeing to proximate cause and Nelson's damages but making the amounts payable dependent on the outcome of the Court's answers to two questions of law. (Am. Cmplt. p. 4). The parties agreed to stipulated facts, and Nelson filed this declaratory judgment action. (Am. Cmplt.).

Nelson's main contentions against Florence Concrete are that it acted negligently in failing to ensure that an inherently dangerous oversize load was transported during an allowed time of day under the permits and in selecting Nesbitt Transportation to transport the load because of its conditional safety rating. (Am. Cmplt. pp. 6-7).

In a Consent Order that incorporates the parties' stipulated facts, the Court agreed to answer these 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?

The Court answers both questions in the affirmative as explained below.

ANALYSIS

Based on the unique, stipulated facts of this case, the Court answers both questions "yes." The Court bases its ruling in accordance with the inherent danger exception to the general rule that an employer is not liable for the work of an independent contractor.

I. DUTY

Nelson argued two bases for a duty: (1) the inherent danger exception to the general rule that an employer is not liable for the work of an independent contractor, and (2) the duty to exercise

reasonable care in the selection of an independent contractor. For the reasons explained below, the Court finds a duty to exist in light of the inherent danger exception. This Court will not address the second proposed basis for liability offered by Plaintiff.

The first question asks whether Florence Concrete “owe[d] a duty of care to Plaintiff to take measures **beyond** verbally contracting” with a shipper with operating authority, insurance, and a proper permit. (Order pp. 1-2) (emphasis added). Nelson argues that, because Florence Concrete agreed it owes a minimal duty to contract with a shipper with operating authority, insurance, and a proper permit, it is established that Florence Concrete owes some duty despite its contention that Nesbitt Transportation is an independent contractor. Florence Concrete argued at the hearing that it did not concede it owed any duty based on the language of the question. However, Florence Concrete failed to explain what the question means if it does not acknowledge at least a minimal duty. For example, Florence Concrete never argued that, because it is using an independent contractor, it may choose any trucking company, even if uninsured, without operating authority, and without proper permitting, and still avoid liability. Regardless, while the Court finds the first question does presuppose that Florence Concrete owes some duty—disproving the argument that hiring an independent contractor absolved Florence Concrete of liability—the Court would find the duty discussed below notwithstanding that language.

A. Inherent Danger Exception

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 exception “is difficult of application to varying conditions and circumstances and

virtually every case has to be considered on its own peculiar facts.” *Allison v. Ideal Laundry & Cleaners*, 215 S.C. 344, 354, 55 S.E.2d 281, 284 (1949). Considering the exception in light of the “peculiar facts” of this case, the Court finds that it applies and Florence Concrete owed Nelson a duty to take “proper precautions” for transportation of its oversize load.

Nelson does not challenge that Nesbitt Transportation acted as an independent contractor, bringing this case, initially, within the general rule. To come within the exception to the rule, the work Florence Concrete hired Nesbitt to perform must be inherently dangerous unless proper precautions are taken. 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.” (Order p. 2) (emphasis added). The Court finds that this fact alone is sufficient to hold a duty exists under the inherent danger exception.

Even without that stipulated fact, the Court would still find the exception applies because hauling an oversize load is work that is “inherently or intrinsically dangerous unless proper precautions are taken.” *Alexander*, 221 S.C. at 487-88, 71 S.E.2d at 304. The General Assembly declared that SCDOT, “in the public interest for **safety** on the highways, may issue . . . permits for moving oversize loads and vehicles.” S.C. Code Ann. § 57-3-190 (emphasis added). It specified that SCDOT “may issue special permits authorizing” the movement of oversize loads or vehicles upon “good cause being shown that it is in the **public interest**.” S.C. Code Ann. § 57-3-130(A) (emphasis added). SCDOT then determined that an oversize load may travel on the roads only during certain hours of certain days. (SCDOT Permit). The restricted travel includes times of darkness, school days, and additional restrictions for large urban areas. These restrictions exist for the safety of the traveling public that may share a roadway with an oversize load. Applying that law to the oversize 72-foot-load in this case, the Court finds that this alone supports a finding that

hauling an oversize load is inherently dangerous to the traveling public unless proper precautions are taken.

Even without the stipulated facts and the statutory and regulatory law, case law alone also supports the Court's conclusion. In *Alexander v. Seaboard Air Line R.R. Co.*, 221 S.C. 477, 71 S.E.2d 299 (1952), the Supreme Court held that a railroad company could not avoid liability for spraying weed killer that ruined a nearby cotton crop by hiring an independent contractor to perform the work. The defendant railroad hired an independent contractor to spray weed killer on the track bed and right-of-way located 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 was destructive to 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 returned a verdict for the plaintiff. The railroad appealed, raising as one issue that it was entitled to a JNOV because the spray company was an independent contractor for whom it was not liable. *Id.* at 481-82, 71 S.E.2d at 301.

In ruling on the inherent danger exception, the Supreme Court considered whether the railroad “kn[e]w or could they have learned by reasonable inquiry of the injurious effect” the spray would have “on growing cotton if it floated” from the right-of-way. *Id.* at 488-89, 71 S.E.2d at 304. The Court also considered evidence that the weed killer should not be sprayed on a windy day and “the wind was blowing pretty high that day”—i.e., evidence that proper precautions were not taken. *Id.* at 489, 71 S.E.2d at 304-05. It held that evidence required the lower court to submit the negligence issue to the jury. *Id.* The Supreme Court affirmed the denial of the railroad's motion for JNOV and affirmed the judgment against it for the negligent acts of its independent contractor. *Id.* at 491, 71 S.E.2d at 305.

Applying *Alexander* to the stipulated facts in this case, Florence Concrete knew the inherent danger to the public if an oversize load was transported during times prohibited by the permit. With that knowledge, it allowed the load off of its lot at a prohibited travel time—*i.e.*, failed to take proper precautions.

In *Duane v. Presley Construction Co.*, 270 S.C. 682, 244 S.E.2d 509 (1978), the plaintiff brought an action for water concentration and silting damages to his property caused by development of an adjacent subdivision. *Id.* at 683, 244 S.E.2d at 509. The developer hired a construction company as an independent contractor to clear the land. *Id.* The developer defended the action on the basis that the independent contractor caused the damage. *Id.* The trial court granted summary judgment for the developer.

On appeal, the Supreme Court reversed. It stated that an employer who hires an independent contractor “is responsible[] if the injury is caused by his own negligence in failing to take preventive measures.” *Id.* at 683-84, 244 S.E.2d at 510. The Court held 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 684, 244 S.E.2d at 510.

Applying *Duane* to the stipulated facts of this case, Florence Concrete owed a duty to take preventive measures to ensure an oversize load left its lot at an allowable travel time because, absent proper precautions, the oversize load posed an inherent danger to persons traveling the public roadways.

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 unique stipulated facts, statutory and regulatory law, and the case law, individually and cumulatively, warrant the Court finding the inherent danger exception applies, and the answer to the first question is “yes.”

Florence Concrete’s arguments to the contrary are not convincing.

Florence Concrete argued it is irrelevant that the oversize load left its lot at a prohibited time because the truck driver’s decision to leave the next morning at a prohibited time caused the accident. It argued the accident could have occurred regardless of whether the oversize load left the lot earlier in the afternoon on January 3 or during a prohibited time. Nelson responded, and the Court agrees, that Florence Concrete’s argument relates to a vicarious liability situation. Nelson does not argue that Florence Concrete is vicariously liable for Nesbitt Transportation’s decision to pull onto the road around 6:30 a.m. Nelson argues that Florence Concrete is liable for its own conduct in allowing the load to leave its lot at a prohibited time. Under these stipulated facts, if Florence Concrete prevented Nesbitt Transportation from leaving the lot at 5:02 p.m., the load could not have legally been on the road again until 9:00 a.m. the next morning and would not have been on the road to injure Nelson. Those facts, and not a hypothetical situation, are what the Court must base its decision upon in this case.

Further, 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.

Florence Concrete argued that it is in the business of manufacturing concrete, and that business is not inherently dangerous. The argument is incorrect because the focus of the inherent

danger exception is the work that the employer hires the independent contractor to perform. In *Alexander v. Seaboard Air Line R.R. Co.*, 221 S.C. 477, 71 S.E.2d 299 (1952), when addressing whether the inherent danger exception applied, the Supreme Court analyzed the inherent danger of the independent contractor's work spraying weed killer on a right-of-way. It did not analyze the danger of the railroad business in general. The Court rejects Florence Concrete's argument.

Florence Concrete also cited to numerous cases that it argued establish that hauling an oversize load is not inherently dangerous. These cases are factually and, in some instances, legally distinguishable.

In *Oulla v. Velazques*, 427 S.C. 428, 831 S.E.2d 450 (Ct. App. 2019), defendant Harbison Community Association bought two pallets of sod from defendant Super-Sod. Harbison employees picked up the sod and did not secure it with straps to their flatbed trailer. *Id.* at 432-33, 831 S.E.2d at 452. The sod fell off of the trailer onto the interstate, backed-up traffic, and the plaintiff was injured when a car hit his stopped vehicle. *Id.* at 433-34, 831 S.E.2d at 452. The plaintiff sued Super-Sod alleging it owed duties as "the loader of a vehicle" under the common law and a statute that requires a vehicle operator to secure a load. *Id.* at 434, 831 S.E.2d at 453. The Court of Appeals rejected both arguments. It held the statute imposed a duty only on the vehicle operator and did not create a duty for Super-Sod to secure "customers' vehicles and trailers." *Id.* at 434, 441, 831 S.E.2d at 453, 457. It held the common law did not create a duty under the facts because Super-Sod did not assume a duty solely by placing the sod on the trailer and "the mere fact that it was foreseeable an unsecured load could be a danger to the [public] [wa]s insufficient to impose liability." *Id.* at 444-45, 831 S.E.2d at 458.

This case is vastly different from *Oulla*. First, this case involves an independent contractor, and *Oulla* does not. In *Oulla*, the defendant did not hire the driver to perform any service for it.

The driver was simply a customer that picked up a purchased product. In this case, Florence Concrete hired Nesbitt Transportation to transport the oversize load for it. Second, this case involves a regulated oversize load owned by the defendant, and *Oulla* involved an unregulated load owned and transported by the customer driver on a flatbed trailer. Third, this case involves an oversize load that the General Assembly, SCDOT, and Florence Concrete all acknowledge is a danger to the public due when on the roads at a prohibited time.

Finally, Florence Concrete argues that because the statute at issue in *Oulla* applied to the vehicle operator and the permit at issue here applies to the permittee, then the same result is warranted in this case. The Court disagrees. In *Oulla*, the plaintiff sought to use the statute to impose a duty on a product seller and then “extend[]” that duty “to members of the traveling public.” *Id.* at 434, 831 S.E.2d at 453. Nelson makes no such argument in this case. Instead, the duty here is based on the inherent danger of the transportation of an oversize load at prohibited times. That a permit is required for the load and is issued to the transportation company does not mean that the employer is relieved of all liability related to the load. Further, the oversize load statute states: “No **person** may violate the terms or conditions of the special permit.” S.C. Code Ann. § 57-3-130(A) (emphasis added).

Florence Concrete cited to *Norris v. Bryant*, 217 S.C. 389, 60 S.E.2d 844 (1950), as holding that hauling logs is not inherently dangerous. Norris rode in a truck with his legs hanging over the side. *Id.* at 393-94, 60 S.E.2d at 845. When the truck met a truck and trailer hauling logs, one of Norris’s legs was severed. *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.* In addressing the inherent danger exception, the Supreme Court stated:

[W]e do not think that the work involved in the instant case was of that quality. 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.

This case is distinguishable from *Norris*. First, a log truck is not an oversize load regulated by the General Assembly and SCDOT due to its danger to the public. As stated above, the particular facts of this case form the basis of and inform the Court's decision. Second, Nelson seeks to hold Florence Concrete liable for its own negligent conduct.

Finally, Florence Concrete cited to a case from the Supreme Court of Alabama, *Fike v. Peace*, 964 So.2d 651 (Ala. 2007), in which 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. The court addressed "whether this case involves an inherently dangerous activity, thereby imposing liability upon [employer] for the negligence of [independent contractor] in the performance of that inherently dangerous activity." *Id.* at 660. The court equated "inherently dangerous" to "ultrahazardous" and "abnormally dangerous" activities. *Id.* at 661 (internal quotation marks omitted). Using that definition, it held that "the hauling of this heavy load does not meet the definition of an 'inherently dangerous' activity because the major risk of harm from the oversized load could have been alleviated if [employer] and [independent contractor] had used reasonable care." *Id.* at 662.

Fike is not persuasive. First, it is out-of-state, non-controlling authority. Second, it applies a different exception than the one used in South Carolina. In South Carolina, the inherent danger exception applies to "work which is inherently or intrinsically dangerous unless proper precautions are taken."³ *Alexander v. Seaboard Air Line R.R. Co.*, 221 S.C. 477, 487-88, 71 S.E.2d 299, 303-

³ *Accord Restatement (Second) of Torts*, § 416 cmt. d ("[I]t is not essential that the work which the contractor is employed to do be in itself an extra-hazardous or abnormally dangerous activity, or

04 (1952). This is different from strict liability that applies to an ultrahazardous or abnormally dangerous activity. In *Fike*, the Alabama Supreme Court said hauling an oversize load could not be inherently dangerous specifically because proper precautions would eliminate the risk of harm. In South Carolina, that proper precautions eliminate the risk of harm brings an activity within the inherent danger exception and allows for an employer's liability for its negligence in failing to take those proper precautions.

For these reasons, the Court answers the first question "yes" because it finds Florence Concrete owed a duty under the inherent danger exception.

II. BREACH OF DUTY

The Court finds the stipulated facts show that Florence Concrete breached the duty discussed above answering the second question "yes."⁴

"A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed." *Horne v. Beason*, 285 S.C. 518, 521, 331 S.E.2d 342, 344 (Ct. App. 1985).

As to the inherent danger exception, Florence Concrete argued almost exclusively about the duty issue and did not really address breach. The Court finds it breached the duty to take precautions to ensure the oversize load left its lot at an allowable travel time. It is foreseeable that allowing an oversize load to travel on public roadways at a prohibited time may likely injure a member of the traveling public. Public safety is the purpose of the permit restrictions.

that it involve a very high degree of risk to those in the vicinity. It is sufficient that it is likely to involve a peculiar risk of physical harm unless special precautions are taken, even though the risk is not abnormally great.").

⁴ Nelson argued that the permit for this oversize load was not signed, and a permit is not valid until signed. This is factually true and, applying it to the language of the first question, means that Florence Concrete breached its minimal duty because Nesbitt Transportation did not have a proper permit.

Over half of Florence Concrete's business involved manufacturing and shipping oversize loads. (Order p. 2 ¶ 8.a.). Florence Concrete knew its oversize loads required special permits with "travel restrictions imposed for the protection of the general public." *Id.* at ¶ 8.a., c., j. It knew "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." *Id.* Florence Concrete had in its possession the oversize permits for the load that injured Nelson and attached them to the trailer. *Id.* at pp. 2-3 ¶ 8.c.

Despite all of this knowledge, Florence Concrete breached its duty by failing to ensure the proper precaution of the oversize load leaving its lot at an allowable time. If Florence Concrete ensured the travel time precautions were followed, the oversize load would not have been on the road at the time of the accident, and Nelson would not be a quadriplegic. That Florence Concrete did not know what time the driver left is not persuasive because it had the ability to monitor the lot. The Court finds that Florence Concrete breached its duty to Nelson to ensure that proper precautions were taken for the inherently dangerous work of transporting an oversize load.

CONCLUSION

For the reasons stated above, this Court GRANTS Plaintiff's motion for summary judgment and answers "yes" in favor of Plaintiff to the two questions of law presented. The Court DENIES Defendant's motion for summary judgment. This final order ends the case.

AND IT SO ORDERED.

The Honorable Michael G. Nettles
Presiding Judge, Florence County



Florence Common Pleas

Case Caption: Thomas Rodriquis Nelson VS Florence Concrete Products Inc ,
defendant, et al

Case Number: 2021CP2102042

Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140

Electronically signed on 2022-04-29 09:00:40 page 16 of 16

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

CIVIL ACTION NO: 2021-CP-21-02042

Thomas Rodriqueis Nelson,

Plaintiff,

vs.

CONSENT ORDER

Florence Concrete Products, Inc.,

Defendant.

This matter comes before the Court based upon the parties' Agreement. The Court finds as follows:

1. Plaintiff is a citizen and resident of the County of Lee, State of South Carolina.
2. Defendant Florence Concrete Products, Inc. is a South Carolina corporation with its principal place of business in the County of Florence, State of South Carolina.
3. This suit arises out of an accident that occurred on January 4, 2019, in Lee County.
4. This Court has personal jurisdiction over the parties hereto and subject matter jurisdiction over the claims asserted in this case.
5. The damages sustained by Plaintiff have been agreed upon by the parties, but the amount(s) payable to Plaintiff is dependent on the outcome of the Court's declaratory ruling on the legal question(s) set forth in Paragraph 7 below, and the outcome of any resulting appeals.
6. Plaintiff will file an Amended Complaint seeking declaratory judgment relief.
7. The Court of Common Pleas for Florence County is asked to determine the following questions:

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 totake 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?

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

8. For purposes of these questions, the parties hereby stipulate to the following facts:

- a. The load was a 72-foot by 24-inch cement slab fabricated by Defendant Florence Concrete Products, Inc. for use in a bridge construction project in North Carolina. This load was oversized (over-length). South Carolina requires a permit for loads longer than 60 feet. Approximately 50%-70% of the products fabricated by Defendant Florence Concrete are classified as oversized loads. This load required oversize permits for travel issued by the South Carolina and North Carolina Departments of Transportation.

Florence Concrete hired Nesbitt Transportation, Inc. to transport the cement slab.

- b. The cement slab was pre-loaded on a Nesbitt Transportation extended trailer and placed in Florence Concrete's facility located at 865 Industrial Road, Sumter, SC 29150. Florence Concrete does not monitor or secure the trailer lot. The load was being shipped to Justice Branch Road, Enfield, North Carolina 27823.
- c. The South Carolina and North Carolina DOTs are the regulatory agencies responsible for processing requests to obtain oversize permits. Nesbitt Transportation submitted true and accurate information to both the South Carolina and North Carolina DOTs to obtain the permits for this load, including their USDOT operating authority number, insurance information and vehicle information. After review of the information, the oversize permits were issued. Shipment of the load was subject to the restrictions and regulations contained in the South Carolina Department of Transportation Oversize/Overweight Permit # RB4441R2489 and North Carolina Single Trip Permit #90103500341 (attached hereto).

Florence Concrete was aware that the shipment of this oversized load had travel restrictions imposed for the protection of the general public. Florence Concrete's Shipping Manager, Lance Roberson, testified 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.

Florence Concrete confirmed that Nesbitt Transportation had the necessary motor carrier operating authority and insurance in place to obtain the oversize permits from the South Carolina DOT and North Carolina DOT for this load. The permits

were issued to Nesbitt Transportation, and Florence Concrete employees attached the permits along with a set of directions for travel to the trailer before it left Florence Concrete's premises.

- d. Calvin Rouse, an employee of Nesbitt Transportation, picked up the load from Florence Concrete at 5:02 p.m. on January 3, 2019, which violated the permitted time for travel contained in the South Carolina Department of Transportation Oversize/Overweight Permit. According to the Permit, the oversized load in question could not have been on the road in Sumter, South Carolina, after 3:00 p.m. on this day. Pursuant to the Permit, the earliest time that this oversized load in question could have been on the road in Sumter, South Carolina, was 9:00 a.m. the next day, on January 4, 2019, which was approximately over 2 hours after the accident described herein occurred in Lynchburg, South Carolina.
- e. Florence Concrete was not aware of the time that Mr. Rouse left its lot with the oversized load nor was it aware that the oversized load left the lot at a time that violated the oversized permit. After leaving Florence Concrete's lot, Mr. Rouse drove to Lynchburg, South Carolina and parked the Nesbitt tractor trailer at a commercial parking lot next to U.S. Highway 76. Florence Concrete was not aware that Mr. Rouse planned to park the load overnight at this location. Florence Concrete's Shipping Manager, Lance Roberson, testified that Florence Concrete did not have a problem with parking the load at this commercial lot so long as the owner of the commercial lot approves it to be parked there.
- f. On January 4, 2019, Plaintiff left his home in Lynchburg, South Carolina, at approximately 6:10 a.m. and was traveling on US Highway 76 to Sumter to go to work. Between 6:27 a.m. and 6:38 a.m., before sunrise, Plaintiff was involved in an accident with the Nesbitt Transportation truck and extended trailer hauling the oversized load belonging to Florence Concrete on US Highway 76 in Lynchburg, South Carolina. The truck was being operated on the road by Mr. Rouse at a time of day which violated the permitted time for travel contained in the South Carolina Department of Transportation Oversize/Overweight Permit.

Florence Concrete did not provide instructions to Nesbitt Transportation or Mr. Rouse on when to move the load. Mr. Rouse testified that it was his choice to leave early that morning to get an early start on his day.

- g. Plaintiff sustained injuries as a result of the accident and is quadriplegic.
- h. At the time of the accident, Nesbitt Transportation, Inc. had been assigned a Conditional Safety Rating with the Federal Motor Carrier Safety Administration (FMCSA) since 2015. The conditional safety rating was assigned after a failed safety audit due to violations of numerous safety regulations. A conditional safety rating is defined as the motor carrier lacking adequate management controls and systems necessary to operate safely which could lead to a number

of safety violations regulated by the FMCSA. Nesbitt Transportation, Inc. never sought to upgrade its rating to a Satisfactory Rating through a corrective action plan with the FMCSA. A corrective action plan certifies that a motor carrier has taken, and will continue to take, steps to correct the deficiencies that led to the safety audit failure.

- i. There are no restrictions placed on a motor carrier that has been assigned a conditional safety rating by the FMCSA or the South Carolina DOT. A motor carrier with a conditional safety rating is permitted to operate on all roads in the United States. Additionally, a conditionally rated motor carrier is permitted to haul oversized loads. Finally, there are no restrictions for a shipper, such as Florence Concrete, in hiring a conditionally rated motor carrier.
- j. Florence Concrete did not conduct an inquiry into Nesbitt Transportation's safety rating prior to verbally contracting with the motor carrier to ship oversized loads. Florence Concrete Product Inc.'s Shipping Manager, Lance Roberson, testified that he did not know what a conditional safety rating is and further testified that if Nesbitt Transportation was issued an oversized permit from the Department of Transportation then that is all that Florence Concrete required.
- k. Florence Concrete and Nesbitt Transportation did not have a written contractual agreement nor were there any written policies and procedures in place between the companies. Florence Concrete did not have a formal evaluation or qualification process to evaluate Nesbitt Transportation and determine its fitness as a commercial motor carrier. Defendant Florence Concrete Products, Inc. used its experience from dealing with Nesbitt Transportation since 1992. Nesbitt Transportation hauled the vast majority of Florence Concrete's loads since 1992 and had done so without any prior motor vehicle accidents, and only minor property damage incidents. Additionally, Florence Concrete relied on the fact that Nesbitt Transportation had been issued a DOT number and operating authority from the FMCSA, was able to obtain oversize load permits from the South Carolina and North Carolina DOTs, and was authorized to operate without restrictions to determine Nesbitt Transportation Inc.'s fitness as a commercial motor carrier.

The parties agree that no other facts are necessary for the Court to answer the stipulated issues and that no discovery is needed for the case, and that the stipulated issues are purely legal in nature.

The parties further agree that the resolution of the stipulated issues is a part of the settlement of the litigation involving them referenced herein.

The parties further agree that the payment obligations between the parties are governed by a separate settlement agreement entered into between the parties and Florence Concrete's insurance carriers. Because the payment obligations are controlled by the separate settlement agreement, but the amount of the payments

will depend upon the outcome of the declaratory decision or order and any final appellate review, the Court's declaratory decision or order will not include a monetary judgment or damages award against Florence Concrete.

The requested declaratory judgment will settle and afford relief from uncertainty and insecurity with respect to the rights, status and other legal relations of the parties. Definite and concrete issues exist regarding the adverse interests of the parties, and the requested declaratory judgment, after any final appellate review, will serve to resolve those issues between the parties.

ACCORDINGLY, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED

AS FOLLOWS:

1. Plaintiff shall file an Amended Complaint seeking a declaratory judgment.
2. The case is to be designated on the non-jury roster.
3. A hearing on this matter will be held at 10:00 am on March 10, 2022.

AND IT IS SO ORDERED.

JUDGE'S ELECTRONIC SIGNATURE TO FOLLOW
Chief Administrative Judge Twelfth Judicial Circuit

WE CONSENT:

s/Ashley B. Nance
Ashley B. Nance, Esquire
State Bar No. 78463
King, Love, Hupfer & Nance, LLC
135 South Dargan Street - Suite 201
Florence, SC 29506
Tel: (843) 407-5525
Fax: (843) 407-5782

Attorneys for the Plaintiff

s/Anthony W. Livoti
Anthony W. Livoti, Esquire
State Bar No. 13971
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, SC 29260
Tel.: (803) 782-4100
Fax: (803) 782-4140

Attorney for Defendant



Florence Common Pleas

Case Caption: Thomas Rodriquis Nelson VS Florence Concrete Products Inc ,
defendant, et al
Case Number: 2021CP2102042
Type: Order/Consent Order

So Ordered

s/ The Honorable Michael G. Nettles #2140

Electronically signed on 2021-12-09 08:51:59 page 6 of 6

ROA 0023

2002L



Oversize/Overweight Multiple Trip Permit # RB4441R2489

Valid From: 2/13/18 To 2/12/19

South Carolina Department of Transportation

For the movement of : NON-DIVISIBLE

Issued To:

NESBITT TRANSPORTATION

PO BOX 760

OLANTA, SC 29114

USDOT #: 286821

Truck-tractor - License #: P744265 (SC)

Truck/Tractor Vin: 1FUJGLBG6CSBR2489

State Fee: \$100.00

Sent by Fax - (843) 659-8255

Telephone #: (843) 659-8254

Ordered by: C. Mooney

Overall Dimensions Length: 100' Width: 14' 0" Height: 13' 6" Overhang Front: Rear:
 Gross Weight: 90,000 Total Axles: 5 or more

MAXIMUM AXLE WEIGHTS: 20,000 lbs on single axle, 40,000 lbs on tandem axle, 55,000 lbs on tridem axle. Total weight not to exceed gross vehicle weight on permit. When transporting multiple pieces, gross weight must be legal.

May travel all Interstate, US and SC highways unless gross weight of the vehicle and load exceed any posted bridge weight limit. This permit does not allow the travel on secondary routes with weight; a route specific permit must be obtained for movement on secondary routes.

TRAVEL IS PROHIBITED OVER POSTED BRIDGES WITH WEIGHT. Bridges may become posted along the permitted route during the permit date range. It is the responsibility of the permittee to select an alternate route or call the permit office for route modifications.

The towing vehicle must be a truck or truck tractor at least three-quarter (3/4) ton or larger.

This permit is valid for a truck/tractor trailer combination. Self propelled vehicles or straight trucks must be specified on the permit with the correct number of axles.

This permit allows overhang on a flatbed/trailer at a maximum trailer length of 53 feet.

Trailers that are less than 48 feet, a maximum 15 feet rear overhang with a rear escort or strobe light.

Trailers that are 48 or 53 feet, a maximum 10 feet rear overhang with rear escort or strobe light.

A maximum of 3 feet front overhang on trailer is allowed.

Travel permitted one half (1/2) hour after official sunrise to one half (1/2) hour before official sunset Monday through Saturday EXCEPT TRAVEL PROHIBITED in close proximity of large urban areas between 7am - 9am all days and 3pm - 6pm on school days and 4:30pm - 6pm on non-school days.

Load widths 12' wide or greater shall display red flags at each outer four corners of the load and display front and rear signs reading: WIDE LOAD or OVERSIZED LOAD with letters 12 inches high and at least 1 1/2 inches wide. Turn signals and brake lights in working order must be displayed.

Load widths greater than 12' and less than or equal to 14', the permittee must provide a rotating amber beacon or strobe light on the rear of the load at a location readily visible to following traffic.

A load shall be so transported by a vehicle or combination of vehicles so that the least width or length dimension becomes the width of the load. The load shall be transported such that no part of it will extend across the centerline of the road except when necessary to avoid a collision with objects located near the edge.

A front escort must be present on all loads whose widths are greater than 12' and less than or equal to 14' on two lane highways. The Department reserves the right to require a rear escort where it is deemed necessary for safety purposes.

Escorts must display a rotating amber beacon or strobe light on top of the escort vehicles, a wide load or oversize load sign on the front of the lead escort vehicle and on the rear of the following escort. There must be radio contact between the escort and the towing vehicles at all times.

No travel shall be allowed during inclement weather such as heavy rain or fog when visibility is restricted to less than 1,000 feet. Travel prohibited during periods of high wind or when highways are slippery or hazardous due to ice, snow or sleet.

The South Carolina Transport Police or Highway Patrol may direct a vehicle off the highway to a safe place. Detour vertical obstructions where necessary; Observe all traffic, motor vehicle and other applicable SC laws. Assume all liability and move at own risk.

SC DEPARTMENT OF TRANSPORTATION PERMIT NUMBER RB4441R2489

Page 1 of 2

 ELECTRONICALLY FILED - 2021 Dec 08 4:00 PM - FLORENCE - COMMON PLEAS - CASE#2021CP2102042
 ELECTRONICALLY FILED - 2021 Dec 09 9:09 AM - FLORENCE - COMMON PLEAS - CASE#2021CP2102042

ROA 0024

 8114-19
 NESBITT TRANS 00253

In pursuant to SC Code of Law 57-3-130 (B)(3)(c), it is the responsibility of the carrier to comply with all Federal Motor Carrier Safety Regulations and applicable State and Federal Laws, including, but not limited to, speed, tire size, brakes and lighting.

For any railroad grade crossing, comply with 56-5-2725 of the SC Code of Laws.

The permittee must exercise caution and use flagmen where necessary over narrow roadways and bridges. No movement allowed on Sundays and from noon the day before until noon the day after the following holidays: New Year's Day Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day (Sunday not included.)

Movement is prohibited on Friday and Saturday from Memorial Day through Labor Day over routes East of I-95, including, but not limited to 9, 38, 76, 327, 378, 501 and 576. Including US-17 to and from the Myrtle Beach area from the North Carolina line to Georgetown, and any other routes in the Myrtle Beach vicinity.

Under the provisions of this permit, the permittee has the privilege of making trips to move similar type and size non-divisible loads under sections of the highways shown above. This provision does not authorize the movement of any non-divisible load exceeding the overall width, length, height, and/or gross weight/axles shown above.

This permit shall be open to inspection at any time by any uniformed officer or authorized agent of the authority granting the permit.

Special Restrictions

ORIGINAL PERMIT SHALL BE SIGNED AND CARRIED IN TOWING VEHICLE DURING MOVEMENT.

I certify that I am familiar with all SC traffic, motor vehicle and other laws and requirements governing this move and will be in full compliance during movement. I agree that all dimensions and weights shown above are correct. I agree to move at my own risk and assume limited liability caused by this movement for any and all reasons including routing error, act, or omission by the state of South Carolina, and its departments or employees.

Permittee Signature 497066 Date

Date Entered: 2/13/18 2:43 pm

Authorized: 2/13/18 2:43 pm

North Carolina DOT Division of Highways
Single Trip Permit #901035Q0341

Valid From: 1/ 3/2019 to 1/12/2019

Issued to:
NESBITT TRANSPORTATION INC
PO BOX 760
OLANTA, SC 29114

Phone: 843.659.8254

State Fee: \$24.00 (869839)

Sent by: Email- nesbitttrans01@yahoo.com

Load Description: **CONCRETE CORE SLAB**

Escorts: 0

Power Unit: **TRUCK-TRACTOR**License: **P744265(SC)**Registered weight: **80,000**VIN: **R2499**Axles: **5**Dimensions - Length: **96'0"**Width: **8'6"**Height: **13'6"**Trailer: **73'0"**Overhang - Front: **NONE**Rear: **NONE**Gross Weight: **112,000**Steer Axle: **20,000**Single Axle: **25,000**Tandem Axle: **50,000**Tridem Axle: **60,000**Four or more Axles: **68,000****VEHICLE(S) MUST BE PROPERLY LICENSED FOR MAXIMUM WEIGHT ALLOWED BY LAW**From: **I-95 NB at the State border of SOUTH CAROLINA at MP ROBESON 0.00**To: **SR-1001 at NC-481-BUS at MP HALIFAX 26.56(IN ENFIELD AT CHURCH ST)****And Return from Destination to Origin**Via Routes: **START ON I-95 NB at the State border of SOUTH CAROLINA at MP ROBESON 0.00,**
NC-561 EB(EXIT 160), SR-1206 SB (HALIFAX), SR-1001 SB (HALIFAX), END ON
SR-1001 at NC-481-BUS at MP HALIFAX 26.56(IN ENFIELD AT CHURCH ST)**AND RETURN****ON SR-1001 NB at NC-481-BUS at MP HALIFAX 26.56(IN ENFIELD AT CHURCH ST),**
SR-1206 NB (HALIFAX), NC-561 WB, I-95 SB, END ON I-95 at the State border of
SOUTH CAROLINA at MP ROBESON 0.00**The route from a specific origin to a specific destination must be included within a single permitted route of travel.**

Permits issued by the Department of Transportation do not authorize travel on city streets, such authority must be obtained from the city/municipality prior to movement of permitted load.

Issuance of a permit by the NCDOT does not imply nor guarantee the clearance of width or height along permitted route of travel. It is the responsibility of permit holder to check route prior to travel thereon.

Permittee to follow all detours authorized by DOT or law enforcement. Use extreme safety precautions and obey posted speed limits while traveling into or through all DOT authorized construction workzones.

It is the responsibility of the mover to review permitted route, locate railroad crossings and follow safety protocol including but not limited to contacting affected railroad company.

Vehicles with low ground clearance are to use caution when traveling over any railroad crossings permitted along route and are required to determine if there is sufficient clearance before attempting to cross the track(s).

If a vehicle is stuck on a railroad track, or if it takes longer than 15 seconds to cross the tracks, the operator is required to notify the railroad company immediately. Every railroad crossing should have the contact information and crossing number posted at the crossing.

Permit not valid when: visibility is less than 500 feet; highway covered with ice or snow; or travel conditions are considered unsafe by the Division of Highways or law enforcement having jurisdiction.

Vehicle combination with extreme wheelbase less than 51 ft limits permitted gross weight to 94,500 lbs or less.

The commodity being transported is to be so loaded or reduced to the least possible dimension and/or weight prior to application for an overdimension and/or overweight permit.

Convoy travel is NOT authorized. Permitted vehicles owned or leased by the same company or permitted vehicles originating at the same location shall travel at a distance of not less than two miles apart.

On permitted route segments that include an interstate, freeway, or toll way requiring entering and exiting via an interchange; a distance of one mile is authorized from the route of travel provided in the "Via Routes" section of this permit onto another contiguous state jurisdiction highway provided that no bridges are crossed, no posted weight limits are exceeded and all other provisions of the permit are followed. The one mile distance shall be from ramp terminal at the intersection of the ramp and other state highway. In the event that the mover travels beyond the one mile limit, crosses a bridge within the one mile variance, or violates any other provision of the permit, the mover is in violation and subject to applicable fines and penalties as specified in G.S. 20-118 and 20-119. Since compliance is the responsibility of the operator, NCDOT recommends that the mover familiarize themselves with the various exits they may choose, and review NCDOT guidance on this provision which is found on the NCDOT Oversize Overweight Permit Unit's web site.

Vehicle must be properly registered or apportioned to operate in North Carolina prior to movement.

Special Restrictions

RED OR ORANGE FLAGS (18" BY 18") TO BE DISPLAYED ON EACH CORNER OF THE LOAD AT THE WIDEST POINT ON LOADS WITH WIDTH EXCEEDING 8FT 6INCHES.
TRAVEL AUTHORIZED MONDAY THROUGH SUNDAY SUNRISE TO SUNSET. SUNRISE AND SUNSET IS DETERMINED BY THE TIME PUBLISHED BY THE UNITED STATES NAVAL OBSERVATORY ACCORDING TO THE VEHICLE'S CURRENT LOCATION.

MAY TRAVEL POSTED SPEED LIMIT

Permittee is responsible for any/all damages to persons/property. Civil penalties will be assessed if: operating off route, transporting improper load, in violation of escort requirements, operating with improper safety equipment or license, failure to comply with dimensions and/or weights of permit, failure to comply with travel restrictions or falsification of a permit application.

PERMIT SHALL BE SIGNED AND CARRIED IN TOWING VEHICLE DURING MOVEMENT.

I CERTIFY THAT I AM FAMILIAR WITH ALL LAWS/ REQUIREMENTS GOVERNING THIS MOVE AND WILL BE IN FULL COMPLIANCE DURING MOVEMENT. ANY ALTERATION(S) WILL RESULT IN VOIDING PERMIT AND SUSPENSION OF NC PERMIT PRIVILEGES. REPEATED PERMIT VIOLATIONS MAY RESULT IN SUSPENSION AND/ OR DENIAL OF NC PERMIT PRIVILEGES.

Permittee Signature

Date

3393595

DMH



Director of Permits
Authorized: 1/3/19 1:17 pm

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	Docket No.: 2021-CP-21-02042
	)	
Thomas Rodriqueis Nelson,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AMENDED SUMMONS FOR RELIEF
	)	(Amended Complaint served)
	)	
Florence Concrete Products, Inc.	)	
	)	
Defendant.	)	
_____	)	

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at 135 South Dargan Street, Suite 201, Florence, SC 29506, within thirty (30) days from the service hereof, exclusive of the date of such service, and in case of the failure to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

(Signature Page to Follow)

Florence, South Carolina

KING, LOVE, HUPFER & NANCE, LLC

January 4, 2022

BY: s/Ashley B. Nance
Ashley B. Nance, I.D. 78463
135 South Dargan Street, Suite 201
Post Office Box 1764
Florence, S.C. 29503
ANance@kingandlove.com
Tel: (843) 407-5525
Fax: (843) 407-5782

LAW OFFICE OF LINWARD C. EDWARDS, II

BY: s/Linward C. Edwards
Linward C. Edwards, II
2301 S. Irby St., Ste. E
Florence, SC 29505
linward@ledwardslaw.com
Tel: (843) 410-9605
Fax: (843) 536-0715

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	Docket No.: 2021-CP-21-02042
	)	
Thomas Rodriquis Nelson,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AMENDED COMPLAINT
	)	FOR DECLARATORY JUDGMENT
	)	
Florence Concrete Products, Inc.	)	(Non Jury)
	)	
Defendant.	)	
_____	)	

The Plaintiff, Thomas Rodriquis Nelson, by and through his undersigned attorneys, files this Amended Complaint seeking a ruling on two legal questions based upon the parties' stipulated facts as follows:

JURISDICTION AND LEGAL ISSUES

1. Plaintiff is a citizen and resident of Lee County, South Carolina.
2. Defendant Florence Concrete Products, Inc. is a South Carolina corporation with its principal place of business in Florence County, South Carolina.
3. This suit arises out of an accident that occurred before sunrise on January 4, 2019, in Lynchburg, South Carolina, which is in Lee County. Plaintiff was traveling to work when a collision occurred with a tractor-trailer owned by Nesbitt Transportation, Inc, and being driven by Calvin A. Rouse, while hauling oversized (overlength) freight belonging to Defendant Florence Concrete Products, Inc., which required oversize permits issued by the South Carolina Department of Transportation and North Carolina Department of Transportation which restricted the time of travel for shipping the load.

4. Plaintiff sustained injuries as a result of the accident and is a quadriplegic.

5. Through extensive litigation and mediation, the Plaintiff reached a comprehensive settlement against all parties in the case. As a part of the settlement, the damages sustained by the Plaintiff were agreed upon by the parties, but the amount(s) payable to Plaintiff by the insurers of Defendant Florence Concrete Products, Inc. are dependent on the outcome of the Court's declaratory ruling on two legal questions, which, in turn, are based on stipulated facts. See Exhibit A and Exhibit B (Specifically, Paragraph 8 of the Consent Order and the oversize permits attached thereto from the South Carolina and North Carolina Departments of Transportation all filed on December 9, 2021). The legal questions raised by the parties address the legal duties and obligations owed by Defendant Florence Concrete Products, Inc., a shipper of oversized loads requiring oversized permits, to Plaintiff, and whether those duties and obligations were breached by Defendant Florence Concrete Products, Inc.

6. The specific questions posed by the Parties for this Court are:

(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?

7. Due to the differences of agreement between the parties on these two questions, Plaintiff seeks declarations from the Court through this Amended Complaint.

8. The Parties stipulated that this case should be concluded by rulings on the two legal questions alone without the need for this Court to make specific findings of fact or any other findings regarding proximate cause or damages. Specifically, the Parties have stipulated to the necessary facts, See Exhibit A and Exhibit B (Specifically, Paragraph 8 of the Consent Order and the oversize permits attached thereto from the South Carolina and North Carolina Departments of Transportation all filed on December 9, 2021), and the damages Plaintiff sustained in this case. The parties have agreed there is no need for further discovery.

9. This Court has jurisdiction over the parties and the causes of action asserted pursuant to the Declaratory Judgments Act, S.C. Code Ann. § 15-53-10 *et seq.* (1976), as amended, and its equitable powers.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

10. The allegations set forth in Paragraphs 1 through 9 above are repeated as if set forth herein verbatim.

11. The Parties stipulated that this case should be concluded by rulings on the two legal questions set forth in Paragraph 6 of this Amended Complaint.

12. Plaintiff asserts that as a shipper of oversized freight, Defendant Florence Concrete Products, Inc., owed a duty of care to Plaintiff to take measures beyond verbally contracting with an insured motor carrier that has U.S. Department of Transportation operating authority that has secured oversized permits to ship oversized freight. Plaintiff further asserts that Defendant Florence Concrete Products, Inc. breached its duty of care to Plaintiff.

13. Plaintiff asserts Defendant Florence Concrete Products, Inc. owed a duty of care at common law, statutorily, through federal and state regulations, and through industry standards to Plaintiff to ensure that the motor carrier was shipping Defendant Florence Concrete Products, Inc.'s oversized freight during the time of day that laws, regulations, permits and industry standards require, to make sure that all parties were in compliance with all permits required to ship oversized loads, and to take preventive measures where necessary to ensure that the oversized freight is being shipped at times that do not violate laws, regulations, permits and industry standards.

14. Plaintiff further asserts Defendant Florence Concrete Products, Inc. owed a duty of care at common law, statutorily, through federal and state regulations, and through industry standards to Plaintiff to exercise due diligence and reasonable care in the selection and hiring of motor carriers, to check the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by the Federal Motor Carrier Safety Administration (hereinafter "FMCSA"), and to maintain internal records of the persons with whom it contracts to assure that they are reasonably and responsibly contracting with motor carriers to ship Defendant Florence Concrete Products, Inc.'s oversized freight.

15. Plaintiff asserts that Defendant Florence Concrete Products, Inc. breached its duty of care owed to Plaintiff in the following particulars to include but not be limited to:

- a. By failing to take preventive measures regarding the oversized load and allowing it to be shipped at times of day that violated the oversize permit issued by the South Carolina Department of Transportation including but not limited to when

the oversized load left Defendant Florence Concrete Products, Inc.'s own premises at a time of day that violated the oversize permit;

- b. by failing to ensure that the motor carrier was shipping the oversized freight during the time of day that laws, regulations, permits and industry standards require;
- c. by failing to exercise due diligence and reasonable care which allowed an unsafe motor carrier to operate unreasonably and unsafely;
- d. by failing to act reasonably in contracting with a motor carrier with a conditional safety rating as defined by the Federal Motor Carrier Safety Administration (FMCSA), which is a rating that indicates a motor carrier lacks adequate management controls and systems necessary to operate safely which could lead to a number of safety violations regulated by the FMCSA; and,
- e. In contracting and/or vetting the motor carrier which ultimately led to the motor carrier operating unreasonably and unsafely;

16. Plaintiff sustained injuries as a result of the accident and is a quadriplegic. By virtue of the settlement agreement the parties reached in this case, the damages sustained by the Plaintiff were agreed upon by the parties, but the amount(s) payable to Plaintiff by the insurers of Defendant Florence Concrete Products, Inc. are dependent on the outcome of the Court's declaratory ruling on two legal questions set forth in Paragraph 6 of this Amended Complaint which, in turn, are based on stipulated facts contained in Exhibit A and Exhibit B (Specifically, Paragraph 8 of the Consent Order and the oversize permits attached thereto from the South Carolina and North Carolina Departments of Transportation all filed on December 9, 2021).

17. Upon information and belief, Defendant Florence Concrete Products, Inc., contends that it owes no duty of care to Plaintiff to take measures beyond verbally contracting for the shipment of the oversize/overweight load when it 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.

18. Based upon the foregoing, a substantial controversy exists between the parties having adverse legal interests to warrant the issuance of a declaratory judgment by this Court.

19. Plaintiff seeks a declaratory ruling from this Court based on the stipulated facts that, as a matter of law, Defendant Florence Concrete Products, Inc., as a shipper of oversized loads that require an oversize/overweight permit for travel over the highway, owed 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.

20. Plaintiff further seeks a declaratory ruling from this Court based on the stipulated facts that, as a matter of law, Defendant Florence Concrete Products, Inc., breached the duty of care owed to the Plaintiff.

WHEREFORE, Plaintiff prays that this Court inquire into this matter and enter an Order declaring the rights of the parties as follows:

- a. Grant a Declaratory Judgment that Defendant Florence Concrete Products, Inc., as a shipper of oversized loads that require an oversize/overweight permit for travel over the highway, owed 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.
- b. Grant a Declaratory Judgment that Defendant Florence Concrete Products, Inc., breached the duty of care owed to the Plaintiff.

Florence, South Carolina

KING, LOVE, HUPFER & NANCE, LLC

January 4, 2022

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

CIVIL ACTION NO: 2021-CP-21-02042

Thomas Rodriquez Nelson,

Plaintiff,

v.

Florence Concrete Products, Inc.

Defendant.

**DEFENDANT FLORENCE CONCRETE
PRODUCTS, INC.'S ANSWER TO
PLAINTIFF'S AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT AND
COUNTERCLAIM FOR DECLARATORY
RELIEF**

(Jury Trial Demanded)

**TO: ASHLEY B. NANCE, ESQUIRE, AND LINWARD C. EDWARDS, ESQUIRE
ATTORNEYS FOR PLAINTIFF, AND TO THE PLAINTIFF ABOVE NAMED:**

Defendant Florence Concrete Products, Inc. ("Florence"), by and through its undersigned counsel, in answering the Plaintiff's Amended Complaint, would respectfully show until this Honorable Court the following:

FOR A FIRST DEFENSE

Florence denies each and every allegation of the Plaintiff's Amended Complaint not hereinafter specifically admitted.

1. Florence admits the allegations of Paragraph 1 of the Amended Complaint.
2. Florence admits the allegations of Paragraph 2 of the Amended Complaint.
3. Florence admits the allegations of Paragraph 3 of the Amended Complaint.
4. Florence admits the allegations of Paragraph 4 of the Amended Complaint.
5. Florence admits the allegations contained in the first and second sentence of Paragraph 5 of the Amended Complaint. As to the allegations contained in the third sentence of Paragraph 5 of the Amended Complaint, Florence admits only that the legal questions raised by the parties in this Declaratory Action are whether Florence owed a duty of care to Plaintiff, which

is denied, and whether Florence breached a duty of care to Plaintiff, which is denied. To the extent any remaining allegations of Paragraph 5 are construed to require a response, they are denied.

6. Florence admits the allegations of Paragraph 6 of the Amended Complaint as stated.

7. Florence admits the allegations of Paragraph 7 of the Amended Complaint.

8. Florence admits the allegations of Paragraph 8 of the Amended Complaint.

9. Florence admits this Court has jurisdiction over the parties and the questions presented pursuant to the Declaratory Judgments Act, S.C. Code Ann. § 15-53-10 et seq.

10. In response to Paragraph 10 of the Amended Complaint, Florence repeats and reasserts its answers to Paragraphs 1 through 9 of the Amended Complaint herein.

11. Florence admits the allegations of Paragraph 11 of the Amended Complaint.

12. In answering the allegations of Paragraph 12 of the Amended Complaint, Florence admits only that Plaintiff has alleged that Florence owed a duty to Plaintiff as set forth in Paragraph 12 of the Amended Complaint and that Plaintiff has alleged that Florence breached those duties. However, Florence denies that it owed such duties to Plaintiff or that it breached said duties. To the extent any remaining allegations of Paragraph 12 are construed to require a response, they are denied. Furthermore, Florence would assert 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. Therefore, the motor carrier that was involved in the accident with Plaintiff would be responsible for Plaintiff's injuries and not Florence.

13. In answering the allegations of Paragraph 13 of the Amended Complaint, Florence admits only that Plaintiff has alleged that Florence owed a duty to Plaintiff as set forth in Paragraph 13 of the Amended Complaint. However, Florence denies that it owed any such duties to Plaintiff,

and Florence further denies that it breached said duties allegedly owed to Plaintiff. To the extent any remaining allegations of Paragraph 13 are construed to require a response, they are denied. Furthermore, Florence would state that compliance with applicable laws, regulations, permits, and industry standards is the responsibility of the motor carrier Florence contracted with and not Florence. The motor carrier is responsible for ensuring that the shipment is moved in accordance with the oversized permit and the motor carrier, not Florence, should be liable for any violations.

14. In answering the allegations of Paragraph 14 of the Amended Complaint, Florence admits only that Plaintiff has alleged that Florence owed a duty to Plaintiff as set forth in Paragraph 14 of the Amended Complaint. However, Florence denies that it owed any such duties to Plaintiff, and Florence further denies that it breached said duties allegedly owed to Plaintiff. To the extent any remaining allegations of Paragraph 14 are construed to require a response, they are denied. Furthermore, Florence is under no duty to check safety statistics and evaluations of the carriers it contracts with so long as those motor carriers have valid operating authority through the U.S. Department of Transportation. Florence contracted with a licensed and insured motor carrier, operating with valid authority, and any liability arising from Plaintiff's accident with the motor carrier falls on the motor carrier and not Florence.

15. Florence denies the allegations of Paragraph 15, including subparts, of the Amended Complaint.

16. Florence admits the allegations of Paragraph 16 of the Amended Complaint.

17. In response to Paragraph 17 of the Amended Complaint, Florence admits only that it did not owe any alleged duty to Plaintiff or that it breached any duty allegedly owed to Plaintiff. Furthermore, Florence denies Plaintiff's incomplete summary of Florence's legal defenses to this matter.

18. Florence admits the allegations of Paragraph 18 of the Amended Complaint.

19. In answering the allegations of Paragraph 19 of the Amended Complaint, Florence admits that Plaintiff seeks a declaratory ruling in his favor but denies that Plaintiff is entitled to a ruling in his favor based on South Carolina law.

20. In answering the allegations of Paragraph 20 of the Amended Complaint, Florence admits that Plaintiff seeks a declaratory ruling in his favor as alleged but denies that he is entitled to a ruling in his favor based on South Carolina law. Florence further denies that it owed Plaintiff a duty of care or that it breached a duty of care owed to Plaintiff.

FOR A SECOND DEFENSE

21. Florence reserves any additional and future defenses as may be revealed by additional information during discovery and investigation and as is consistent with the South Carolina Rules of Civil Procedure.

**FOR A THIRD DEFENSE AND BY WAY OF COUNTERCLAIM
(DECLARATORY RELIEF)**

22. Florence repeats and reasserts its answers to Paragraphs 1 through 21 of the Amended Complaint as if set forth verbatim herein.

23. Florence seeks a declaration from this Court that answers the questions presented in Paragraph 6 of the Amended Complaint, namely that Florence did not owe any duty to Plaintiff and, if the Court finds such a duty was owed (which is denied), that Florence did not breach said duty.

WHEREFORE, having answered the Plaintiff's Amended Complaint, Defendant Florence Concrete Products, Inc. respectfully requests that his Court hear the parties and find for Florence Concrete on the questions presented.

MURPHY & GRANTLAND, P.A.

s/ Anthony W. Livoti

Anthony W. Livoti (SCB 13971)

Cordes B. Kennedy (SCB 102287)

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Attorneys for Florence Concrete Products, Inc.

January 21, 2022

STATE OF SOUTH CAROLINA)
COUNTY OF LEE)
Thomas Rodriquis Nelson,)
Plaintiff,)
vs.)
Nesbitt Transportation Inc., Robert F.)
Nesbitt, Individually and as Registered)
Agent for Nesbitt Transportation, Inc.,)
Robert T. Nesbitt d/b/a Tim Nesbitt)
Trucking and Calvin A. Rouse.)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Docket No.: 2019-CP-31-_____

SUMMONS FOR RELIEF
(Complaint, Interrogatories and
Requests for Production of
Documents Served)

(Jury Trial Requested)

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at 135 South Dargan Street, Suite 201, Florence, SC 29506, within thirty (30) days from the service hereof, exclusive of the date of such service, and in case of the failure to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

(Signature Page to Follow)

Florence, South Carolina

KING, LOVE, HUPFER & NANCE, LLC

September 9, 2019

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF LEE	)	Docket No.: 2019-CP-31-_____
	)	
Thomas Rodriquis Nelson,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	COMPLAINT
	)	
Nesbitt Transportation Inc., Robert F.	)	(Jury Trial Requested)
Nesbitt, Individually and as Registered	)	
Agent for Nesbitt Transportation, Inc.,	)	
Robert T. Nesbitt d/b/a Tim Nesbitt	)	
Trucking and Calvin A. Rouse.	)	
	)	
Defendants.	)	
_____	)	

The Plaintiff, Thomas Rodriquis Nelson, and the undersigned attorneys, complaining of the Defendants, jointly and severally, would allege and show unto the Court the following:

1. Plaintiff is a citizen and resident of the County of Lee, State of South Carolina.
2. That upon information and belief Defendant Nesbitt Transportation, Inc. is a forfeited South Carolina corporation with its principal place of business in the County of Sumter, State of South Carolina. This Defendant is registered as a motor carrier with the United States Department of Transportation (hereinafter "USDOT") and bearing USDOT number 286821. This USDOT number was labeled on the 2012 Freightliner tractor involved in the accident in this case and the name of "Nesbitt's Transportation" was emblazoned on the tractor as well. The name "Nesbitt's" was emblazoned on the trailer that was involved in the accident in this case.

3. That upon information and belief, Defendant Nesbitt Transportation, Inc. currently has a forfeited status with the South Carolina Secretary of State and did so at the time of the acts and omissions described in this Complaint.

4. That upon information and belief, Defendant Robert F. Nesbitt, individually and as an employee and registered agent of Defendant Nesbitt Transportation, Inc. is a citizen and resident of the County of Sumter, State of South Carolina. At all times herein, Defendant Robert F. Nesbitt acted in his individual capacity as well as the registered agent for Defendant Nesbitt Transportation, Inc., which is a forfeited company.

5. That upon information and belief, Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking is a DBA with the principal place of business in the County of Sumter, State of South Carolina and is the owner of the 2012 Freightliner tractor and trailer involved in the accident in this case and provided said tractor and trailer to Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt and Defendant Calvin A. Rouse.

6. That upon information and belief Defendant Calvin A. Rouse is a citizen and resident of the County of Lee, State of South Carolina. Defendant Calvin A. Rouse was the driver of the 2012 Freightliner Tractor that was involved in the accident in this case with Plaintiff, and at all times referred to herein acted as the employee, agent and legal representative of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking, in all acts and omissions set forth herein.

7. This suit arises out of an accident that occurred on January 4, 2019, at approximately 6:40 a.m., when Defendant Calvin A. Rouse, while driving the 2012 Freightliner Tractor caused a motor vehicle collision in the County of Lee, State of South Carolina, which

resulted in Plaintiff suffering serious and permanent debilitating injuries causing, amongst many severe health problems, Plaintiff to be paraplegic.

8. That this Court has personal jurisdiction over the parties hereto and subject matter jurisdiction over the claims asserted herein and venue is proper in this Court.

FOR A FIRST CAUSE OF ACTION
(Negligence, Gross Negligence, Negligence *Per Se*, Recklessness)
(All Defendants)

9. The allegations set forth in Paragraphs 1 through 8 above are repeated as if set forth herein verbatim.

10. Upon information and belief and at all times relevant hereto, Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking were joint venture partners and had an agreement to operate a trucking business that primarily engaged in the interstate transport of cargo and freight by tractors and trailers.

11. Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking exercised control over the transportation process, including but not limited to, registering with the USDOT as a motor carrier, contracting with companies to ship cargo and freight, providing tractors and trailers that it owned to its drivers, maintaining the tractors and trailers, and supervising the entire shipping process from pick-up of the cargo and freight through its delivery to its final destination.

12. At all times relevant hereto, Defendant Calvin A. Rouse was an employee, agent, and legal representative of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking, acting in the course and scope of his employment.

13. Defendant Calvin A. Rouse held himself out to the public as an employee, agent and representative of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking as evidenced collectively by the logo “Nesbitt’s Transportation” emblazoned on the tractor he drove, the logo “Nesbitt’s” emblazoned on the trailer connected to the tractor he drove, by Defendant Nesbitt Transportation, Inc.’s USDOT number labeled on the tractor he drove, and by the tractor and trailer itself that he operated which is owned by Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking.

14. That at all times relevant hereto, Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking were the employers and principals of Defendant Calvin A. Rouse.

15. That Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking exercised control over the conduct of Defendant Calvin A. Rouse, at all times relevant hereto, and had the right to control the time, manner, and method of Defendant Calvin A. Rouse’s work.

16. That Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking are responsible for Defendant Calvin A. Rouse’s actions and the consequences of his actions on January 4, 2019, pursuant, but not limited to, the common law, the Federal Motor Carrier Safety Regulations, and the theories of *respondeat superior*, agency, master/servant liability, and vicarious liability.

17. On or about January 4, 2019, before daylight at approximately 6:40 a.m., Defendant Calvin A. Rouse, while acting as an employee, agent or legal representative for Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T.

Nesbitt d/b/a Tim Nesbitt Trucking, was driving a commercial tractor with an oversized trailer owned and provided by these same Defendants, and carrying oversized freight, and caused a collision with the Plaintiff on Highway 76 in Lynchburg, South Carolina.

18. Defendant Calvin A. Rouse was pulling out of a private driveway and attempting to turn left onto U.S. Highway 76 eastbound while Plaintiff, who was operating a vehicle owned by his mother, Sandra Nelson-Harrison, was traveling westbound on U.S. Highway 76. As Plaintiff approached, Defendant Calvin A. Rouse stopped in the highway, leaving the oversized trailer of the tractor that he was operating completely diagonal across the westbound lane of travel and at an extreme angle, blocking the entire westbound lane. Defendant Calvin A. Rouse failed to yield the right of way to Plaintiff causing the Plaintiff to collide with the trailer attached to the tractor that Defendant Calvin A. Rouse was operating.

19. The impact of the collision crushed Plaintiff's vehicle and caused serious and permanent catastrophic injuries to Plaintiff which has required Plaintiff to undergo extensive medical treatment and surgical intervention. Plaintiff is now paraplegic as a result of the injuries sustained in the accident.

20 At the time of the acts and omissions complained of, it was completely dark outside and before sunrise. The accident location is on a remote, two-lane highway, with no street lamps. The oversized trailer was positioned at such an extreme angle across the two lane-highway in the complete dark that it was rendered invisible to Plaintiff. There were no flaggers or escort vehicles for the tractor and oversized trailer.

21. Plaintiff was acting in a reasonable, prudent and careful manner at all times pertinent hereto and was not at fault in any way.

22. Defendant Calvin A. Rouse, who was acting in the scope and course of his employment, agency and representation of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking, owed a duty to the general public, including Plaintiff, to operate his tractor and trailer in a safe and reasonable manner and in accordance with the commons laws, and State and Federal law.

23. That the collision, injuries and damages herein described in this Complaint were the direct, foreseeable, and proximate result of the negligent, careless, willful, wanton, reckless, and grossly negligent acts and/or omissions of Defendant Calvin A. Rouse who was acting in the scope and course of his employment, agency and representation of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking in one or more of the following particulars:

- (a) Failing to yield the right of way to the Plaintiff;
- (b) Failing to keep a proper lookout;
- (c) Failing to maintain proper control of the tractor/trailer;
- (d) Failing to comply with the Federal Motor Carrier Safety Regulations Act;
- (e) Failing to comply with South Carolina Statutory and common law;
- (f) Operating a vehicle on the road at an improper speed;
- (g) In stopping the tractor/trailer in the middle of the highway while traffic was approaching;
- (h) Failing to see or observe traffic which a reasonable person should see;
- (i) Driving while diverting his attention to something other than the road and traffic conditions as he pulled out onto the highway;

- (j) Failing to abide by the proper rules and regulations concerning appropriate risk;
- (k) Driving under an impaired and fatigued condition;
- (l) Driving while tired or not otherwise fully alert in reckless disregard of the rights and safety of others, especially the rights and safety of the Plaintiff;
- (m) Failing to use the degree of care and skill required by a tractor/trailer driver under the same or similar circumstances;
- (n) Driving a tractor/trailer hauling an oversized load at an unauthorized time during the day;
- (o) Driving a tractor/trailer hauling an oversized load without the proper permits;
- (p) Driving a tractor/trailer in a manner as to indicate willful, wanton, grossly negligent, and negligent disregard for the safety of others;
- (q) Failing to comply with industry standards for safe operation of a tractor and trailer; and,
- (r) In any other such manner that Plaintiff may become aware of through discovery and/or at trial.

All of the above-referenced acts and/or omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

24. That as a direct and proximate cause of the acts and/or omissions, or both, of Defendants, Plaintiff suffered physical and mental injuries, which have caused, and in the future will cause, Plaintiff to suffer one or more of the following elements of damages:

- (a) Physical pain and suffering;
- (b) Loss of income;
- (c) Loss of Plaintiff's enjoyment of life;
- (d) Substantial expenses for past and future medical services;

- (e) Permanent impairment;
- (f) Mental anguish, shock, fear and embarrassment;
- (g) Expenses for transportation to and from medical services; and
- (h) Other particulars as evidence may show at trial.

25. That due to the willful, wanton, reckless, grossly negligent, negligent per se, and negligent acts of the Defendants as set out above, Plaintiff is entitled to recover actual and punitive damages, jointly and severally as determined by a jury.

FOR A SECOND CAUSE OF ACTION
(Negligent Hiring, Supervision, Retention and Maintenance)
(As to Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking)

26. The allegations set forth in Paragraphs 1 through 25 above are repeated as if set forth herein verbatim.

27. That Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking owed a duty to Plaintiff and others to exercise reasonable care in conducting its business activities, including the implementation and following of appropriate operating standards and procedures, the hiring, retention and supervision of its employees, drivers and agents, including Defendant Calvin A. Rouse, and the maintenance of the tractor and trailer.

28. That Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking owed statutory and common law duties to Plaintiff and others not to negligently, grossly negligently, negligently *per se*, willfully,

wantonly, carelessly and/or recklessly hire, supervise and retain employees and to use safe and fit equipment such as the tractor and trailer.

29. As a motor carrier, Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking had certain duties and responsibilities as defined by the Federal Motor Carrier Safety Regulations and industry standards including, but not limited to, the duty to properly qualify Defendant Calvin A. Rouse, the duty to properly train Defendant Calvin A. Rouse, the duty to supervise Defendant Calvin A. Rouse, the duty to properly maintain its vehicles, the duty to entrust a tractor and trailer only to those capable and qualified of handling a dangerous instrumentality, and the duty to otherwise establish and implement necessary management controls and systems for the safe operation of its commercial motor vehicles.

30. Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking breached these duties by hiring personnel or employees who committed the acts described in this Complaint and others, and Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking either knew or should have known that Defendant Calvin A. Rouse was likely to commit and/or did commit wrongful conduct but failed to remediate the situation.

31. Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking breached these duties by failing to supervise the personnel who committed the acts described herein and Defendants either knew of

should have known that Defendant Calvin A. Rouse was likely to commit wrongful conduct and failed to remediate the situation.

32. Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking breached these duties by failing to undertake investigation into wrongful and unreasonable conduct of its employees and personnel, failing to discharge employees and personnel, failing to require remedial training for employees and personnel and failing to reassign employees and personnel to prevent severe bodily injury or death to the motoring public.

33. Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking breached these duties by failing to conduct proper maintenance on its tractors and trailers to comply with the Federal Motor Carrier Safety Regulations and industry standards for safe operation to prevent severe bodily injury or death to the motoring public.

34. That as a direct and proximate result of Defendants' conduct, acts and omissions, Plaintiff suffered severe injuries and damages as outlined in this Complaint and is entitled to actual and punitive damages caused by Defendants' breach of duty.

35. Plaintiff is entitled to judgment against Defendants, jointly and severally, for the above-described actual damages and injury to Plaintiff and for punitive damages in an amount to be determined by the jury.

FOR A THIRD CAUSE OF ACTION**(Negligent Entrustment)**

(As to Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking)

36. The allegations set forth in Paragraphs 1 through 35 above are repeated as if set forth herein verbatim.

37. That the injuries and damages sustained by the Plaintiff were caused and occasioned by the willful, wanton, reckless, careless, negligent and unlawful conduct on the part of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking in negligently entrusting the tractor and trailer to Defendant Calvin A. Rouse in one or more of the following particulars, to wit:

- (a) When they knew or should have known that Defendant Calvin A. Rouse was not capable of safely operating a tractor and trailer for the reasons as set forth in this Complaint;
- (b) In failing to adequately train Defendant Calvin A. Rouse;
- (c) In failing to adequately supervise Defendant Calvin A. Rouse;
- (d) In failing to properly investigate Defendant Calvin A. Rouse's background, driving history and/or qualifications to operate the tractor and trailer before hiring him to operate the same;
- (e) In failing to require that Defendant Calvin A. Rouse be qualified to operate a tractor and oversize trailer prior to hauling the oversize load at the time of the subject collision;
- (f) In violating various provisions of the Federal Motor Carrier Safety Regulations Act;

All of the above being in violation of the laws of the State of South Carolina.

38. That as a direct and proximate result of Defendants' conduct, acts and omissions, Plaintiff suffered severe injuries and damages as outlined in this Complaint and is entitled to actual and punitive damages caused by Defendants' breach of duty.

39. Plaintiff is entitled to judgment against Defendants, jointly and severally, for the above-described actual damages and injury to Plaintiff and for punitive damages in an amount to be determined by the jury.

WHEREFORE, Plaintiff prays that the Court enter judgment against the Defendants for the Plaintiff's actual and punitive damages in an amount to be determined by the jury, for the reasonable costs of this action, and for such other and further relief as this Court may deem just and proper.

Florence, South Carolina

KING, LOVE, HUPFER & NANCE, LLC

September 9, 2019

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA)
COUNTY OF LEE)
Thomas Rodriquis Nelson,)
Plaintiff,)
vs.)
Nesbitt Transportation Inc., Robert F.)
Nesbitt, Individually and as Registered)
Agent for Nesbitt Transportation, Inc.,)
Robert T. Nesbitt d/b/a Tim Nesbitt)
Trucking, Calvin A. Rouse, and)
Florence Concrete Products, Inc.)
Defendants.)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Docket No.: 2019-CP-31-00296

AMENDED SUMMONS FOR RELIEF
(Amended Complaint served)

(Jury Trial Requested)

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at 135 South Dargan Street, Suite 201, Florence, SC 29506, within thirty (30) days from the service hereof, exclusive of the date of such service, and in case of the failure to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

(Signature Page to Follow)

Florence, South Carolina

KING, LOVE, HUPFER & NANCE, LLC

October 21, 2019

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF LEE	)	Docket No.: 2019-CP-31-00296
	)	
Thomas Rodriquis Nelson,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AMENDED COMPLAINT
Nesbitt Transportation Inc., Robert F.	)	
Nesbitt, Individually and as Registered	)	(Jury Trial Requested)
Agent for Nesbitt Transportation, Inc.,	)	
Robert T. Nesbitt d/b/a Tim Nesbitt	)	
Trucking, Calvin A. Rouse, and	)	
Florence Concrete Products, Inc.	)	
	)	
Defendants.	)	
	)	

The Plaintiff, Thomas Rodriquis Nelson, and the undersigned attorneys, complaining of the Defendants, jointly and severally, would allege and show unto the Court the following:

1. Plaintiff is a citizen and resident of the County of Lee, State of South Carolina.
2. That upon information and belief Defendant Nesbitt Transportation, Inc. is a forfeited South Carolina corporation with its principal place of business in the County of Sumter, State of South Carolina. This Defendant is registered as a motor carrier with the United States Department of Transportation (hereinafter "USDOT") and bearing USDOT number 286821. This USDOT number was labeled on the 2012 Freightliner tractor involved in the accident in this case and the name of "Nesbitt's Transportation" was emblazoned on the tractor as well. The name "Nesbitt's" was emblazoned on the trailer that was involved in the accident in this case.

3. That upon information and belief, Defendant Nesbitt Transportation, Inc. currently has a forfeited status with the South Carolina Secretary of State and did so at the time of the acts and omissions described in this Complaint.

4. That upon information and belief, Defendant Robert F. Nesbitt, individually and as an employee and registered agent of Defendant Nesbitt Transportation, Inc. is a citizen and resident of the County of Sumter, State of South Carolina. At all times herein, Defendant Robert F. Nesbitt acted in his individual capacity as well as the registered agent for Defendant Nesbitt Transportation, Inc., which is a forfeited company.

5. That upon information and belief, Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking is a DBA with the principal place of business in the County of Sumter, State of South Carolina and is the owner of the 2012 Freightliner tractor and trailer involved in the accident in this case and provided said tractor and trailer to Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt and Defendant Calvin A. Rouse.

6. That upon information and belief Defendant Calvin A. Rouse is a citizen and resident of the County of Lee, State of South Carolina. Defendant Calvin A. Rouse was the driver of the 2012 Freightliner Tractor that was involved in the accident in this case with Plaintiff, and at all times referred to herein acted as the employee, agent and legal representative of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking, in all acts and omissions set forth herein.

7. That upon information and belief, Defendant Florence Concrete Products, Inc. (hereinafter "Florence Concrete") is a South Carolina corporation with its principal place of business in the County of Florence, State of South Carolina.

8. That upon information and belief, Defendant Florence Concrete is in the business of producing products for buildings and bridges. Defendant Florence Concrete operates a precast concrete manufacturing facility in Sumter, South Carolina which allows it to “fabricate, deliver, and install our products in the following states: South Carolina, North Carolina, Georgia, and Virginia.” (<http://www.fcpsumter.com/>) (Accessed July 31, 2019).

9. That upon information and belief, Defendant Florence Concrete contracted directly with Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking to ship its freight from Sumter, South Carolina, and hired Defendants to deliver it to a bridge construction project located in Enfield, North Carolina. Said freight consisted of a concrete barrier/beam/slab that was approximately 72 feet in length.

10. This suit arises out of an accident that occurred on January 4, 2019, at approximately 6:40 a.m., when Defendant Calvin A. Rouse, while driving the 2012 Freightliner Tractor and shipping freight owned by Defendant Florence Concrete, caused a motor vehicle collision in the County of Lee, State of South Carolina, which resulted in Plaintiff suffering serious and permanent debilitating injuries causing, amongst many severe health problems, Plaintiff to be paraplegic.

11. That this Court has personal jurisdiction over the parties hereto and subject matter jurisdiction over the claims asserted herein and venue is proper in this Court.

FOR A FIRST CAUSE OF ACTION
(Negligence, Gross Negligence, Negligence *Per Se*, Recklessness)
(As to Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt, Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking and Defendant Calvin A. Rouse)

12. The allegations set forth in Paragraphs 1 through 11 above are repeated as if set forth herein verbatim.

13. Upon information and belief and at all times relevant hereto, Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking were joint venture partners and had an agreement to operate a trucking business that primarily engaged in the interstate transport of cargo and freight by tractors and trailers.

14. Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking exercised control over the transportation process, including but not limited to, registering with the USDOT as a motor carrier, contracting with companies to ship cargo and freight, providing tractors and trailers that it owned to its drivers, maintaining the tractors and trailers, and supervising the entire shipping process from pick-up of the cargo and freight through its delivery to its final destination.

15. At all times relevant hereto, Defendant Calvin A. Rouse was an employee, agent, and legal representative of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking, acting in the course and scope of his employment.

16. Defendant Calvin A. Rouse held himself out to the public as an employee, agent and representative of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking as evidenced collectively by the logo

“Nesbitt’s Transportation” emblazoned on the tractor he drove, the logo “Nesbitt’s” emblazoned on the trailer connected to the tractor he drove, by Defendant Nesbitt Transportation, Inc.’s USDOT number labeled on the tractor he drove, and by the tractor and trailer itself that he operated which is owned by Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking.

17. That at all times relevant hereto, Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking were the employers and principals of Defendant Calvin A. Rouse.

18. That Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking exercised control over the conduct of Defendant Calvin A. Rouse, at all times relevant hereto, and had the right to control the time, manner, and method of Defendant Calvin A. Rouse’s work.

19. That Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking are responsible for Defendant Calvin A. Rouse’s actions and the consequences of his actions on January 4, 2019, pursuant, but not limited to, the common law, the Federal Motor Carrier Safety Regulations, and the theories of *respondeat superior*, agency, master/servant liability, and vicarious liability.

20. On or about January 4, 2019, before daylight at approximately 6:40 a.m., Defendant Calvin A. Rouse, while acting as an employee, agent or legal representative for Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking, was driving a commercial tractor with an oversized trailer owned and provided by these same Defendants, and carrying oversized freight owned by

Defendant Florence Concrete, and caused a collision with the Plaintiff on Highway 76 in Lynchburg, South Carolina.

21. Defendant Calvin A. Rouse was pulling out of a private driveway and attempting to turn left onto U.S. Highway 76 eastbound while Plaintiff, who was operating a vehicle owned by his mother, Sandra Nelson-Harrison, was traveling westbound on U.S. Highway 76. As Plaintiff approached, Defendant Calvin A. Rouse stopped in the highway, leaving the oversized trailer of the tractor that he was operating completely diagonal across the westbound lane of travel and at an extreme angle, blocking the entire westbound lane. Defendant Calvin A. Rouse failed to yield the right of way to Plaintiff causing the Plaintiff to collide with the trailer attached to the tractor that Defendant Calvin A. Rouse was operating.

22. The impact of the collision crushed Plaintiff's vehicle and caused serious and permanent catastrophic injuries to Plaintiff which has required Plaintiff to undergo extensive medical treatment and surgical intervention. Plaintiff is now paraplegic as a result of the injuries sustained in the accident.

23 At the time of the acts and omissions complained of, it was completely dark outside and before sunrise. The accident location is on a remote, two-lane highway, with no street lamps. The oversized trailer was positioned at such an extreme angle across the two lane-highway in the complete dark that it was rendered invisible to Plaintiff. There were no flaggers or escort vehicles for the tractor and oversized trailer.

24. Plaintiff was acting in a reasonable, prudent and careful manner at all times pertinent hereto and was not at fault in any way.

25. Defendant Calvin A. Rouse, who was acting in the scope and course of his employment, agency and representation of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking, owed a duty to the general public, including Plaintiff, to operate his tractor and trailer in a safe and reasonable manner and in accordance with the commons laws, and State and Federal law.

26. That the collision, injuries and damages herein described in this Complaint were the direct, foreseeable, and proximate result of the negligent, careless, willful, wanton, reckless, and grossly negligent acts and/or omissions of Defendant Calvin A. Rouse who was acting in the scope and course of his employment, agency and representation of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking in one or more of the following particulars:

- (a) Failing to yield the right of way to the Plaintiff;
- (b) Failing to keep a proper lookout;
- (c) Failing to maintain proper control of the tractor/trailer;
- (d) Failing to comply with the Federal Motor Carrier Safety Regulations Act;
- (e) Failing to comply with South Carolina Statutory and common law;
- (f) Operating a vehicle on the road at an improper speed;
- (g) In stopping the tractor/trailer in the middle of the highway while traffic was approaching;
- (h) Failing to see or observe traffic which a reasonable person should see;
- (i) Driving while diverting his attention to something other than the road and traffic conditions as he pulled out onto the highway;

- (j) Failing to abide by the proper rules and regulations concerning appropriate risk;
- (k) Driving under an impaired and fatigued condition;
- (l) Driving while tired or not otherwise fully alert in reckless disregard of the rights and safety of others, especially the rights and safety of the Plaintiff;
- (m) Failing to use the degree of care and skill required by a tractor/trailer driver under the same or similar circumstances;
- (n) Driving a tractor/trailer hauling an oversized load at an unauthorized time during the day;
- (o) Driving a tractor/trailer hauling an oversized load without the proper permits;
- (p) Driving a tractor/trailer in a manner as to indicate willful, wanton, grossly negligent, and negligent disregard for the safety of others;
- (q) Failing to comply with industry standards for safe operation of a tractor and trailer; and,
- (r) In any other such manner that Plaintiff may become aware of through discovery and/or at trial.

All of the above-referenced acts and/or omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

27. That as a direct and proximate cause of the acts and/or omissions, or both, of Defendants, Plaintiff suffered physical and mental injuries, which have caused, and in the future will cause, Plaintiff to suffer one or more of the following elements of damages:

- (a) Physical pain and suffering;
- (b) Loss of income;
- (c) Loss of Plaintiff's enjoyment of life;
- (d) Substantial expenses for past and future medical services;

- (e) Permanent impairment;
- (f) Mental anguish, shock, fear and embarrassment;
- (g) Expenses for transportation to and from medical services; and
- (h) Other particulars as evidence may show at trial.

28. That due to the willful, wanton, reckless, grossly negligent, negligent per se, and negligent acts of the Defendants as set out above, Plaintiff is entitled to recover actual and punitive damages, jointly and severally as determined by a jury.

FOR A SECOND CAUSE OF ACTION
(Negligent Hiring, Supervision, Retention and Maintenance)
(As to Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking)

29. The allegations set forth in Paragraphs 1 through 28 above are repeated as if set forth herein verbatim.

30. That Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking owed a duty to Plaintiff and others to exercise reasonable care in conducting its business activities, including the implementation and following of appropriate operating standards and procedures, the hiring, retention and supervision of its employees, drivers and agents, including Defendant Calvin A. Rouse, and the maintenance of the tractor and trailer.

31. That Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking owed statutory and common law duties to Plaintiff and others not to negligently, grossly negligently, negligently *per se*, willfully,

wantonly, carelessly and/or recklessly hire, supervise and retain employees and to use safe and fit equipment such as the tractor and trailer.

32. As a motor carrier, Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking had certain duties and responsibilities as defined by the Federal Motor Carrier Safety Regulations and industry standards including, but not limited to, the duty to properly qualify Defendant Calvin A. Rouse, the duty to properly train Defendant Calvin A. Rouse, the duty to supervise Defendant Calvin A. Rouse, the duty to properly maintain its vehicles, the duty to entrust a tractor and trailer only to those capable and qualified of handling a dangerous instrumentality, and the duty to otherwise establish and implement necessary management controls and systems for the safe operation of its commercial motor vehicles.

33. Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking breached these duties by hiring personnel or employees who committed the acts described in this Complaint and others, and Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking either knew or should have known that Defendant Calvin A. Rouse was likely to commit and/or did commit wrongful conduct but failed to remediate the situation.

34. Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking breached these duties by failing to supervise the personnel who committed the acts described herein and Defendants either knew of

should have known that Defendant Calvin A. Rouse was likely to commit wrongful conduct and failed to remediate the situation.

35. Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking breached these duties by failing to undertake investigation into wrongful and unreasonable conduct of its employees and personnel, failing to discharge employees and personnel, failing to require remedial training for employees and personnel and failing to reassign employees and personnel to prevent severe bodily injury or death to the motoring public.

36. Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking breached these duties by failing to conduct proper maintenance on its tractors and trailers to comply with the Federal Motor Carrier Safety Regulations and industry standards for safe operation to prevent severe bodily injury or death to the motoring public.

37. That as a direct and proximate result of Defendants' conduct, acts and omissions, Plaintiff suffered severe injuries and damages as outlined in this Complaint and is entitled to actual and punitive damages caused by Defendants' breach of duty.

38. Plaintiff is entitled to judgment against Defendants, jointly and severally, for the above-described actual damages and injury to Plaintiff and for punitive damages in an amount to be determined by the jury.

FOR A THIRD CAUSE OF ACTION**(Negligent Entrustment)**

(As to Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking)

39. The allegations set forth in Paragraphs 1 through 38 above are repeated as if set forth herein verbatim.

40. That the injuries and damages sustained by the Plaintiff were caused and occasioned by the willful, wanton, reckless, careless, negligent and unlawful conduct on the part of Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking in negligently entrusting the tractor and trailer to Defendant Calvin A. Rouse in one or more of the following particulars, to wit:

- (a) When they knew or should have known that Defendant Calvin A. Rouse was not capable of safely operating a tractor and trailer for the reasons as set forth in this Complaint;
- (b) In failing to adequately train Defendant Calvin A. Rouse;
- (c) In failing to adequately supervise Defendant Calvin A. Rouse;
- (d) In failing to properly investigate Defendant Calvin A. Rouse's background, driving history and/or qualifications to operate the tractor and trailer before hiring him to operate the same;
- (e) In failing to require that Defendant Calvin A. Rouse be qualified to operate a tractor and oversize trailer prior to hauling the oversize load at the time of the subject collision;
- (f) In violating various provisions of the Federal Motor Carrier Safety Regulations Act;

All of the above being in violation of the laws of the State of South Carolina.

41. That as a direct and proximate result of Defendants' conduct, acts and omissions, Plaintiff suffered severe injuries and damages as outlined in this Complaint and is entitled to actual and punitive damages caused by Defendants' breach of duty.

42. Plaintiff is entitled to judgment against Defendants, jointly and severally, for the above-described actual damages and injury to Plaintiff and for punitive damages in an amount to be determined by the jury.

FOR A FOURTH CAUSE OF ACTION
(Negligence, Gross Negligence, Negligence Per Se, Recklessness)
(As to Defendant Florence Concrete)

43. The allegations set forth in Paragraphs 1 through 42 above are repeated as if set forth herein verbatim.

44. That Defendant Florence Concrete is a highly sophisticated and experienced concrete company having been in business for over sixty (60) years. Defendant Florence Concrete advertises to the public that its "past projects and projects currently under construction clearly signify our competence, expertise, quality and acceptance in this specialized area of the construction industry." (<http://www.fcpsumter.com/>) (Accessed July 31, 2019).

45. That Defendant Florence Concrete is registered as a motor carrier with the USDOT and bearing USDOT number 137608.

46. That Defendant Florence Concrete fabricated a concrete barrier/beam/slab for installation at a bridge construction project located in Enfield, North Carolina. This concrete barrier/beam/slab was approximately 72 feet in length and required an oversized and extended trailer to ship over the highway between South Carolina and North Carolina.

47. That upon information and belief, Defendant Florence Concrete contracted directly with Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking, and hired Defendants to ship its oversized freight from Sumter, South Carolina, to the bridge construction project located in Enfield, North Carolina.

48. Given the size of this load, and Defendant Florence Concrete's significant experience handling freight of this size, and the fact that Defendant Florence Concrete is registered as a motor carrier with the USDOT, Defendant Florence Concrete either knew or should have known about the significant risk of injury to other drivers and passengers on highways in shipping a concrete barrier/beam/slab of this size.

49. That Defendant Florence Concrete owed a duty at common law, statutorily, and through federal and state regulations, to Plaintiff and others to exercise due diligence and reasonable care in the selection and hiring of carriers, to check the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by the Federal Motor Carrier Safety Act (hereinafter "FMCSA"), and to maintain internal records of the persons with whom it contracts to assure that they are reasonably and responsibly contracting with carriers.

50. That Defendant Florence Concrete owed a duty at common law, statutorily, and through federal and state regulations, to Plaintiff and others to ensure that Defendant Nesbitt Transportation Inc., Defendant Robert F. Nesbitt, and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking and Defendant Calvin A. Rouse, were shipping oversized freight that belonged to Defendant Florence Concrete during the time of day that laws, regulations and industry

standards require, and that said Defendants were in compliance with all permits required to ship oversize loads.

51. At the time of the acts and omissions complained of, Defendant Nesbitt Transportation Inc. had a forfeited status with the South Carolina Secretary of State which indicates that the State of South Carolina did not recognize it as a corporate entity.

52. At the time of the acts and omissions complained of, Defendant Nesbitt Transportation, Inc. and Defendant Robert F. Nesbitt operated with a conditional safety rating and had done so since October 9, 2017, which reveals that Defendants did not have adequate safety management controls in place to ensure compliance with the safety fitness standard according to the FMCSA.

53. In a simple, fast and free internet search online on the South Carolina Secretary of State website, Defendant Florence Concrete would have discovered that Defendant Nesbitt Transportation, Inc., was a forfeited company.

54. In a simple, fast and free internet search online of the government-sponsored FMCSA website, Defendant Florence Concrete would have discovered that Defendant Nesbitt Transportation Inc. and Defendant Robert F. Nesbitt had operated with a conditional safety rating since October 9, 2017.

55. That Defendant Florence Concrete contracted with Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking continuously and frequently for the shipment of large, oversized loads that required early-morning hour deliveries when Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking did not have

adequate safety management controls in place to ensure compliance with the safety fitness standard.

56. That the collision, injuries and damages herein described in this Complaint were the direct, foreseeable, and proximate result of the negligent, careless, willful, wanton, reckless, and grossly negligent acts and/or omissions of Defendant Florence Concrete in one or more of the following particulars:

- (a) By failing to exercise due diligence and reasonable care which allowed an unsafe motor carrier to operate unreasonably which ultimately led to the accident and damages in this case;
- (b) by failing to act reasonably in contracting with a motor carrier with a conditional safety rating as defined by the FMCSA, which is a rating that indicates a motor carrier does not have the adequate management controls and systems in place to safely operate;
- (c) In contracting and/or vetting Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt, Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking and Defendant Calvin A. Rouse which ultimately led to the operation of an unsafe motor carrier thus causing the accident and damages in this case;
- (d) by failing to ensure that Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt, Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking and Defendant Calvin A. Rouse had obtained the proper permits to ship the oversize freight belonging to Defendant Florence Concrete;
- (e) by failing to ensure that Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt, Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking and Defendant Calvin A. Rouse were shipping the oversize freight during the time of day that laws, regulations and industry standards require; and
- (f) In any other such manner that Plaintiff may become aware of through discovery and/or at trial.

57. That as a direct and proximate result of Defendant Florence Concrete's conduct, acts and omissions, Plaintiff suffered severe injuries and damages as outlined in this Complaint and is entitled to actual and punitive damages caused by Defendants' breach of duty.

58. Plaintiff is entitled to judgment against Defendants, jointly and severally, for the above-described actual damages and injury to Plaintiff and for punitive damages in an amount to be determined by the jury.

WHEREFORE, Plaintiff prays that the Court enter judgment against the Defendants for the Plaintiff's actual and punitive damages in an amount to be determined by the jury, for the reasonable costs of this action, and for such other and further relief as this Court may deem just and proper.

(Signature Page to Follow)

Florence, South Carolina

KING, LOVE, HUPFER & NANCE, LLC

October 21, 2019

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF LEE) THIRD JUDICIAL CIRCUIT

Thomas Rodriquis Nelson,) C.A. No. 2019-CP-31-00296
)
 Plaintiff,) **DEFENDANT FLORENCE CONCRETE**
) **PRODUCTS, INC.'S ANSWER TO**
 vs.) **AMENDED COMPLAINT**
)
 Nesbitt Transportation, Inc., Robert F.)
 Nesbitt, Individually and as Registered)
 Agent for Nesbitt Transportation, Inc.,)
 Robert T. Nesbitt d/b/a Tim Nesbitt)
 Trucking, Calvin A. Rouse, and Florence)
 Concrete Products, Inc.,)
)
 Defendants.)

The Defendant, Florence Concrete Products, Inc., by and through its undersigned counsel, hereby responds to the Complaint of Plaintiff and denies each and every allegation of the Complaint except as may be expressly admitted herein. Defendant Florence Concrete Products, Inc. responds to the specific allegations of Plaintiff's Complaint, in accordance with the numbered paragraphs thereof, as follows:

JURISDICTION AND VENUE

1. Admitted upon information and belief.
2. Denied for lack of knowledge and demands strict proof thereof.
3. Denied for lack of knowledge and demands strict proof thereof.
4. Denied for lack of knowledge and demands strict proof thereof.
5. Denied for lack of knowledge and demands strict proof thereof.
6. Denied for lack of knowledge and demands strict proof thereof.
7. Admitted.
8. Admitted.
9. Defendant admits only contracting with Nesbitt Transportation, Inc. for delivery

of a bridge beam that was approximately seventy-two (72) feet long from Sumter to a bridge construction project in Enfield, North Carolina. Defendant denies all remaining allegations in this Paragraph and demands strict proof thereof.

10. Defendant Florence Concrete admits only on information and belief that on January 4, 2019, at approximately 6:40 a.m. an accident occurred between the Plaintiff and a truck driven by Calvin A. Rouse in Lee County, South Carolina. Defendant denies all remaining allegations in this Paragraph for lack of knowledge and demands strict proof thereof.

11. Admitted.

FOR A FIRST CAUSE OF ACTION

(Negligence, Gross Negligence, Negligence *Per Se*, Recklessness)

(As to Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt, Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking and Defendant Calvin A. Rouse)

12. Defendant incorporates by reference its responses to Paragraphs 1 through 28 of the Complaint as if stated herein verbatim.

13. This paragraph states claims against another defendant and not against this Defendant. Any allegations are denied in so far as they relate to this Defendant.

14. This paragraph states claims against another defendant and not against this Defendant. Any allegations are denied in so far as they relate to this Defendant.

15. This paragraph states claims against another defendant and not against this Defendant. Any allegations are denied in so far as they relate to this Defendant.

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27. This paragraph states claims against another defendant and not against this Defendant. Any allegations are denied in so far as they relate to this Defendant.

28. Denied.

FOR A SECOND CAUSE OF ACTION
(Negligent Hiring, Supervision, Retention and Maintenance)
(As to Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt and
Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking)
(All Defendants)

29. Defendant incorporates by reference its responses to Paragraphs 1 through 28 of the Complaint as if stated herein verbatim.

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31. This paragraph states claims against another defendant and not against this Defendant. Any allegations are denied in so far as they relate to this Defendant.

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35. This paragraph states claims against another defendant and not against this Defendant. Any allegations are denied in so far as they relate to this Defendant.

36. This paragraph states claims against another defendant and not against this Defendant. Any allegations are denied in so far as they relate to this Defendant.

37. This paragraph states claims against another defendant and not against this Defendant. Any allegations are denied in so far as they relate to this Defendant.

38. Denied.

FOR A THIRD CAUSE OF ACTION

(Negligent Entrustment)

(As to Defendant Nesbitt Transportation, Inc., Defendant Robert F. Nesbitt and Defendant Robert T. Nesbitt d/b/a Tim Nesbitt Trucking)

39. Defendant incorporates by reference its responses to Paragraphs 1 through 38 of the Complaint as if stated herein verbatim.

40. This Paragraph and all its subparts (a) through (f) are against another defendant and not against this Defendant. Any allegations are denied in so far as they relate to this Defendant.

41. This Paragraph states claims against another Defendant and not against this Defendant. Any allegations are denied in so far as they relate to this Defendant.

42. Denied.

FOR A FOURTH CAUSE OF ACTION
(Negligence, Gross Negligence, Negligence *Per Se*, Recklessness)
(As to Defendant Florence Concrete)

43. Defendant incorporates by reference their responses to Paragraphs 1 through 42 of the Complaint as if stated herein verbatim.

44. Admitted.

45. Admitted.

46. Admitted.

47. Defendant admits only that they contracted with Nesbitt Transportation, Inc. for delivery of a bridge beam from Sumter, South Carolina to a construction project in Enfield, North Carolina. Defendant denies all remaining allegations contained in Paragraph 47.

48. Denied.

49. As to Paragraph 49, the Plaintiff has set forth legal conclusions which can be neither admitted nor denied, and therefore, Defendant would crave reference to the Code of Laws of South Carolina and common law as to duties and limitations on liability for the respective parties. To the extent a response is required, Defendant denies the allegations set forth in Paragraph 49.

50. As to Paragraph 50, the Plaintiff has set forth legal conclusions which can be neither admitted nor denied, and therefore, Defendant would crave reference to the Code of Laws of South Carolina and common law as to duties and limitations on liability for the respective parties. To the extent a response is required, Defendant denies the allegations set forth in Paragraph 50.

51. Denied for lack of knowledge and demands strict proof thereof.

52. Denied for lack of knowledge and demands strict proof thereof.

53. Denied for lack of knowledge and demands strict proof thereof.

54. Denied for lack of knowledge and demands strict proof thereof.

55. Defendant admits only that it contracts with Nesbitt Transportation, Inc. and that some loads require oversized permits. Defendant denies all remaining allegations contained in Paragraph 55.

56. Defendant denies the allegations, including all subparts (a) through (f), asserted against it in Paragraph 56.

57. Denied.

58. Denied.

59. Defendant denies that the Plaintiff is entitled to the relief requested in the Complaint, or any other recovery whatsoever.

60. Defendant denies each and every allegation of the Complaint except those allegations expressly admitted herein.

FIRST AFFIRMATIVE DEFENSE

Any injury claimed to have been sustained by Plaintiff was not proximately caused by an act of Florence Concrete, but rather was due to the intervening, independent act or omission of a third person; said act or omission being the sole, proximate and direct cause of Plaintiff's alleged injuries, for which Defendant Florence Concrete is not liable.

SECOND AFFIRMATIVE DEFENSE

Defendant Florence Concrete is not liable to the extent Plaintiff's alleged loss resulted from the intervening negligence of a third party not employed by Florence Concrete.

THIRD AFFIRMATIVE DEFENSE

Defendant Florence Concrete is not liable to the extent Plaintiff was negligent, grossly negligent, and reckless, and such negligence, gross negligence, and recklessness on the part of Plaintiff caused or contributed to the injuries or loss complained of in the Complaint, and exceeded any alleged negligence of Defendant Florence Concrete, which is denied. Alternatively, Plaintiff's recovery must be reduced in proportion to the contributory negligence,

gross negligence, and recklessness of Plaintiff.

FOURTH AFFIRMATIVE DEFENSE

Any alleged injuries or losses Plaintiff sustained, if any, were caused by Plaintiff's assumption of a known risk.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims may be barred by the doctrine of open and obvious condition and/or known and expected condition.

SIXTH AFFIRMATIVE DEFENSE

Defendant Florence Concrete reserves the right to assert claims for contribution and indemnity against any named party or a party not named in this action.

SEVENTH AFFIRMATIVE DEFENSE

Any recovery by Plaintiff must be reduced or offset by amounts Plaintiff has received or will receive from others for the same injuries.

EIGHTH AFFIRMATIVE DEFENSE

Defendant Florence Concrete pleads any and all applicable protections afforded to it under the South Carolina Fairness in Civil Justice Act of 2011, codified at S.C. Code Ann. §§ 15-32-510 to 15-32-540, as a defense to Plaintiff's claims or request for an award of punitive damages.

NINTH AFFIRMATIVE DEFENSE

To the extent Plaintiff seeks punitive damages from Defendant Florence Concrete, an award of such damages is precluded by applicable statutory and common law, and further, such an award would violate Defendant Florence Concrete's rights to due process and equal protection under the Constitution of the United States.

TENTH AFFIRMATIVE DEFENSE

Defendant Florence Concrete reserves the right to amend its Answer and to raise additional and/or affirmative defenses as may become available or revealed to it during the course of discovery in this case.

WHEREFORE, having fully answered the Complaint, Defendant respectfully prays that the Court dismiss Plaintiff's claims against it, with all costs and expenses awarded to the Defendant, together with any and all further relief that the Court deems equitable and just.

Respectfully submitted,

HALLIGAN MAHONEY WILLIAMS SMITH
FAWLEY & REAGLE, PA

By: s/ Thomas K. Barlow

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Attorneys for Defendant
Florence Concrete Products, Inc.

January 22, 2020

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF LEE

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

Thomas Rodriquis Nelson,
Plaintiff,

C/A#: 2019-CP-31-00296

vs.

**STIPULATION OF DISMISSAL WITH
PREJUDICE AS TO DEFENDANTS NESBITT
TRANSPORTATION, INC. AND CALVIN A.
ROUSE ONLY**

Nesbitt Transportation Inc., Calvin A.
Rouse and Florence Concrete Products,
Inc.,
Defendants.

Plaintiff and Defendants Nesbitt Transportation, Inc. and Calvin A. Rouse enter into this Stipulation of Dismissal **with prejudice**, by and through their undersigned counsel, as to all of Plaintiff's claims asserted against Defendants Nesbitt Transportation, Inc. and Calvin A. Rouse only in this case. Plaintiff specifically is not dismissing his claims against the remaining Defendant, Florence Concrete Products, Inc., and the lawsuit will remain pending as to Defendant, Florence Concrete Products, Inc. The parties stipulate that all claims asserted by Plaintiff in this action against Defendants Nesbitt Transportation, Inc. and Calvin A. Rouse only are dismissed **with prejudice**. Plaintiff and Defendants Nesbitt Transportation, Inc. and Calvin A. Rouse further agree and stipulate that they will bear their own attorney's fees, costs and expenses with regard to Plaintiff's claims asserted against Defendants Nesbitt Transportation, Inc. and Calvin A. Rouse only in this case.

WE SO CONSENT:

s/Ashley B. Nance

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Attorneys for Plaintiff

March 17, 2021

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*Attorneys for Defendant Florence Concrete Products,
Inc.*

RECEIVED

May 27 2022

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Civil Action No. 2021-CP-21-02042

Thomas Rodriquez Nelson.....Respondent,

v.

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

NOTICE OF APPEAL

Florence Concrete Products, Inc. appeals the Order of the Honorable Michael G. Nettles dated April 29, 2022. Appellant received written notice of entry of this Order on April 29, 2022.

May 27, 2022

s/ Anthony W. Livoti

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Attorneys for Respondent

RECEIVED

May 27 2022

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Civil Action No. 2021-CP-21-02042

Thomas Rodriqueis Nelson.....Respondent,

v.

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

PROOF OF SERVICE

The undersigned hereby certifies that on May 27, 2022, the Notice of Appeal was served on all counsel of record in this action by mailing a copy of the Notice by United States Mail, postage prepaid, and electronic mail to the following addresses:

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May 27, 2022

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Attorneys for Appellant

May 27, 2022

RECEIVED
May 27 2022
SC Court of Appeals

SENT VIA EMAIL

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Candace Dowell, Et al. V. Benton Concrete & Utilities, LLC
Appellate Case No. 2021-000899
Our File No.: 1295-0251

Dear Ms. Kitchings:

Attached for filing is a Notice of Appeal, Proof of Service, and the Order from the lower court that is the subject of the Appeal.

Thank you for your attention to this matter.

Very truly yours,
s/Cordes B. Kennedy
Cordes B. Kennedy

CBK/hws
Enclosure

cc: Ashley Nance (*sent via email*)
Linward Edwards (*sent via email*)
Kathleen Barnes (*sent via email*)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	CASE NO. 2021-CP-21-02042
	)	
Thomas Rodriquis Nelson,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MOTION FOR
	)	SUMMARY JUDGMENT
v.	)	
	)	
Florence Concrete Products, Inc.,	)	
	)	
Defendant.	)	
	)	

Pursuant to Rule 56, SCRCP, Plaintiff Thomas Rodriquis Nelson moves for summary judgment as to the two questions presented to the Court in this declaratory judgment action. Plaintiff seeks summary judgment as to the following:

1. Florence Concrete owed a duty to ensure that proper precautions were taken for the inherently dangerous work of transporting its oversize load over public roadways.
2. Florence Concrete owed a duty to exercise reasonable care in the selection of Nesbitt Transportation as the carrier of its oversize load.
3. Florence Concrete breached its duty to ensure that proper precautions were taken for the inherently dangerous work of transporting its oversize load over public roadways.
4. Florence Concrete breached its duty to exercise reasonable care in the selection of Nesbitt Transportation as the carrier of its oversize load.

In support of this motion, Plaintiff relies upon the accompanying memorandum of law, the authorities cited in the memorandum, the stipulated facts, and the oral argument scheduled for March 10, 2022.

Plaintiff respectfully requests the Court answer “yes” to both questions in the declaratory judgment action and grant summary judgment in his favor.

Florence, South Carolina

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February 28, 2022

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	CASE NO. 2021-CP-21-02042
	)	
Thomas Rodriquis Nelson,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN
	)	SUPPORT OF MOTION FOR
v.	)	SUMMARY JUDGMENT
	)	
Florence Concrete Products, Inc.,	)	
	)	
Defendant.	)	
	)	

This is a declaratory judgment action asking the Court to determine the duty that Defendant Florence Concrete Products, Inc., owed to Plaintiff Thomas Rodriquis Nelson under the facts of this case and whether Florence Concrete breached a duty. The parties agreed to stipulated facts, proximate cause, and damages.

Florence Concrete hired a transportation company to haul a 72-foot-long cement slab that it manufactured. The length of the slab required a special oversize permit that restricted the transportation time to daylight hours only. When Nelson drove to work in the dark around 6:30 a.m., he came upon the tractor trailer hauling the oversize load. It was illegal for the load to be on the road at that time. The vehicles collided in the dark, and Nelson suffered severe injuries and became a quadriplegic.

Nelson sued Florence Concrete for his injuries. He alleged its negligence in failing to ensure that its oversize load was transported during an allowed time of day under the permit and in selecting Nesbitt Transportation to transport the load because of a poor safety rating. (Am. Cmplt. pp. 6-7). Florence Concrete admitted that transporting an oversize load at a time that is not allowable creates an inherent risk and danger to the public, but it defended Nelson's action on the

basis that it hired an independent contractor transportation company that is solely liable for Nelson's injuries. (Order p. 2 ¶ 8.c.; Ans. to Am. Cmpl't.).

The parties came to a settlement agreement that is contingent upon the Court answering two questions of law regarding Florence Concrete's duty owed to Nelson and whether it breached a duty. The Court should grant Nelson's motion for summary judgment by finding that Florence Concrete owed Nelson a duty under the circumstances of this case and breached that duty.

FACTS AND PROCEDURAL HISTORY

Florence Concrete is in the business of manufacturing concrete slabs, many of which are used in highway construction projects. More than half of its products are longer than 60 feet. (Order p. 2 ¶ 8.a., c.). A load that is over 60-feet-long is not supposed to be on the public roadways unless the transporter of the load applies for and receives an oversize permit from the South Carolina Department of Transportation ("SCDOT"). *Id.* at ¶ 8.a; S.C. Code Ann. §§ 57-3-130, 56-5-4070. An SCDOT oversize permit restricts the time of day that the permittee can travel to only daylight hours. Travel is restricted to only Monday through Saturday from half-an-hour after official sunrise until half-an-hour before official sunset. (SCDOT permit exhibit to Order p. 1). The SCDOT oversize permit also prohibits travel in close proximity to large urban areas on all days between the hours of 7:00 a.m. and 9:00 a.m., and on school days between the hours of 3:00 p.m. and 6:00 p.m. *Id.*

The cement slab that injured Nelson was 72 feet long and 24 inches wide and required an oversize permit. (Order p. 2 ¶ 8.a.). Florence Concrete verbally contracted with Nesbitt Transportation to haul the slab from its Sumter, SC, manufacturing facility to a bridge construction

project in North Carolina. *Id.* at p. 2 ¶ 8.a-b. Nesbitt Transportation applied for and received oversize load permits from SCDOT and NCDOT.¹ *Id.* at p. 2 ¶ 8.c.

Under the permit terms, the oversize load could not be on the road from 3:00 p.m. on January 3, 2019, until 9:00 a.m. on January 4, 2019.² (Order p. 3 ¶ 8.d.). Florence Concrete knew that the permit for this oversize load contained “travel restrictions imposed for the protection of the general public.” (Order p. 2 ¶ 8.c.).

Florence Concrete put the cement slab onto a Nesbitt Transportation extended trailer located at Florence Concrete’s facility in Sumter, SC. *Id.* at p. 2 ¶ 8.b. Florence Concrete employees attached to the trailer the SCDOT and NCDOT permits that expressly stated the restricted travel times, just as all of the other prior permits for oversize loads that Florence Concrete shipped. *Id.* at p. 3 ¶ 8.c.

On January 3, 2019, a Nesbitt Transportation employee came to Florence Concrete’s facility and picked up the oversize load at 5:02 p.m.—over two hours after it could legally be on the road and at a travel time which was expressly prohibited by the permits. *Id.* at ¶ 8.d. Despite knowing that the permits contained travel restrictions, Florence Concrete did not monitor its own lot or know when the load left the lot. *Id.* at ¶¶ 8.b., -e.

The driver took the oversize load to a commercial parking lot in Lynchburg, SC, left it overnight, and then got on the road again the next morning around 6:30 a.m.—a travel time still prohibited by the permits. *Id.* at ¶ 8.d.-e. Around 6:30 a.m., before sunrise, while Nelson drove to work, he came upon the truck and trailer hauling the oversize cement slab. (Order p. 3 ¶ 8.f.). The

¹ The North Carolina Department of Transportation oversize load and permit requirements are the same as the SCDOT requirements for purposes of this case. The same facts and arguments apply to both permitting entities.

² Sumter is a large urban area, and January 4, 2019, was a school day.

vehicles collided in the dark, and Nelson suffered severe injuries and became a quadriplegic. *Id.* If the load traveled at the allowed time of after 9:00 a.m. on January 4, 2019, it would not have been on the road at 6:00 a.m. to injure Nelson.

The SCDOT permit states in all capital letters that it “shall be signed and carried in the towing vehicle during movement.” (SCDOT permit exhibit to Order p. 1). The SCDOT guidelines for oversize loads state: “An Oversize/Overweight Permit is not valid until signed by an authorized representative of the permittee [Nesbitt Transportation].”³ The oversize permit that Florence Concrete left on the load for the driver is not signed. *Id.*

At the time of the collision, the Federal Motor Carrier Safety Administration (“FMCSA”) rated Nesbitt Transportation’s safety as “conditional”. *Id.* at p. 3 ¶ 8.h. Nesbitt Transportation lost a satisfactory rating in 2015 after a failed safety audit showed violations of numerous regulations. *Id.* A conditional safety rating means that the FMCSA found Nesbitt Transportation lacked “adequate management controls and systems necessary to operate safely which could lead to a number of safety violations regulated by the FMCSA.” *Id.* at p. 4 ¶ 8.h. After losing its satisfactory rating in 2015, Nesbitt Transportation never tried to correct its deficiencies to regain the satisfactory rating. *Id.* Nesbitt Transportation could still operate as a motor carrier and haul an oversize load with a conditional safety rating. *Id.* at ¶ 8.i.

Starting in 1992, Florence Concrete regularly hired Nesbitt Transportation to haul its loads. *Id.* at p. 4 ¶ 8.k. They did not have a written agreement or operate under any policies or procedures. *Id.* Florence Concrete did not have any evaluation or qualification process for selecting a

³ *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 February 9, 2022).

transportation company to haul an oversize load. *Id.* Florence Concrete never looked into Nesbitt Transportation's safety rating. *Id.* at ¶ 8.j.-k.

In 2019, Nelson filed a negligence action against Florence Concrete. (2019-CP-31-00296). Florence Concrete's shipping manager admitted "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." (Order p. 2 ¶ 8.c.). After extensive litigation and mediation, the parties reached a settlement agreeing to proximate cause and Nelson's damages but making the amounts payable dependent on the outcome of the Court's answers to two questions. (Am. Cmplt. p. 4). The parties agreed to stipulated facts, and Nelson filed this declaratory judgment action. (Am. Cmplt.).

Nelson's main contentions against Florence Concrete are that it acted negligently in failing to ensure that its inherently dangerous oversize load was transported during an allowed time of day under the oversize load permits and in selecting Nesbitt Transportation to transport the load because of its conditional safety rating. (Am. Cmplt. pp. 6-7).

In a Consent Order that incorporates the parties' stipulated facts, the Court agreed to answer these 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?

The parties agreed to submit cross-motions for summary judgment and memoranda in support, with reply argument reserved for the hearing on the motions.

STANDARD

“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). “Cross 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) (internal quotation and alteration marks omitted).

ARGUMENT

There are two independent grounds for the Court to answer the questions “yes” and grant Nelson’s motion for summary judgment. It should find Florence Concrete owed a duty either to ensure proper precautions were taken for the inherently dangerous work of hauling an oversize load or to use reasonable care in the selection of an independent contractor hired to perform work involving danger, or both. Both duties are similarly based on the particular facts of this case involving work that Florence Concrete knew posed a danger to the traveling public if proper precautions were not taken. The stipulated facts show that Florence Concrete violated both duties.

I. THE COURT SHOULD ANSWER “YES” TO QUESTION 1.

The Court should answer “yes” to Question 1 for either or both of two independent reasons. First, under existing South Carolina law and the facts of this case, Florence Concrete owed a duty to ensure that proper precautions were taken for the inherently dangerous work of transporting its oversize load over public roadways. Second, Florence Concrete owed a duty to exercise reasonable care in the selection of Nesbitt Transportation as the carrier of its oversize load.

By submitting Question 1 to the Court by consent, the parties agree that Florence Concrete owed some duty to Nelson. The question asks if Florence Concrete owed a duty “beyond” contracting with a shipper with operating authority, insurance, and a proper permit. (Order pp. 1-

2). Therefore, it is established that Florence Concrete owes some duty despite its contention that Nesbitt Transportation is an independent contractor. The issue for the Court is the extent of that duty under the particular facts of this case.

“[A] court may establish and define the standard of care by looking to the common law, statutes, administrative regulations, industry standards, or a defendant’s own policies and guidelines.” *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016).

Florence Concrete would like to limit its duty to contracting with a shipper with operating authority, insurance, and a proper permit. This would allow Florence Concrete to stick its head in the sand any time a shipper violated a permit and avoid liability for harm that Florence Concrete is easily able (and has a duty) to prevent.

Because transportation of an oversize load is inherently dangerous and Florence Concrete admitted knowledge of that inherent danger in the absence of proper precautions, Florence Concrete owed a duty beyond simply contracting with a shipper that could legally transport the load and maintained insurance. It owed a duty to ensure that proper precautions were taken to avoid the inherent danger of transporting an oversize load.

A. Florence Concrete owed a duty to ensure that proper precautions were taken for the inherently dangerous work of transporting its oversize load over public roadways.

For over seventy years, South Carolina appellate courts have held that a defendant cannot avoid liability by using an independent contractor to do work that is inherently or intrinsically dangerous unless proper precautions are taken. In other words, while an employer is generally not liable for the work of an independent contractor, there is an exception to that rule—an employer remains liable for injuries that occur for work that is inherently dangerous without proper precautions.

In *Allison v. Ideal Laundry Cleaners*, 215 S.C. 344, 55 S.E.2d 281 (1949), the defendant Laundry replaced its coal boilers with a propane gas system. It exploded within a few days of installation. *Id.* at 348-49, 55 S.E.2d at 281-82. When adjoining property owners with damage from the explosion 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 plaintiffs argued the Laundry had “absolute liability” regardless of negligence. *Id.* at 349, 55 S.E.2d at 282. The Supreme Court rejected that argument. It then addressed the general rule of nonliability for independent contractors and held that “there 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.” *Id.* at 350, 55 S.E.2d at 282.

The *Allison* court’s analysis of the exception is instructive. It considered the “factor” 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 the owner used the same contractor that installed in his home gas storage that worked properly, used a contractor licensed by the city with a separate license for each installation, and investigated the safety of gas installations at other industrial plants before installing it in the laundry. *Id.* The court also 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.* Importantly, it noted that “virtually every case has to be considered on its own peculiar facts.” *Id.*

In this case, it is established that being on the road with an oversize load at night is inherently dangerous because (1) SCDOT, as the regulating authority, forbids it and (2) Florence Concrete admitted knowledge “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.” (Order p. 2 ¶ 8.c.) (emphasis added). The Court does not have to make this separate finding because the stipulated facts already state it. (Order p. 2 ¶ 8.c.). The oversize load itself was the danger in this case—the size of the load is the very reason why it was not allowed on the road except during daylight hours. The establishment of inherent danger as a matter of law distinguishes this case from *Allison* because the risk of hauling an oversize load on public roadways without proper precautions is established as a matter of law.

Further, in *Allison*, the work was a one-time installation for a new commercial gas system that the owner did not have experience with and that no governing authority regulated. Here, in stark contrast, over half of Florence Concrete’s products are oversize loads that it shipped on a regular basis for decades. (Order p. 2 ¶ 8.a., c., k.). It knew SCDOT regulated the travel times for oversize loads for public safety purposes. (Order p. 2 ¶ 8.c.). It had the permit with restricted travel times in its possession and left it on the truck for the driver. *Id.* Florence Concrete did not monitor

its trailer lot to ensure that an oversize load left the lot only during a legally permissible time. (Order p. 2 ¶ 8.b.). The “peculiar facts” of this case fall within the exception.

In *Alexander v. Seaboard Air Line R.R. Co.*, 221 S.C. 477, 71 S.E.2d 299 (1952), the Supreme Court held that a railroad company could not avoid liability for spraying weed killer that ruined a nearby cotton crop by hiring an independent contractor to perform the work. The defendant railroad entered into a written contract with Spray Services, Inc., to spray weed killer on the track bed and right-of-way located 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 was destructive to 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 returned a verdict for the plaintiff, and the railroad appealed, raising as one issue that it was entitled to a JNOV because the spray company was an independent contractor for whom it was allegedly not liable. *Id.* at 481-82, 71 S.E.2d at 301.

The Supreme Court stated an “exception to the general rule” that an employer is not liable for the negligence of an independent contractor—“Liability cannot be evaded by employing an independent contractor to do work which is inherently or intrinsically dangerous unless proper precautions are taken.” *Id.* at 487-88, 71 S.E.2d at 304. The Court considered whether the railroad “kn[e]w or could they have learned by reasonable inquiry of the injurious effect” the spray would have “on growing cotton if it floated” from the right-of-way. *Id.* at 488-89, 71 S.E.2d at 304. On that point, the Court found “there does not seem to be any question as to the availability of such information to” the railroad and that the spray company’s knowledge of the danger “was imputable to” it. *Id.* at 489, 71 S.E.2d at 304. The Court also found evidence that the weed killer should not be sprayed on a windy day and “the wind was blowing pretty high that day”—*i.e.*, evidence that proper precautions were not taken—required the lower court to submit the negligence the issue to

the jury. *Id.* at 489, 71 S.E.2d at 304-05. The Supreme Court affirmed the denial of the railroad's motion for JNOV and affirmed the judgment against it for the negligent acts of its independent contractor. *Id.* at 491, 71 S.E.2d at 305.

Here, as in *Alexander*, there is no question that Florence Concrete knew that the contracted work of hauling an oversize load was inherently dangerous unless proper precautions are taken. The evidence is even stronger in this case than in *Alexander* because of Florence Concrete's decades of instances of contracting to haul oversize loads subject to SCDOT permit travel restrictions.

In 1965, the American Law Institute released the *Restatement (Second) of Torts*, which included § 416 entitled "Work Dangerous in Absence of Special Precautions." Consistent with South Carolina law, § 416 states:

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

Restatement (Second) of Torts, § 416. The Reporter's Notes to § 416 cite to *Davis v. Summerfield*, 133 N.C. 325, 45 S.E. 654 (N.C. 1903), a case that the South Carolina Supreme Court cited to on three different occasions in support of its law on this point. See *Allison*, 215 S.C. at 350, 55 S.E.2d at 282 (citing *Davis* as a "well considered case"); *Alexander*, 221 S.C. at 488, 71 S.E.2d at 304 (repeating *Allison*'s citation of *Davis*); *Duane v. Presley Constr. Co.*, 270 S.C. 682, 684, 244 S.E.2d 509, 510 (1978) (noting *Davis* was "cited with approval in" *Allison* and *Alexander*).⁴

⁴ Plaintiff cites to § 416 for the proposition that South Carolina's law on this point is widely accepted and applied. Plaintiff is aware that South Carolina has not cited to § 416 but this is irrelevant given that it was the law in South Carolina before § 416 was even enacted.

In 1978, over ten years after the release of the *Restatement* § 416, the South Carolina Supreme Court again repeated the law that a defendant cannot avoid liability by using an independent contractor to do work that is inherently or intrinsically dangerous unless proper precautions are taken. In *Duane v. Presley Constr. Co.*, 270 S.C. 682, 244 S.E.2d 509 (1978), the plaintiff brought an action for water concentration and silting damages to his property caused by development of an adjacent subdivision. *Id.* at 683, 244 S.E.2d at 509. The developer hired a construction company as an independent contractor to clear the land. *Id.* The developer defended the action on the basis that any damage was caused by the independent contractor who was solely responsible. *Id.* The trial court granted summary judgment for the developer.

On appeal, the Supreme Court reversed. It stated that “[g]enerally, an employer is not liable for the torts of an independent contractor committed in the performance of contracted work” but “is responsible, however, if the injury is caused by his own negligence in failing to take preventive measures.” *Id.* at 683-84, 244 S.E.2d at 510 (citing *Davis*, *Allison*, and *Alexander*). Applying that law to the facts of the case, the Court held 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 684, 244 S.E.2d at 510.

Applying this established law to the particular facts of this case, the Court should find Florence Concrete owed a duty to ensure that proper precautions were taken for the inherently dangerous work of transporting an oversize load over public roadways. Florence Concrete’s own negligence in failing to take the preventive measure of keeping the trailer on its lot until a permitted travel time caused Mr. Nelson’s injuries.

There is much more danger in this case than in *Allison*, *Alexander*, and *Duane* because those cases all involved property damage and this case involves danger of physical injury to the

traveling public. The danger involved is inherent in the work of transporting an oversize load on public roads. The risk cannot be avoided altogether, it can only be protected against by taking proper precautions.

It is undisputed that Florence Concrete knew “that the shipment of this oversized load had travel restrictions imposed for the protection of the general public.” *Id.* The proper precaution is to comply with the times that an oversize is allowed by permit to be transported.

The *Restatement* § 416 even uses an unsafe load example.

[I]f a contractor is employed to transport the employer’s goods by truck over the public highway, the employer is not liable for the contractor’s failure to inspect the brakes on his truck, or for his driving in excess of the speed limit, because the risk is in no way a peculiar one, and only an ordinary precaution is called for. But if the contractor is employed to transport giant logs weighing several tons over the highway, the employer will be subject to liability for the contractor’s failure to take special precautions to anchor them on his trucks.

Restatement (Second) of Torts, § 416, cmt. d. This case is analogous to the *Restatement* example. Florence Concrete contracted to transport an oversize load and is subject to liability for Nesbitt Transportation’s failure to comply with the known precaution of driving the load only during the allowed times.

Finally, *Allison* refutes Florence Concrete’s argument that its duty is limited to only contracting with a shipper with operating authority, insurance, and a proper permit. In *Allison*, the Supreme Court considered that the contractor chosen was licensed by the city with a separate license for each installation but did not find that fact dispositive. 215 S.C. at 351, 55 S.E.2d at 283. Instead, the relevant consideration was the **owner’s knowledge** of the inherent danger of the work unless performed properly. *Id.* at 353-54, 55 S.E.2d at 284. In this case, consideration of that element establishes that Florence Concrete owed a duty to Nelson to take measures beyond verbally contracting for the shipment of the load with a shipper that is a properly-insured

independent contractor motor carrier that has U.S. Department of Transportation operating authority and secured the proper oversize load permits from the SCDOT and NCDOT.

The Court should answer “Yes” to question 1.

B. Alternatively, Florence Concrete owed a duty to use reasonable care in the selection of an independent contractor under the facts of this case.

Alternatively, as an additional basis for finding a duty under the facts of this case, Florence Concrete owed a duty to use reasonable care in the selection of Nesbitt Transportation as an independent contractor to haul an oversize load.

i. Under South Carolina law, an owner owes a duty to use reasonable care in the selection of an independent contractor for work involving danger to others.

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.

In *Conlin v. City Council of Charleston*, 15 Rich. 201 (Ct. App. 1868),⁵ 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 Mr. Conlin came to do his work. *Id.* at 203. Mr. 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 on a basis that the jury instructions “seem to have held” that the contractor must have had exclusive possession of the steeple to qualify as an independent contractor, when the law required only that he “have had such control of the place as

⁵ While the opinion says it is decided by the “Court of Appeals of South Carolina”, it was decided by what is known now as the Supreme Court. The Court of Appeals as it is known now did not exist until 1979. S.C. Code Ann. § 14-8-10.

was convenient for doing” the 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 (emphasis added). Importantly, the Court made this statement about owner liability in an opinion remanding the case for a new trial on the law stated by the Court. Therefore, it plainly meant for the parties to rely on its statements of the law.

It is undisputed that the work of transporting an oversize load (especially during prohibited hours) involves danger to others. (Order p. 2 ¶ 8.c.). Therefore, it falls within the law stated in *Conlin* that an owner is responsible for the negligence of a contractor that is unworthy of trust for work involving danger to others. 15 Rich. at 211-12.

Over 100 years later, the Supreme Court affirmed an action in which the trial judge submitted to the jury the liability theory of an owner’s negligent selection of an independent contractor. *Anderson v. West*, 270 S.C. 184, 241 S.E.2d 551 (1978). 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 evidence of negligent selection. *Id.* at 188, 241 S.E.2d at 553. However, Geer Drug failed to object to the trial court’s submission of the

negligent selection theory to the jury. *Id.* Because the trial court properly submitted the issue of employment to the jury, the Court did not need to 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, and this Court should do the same in this case.

In the event that Florence Concrete argues that the appellate cases discussing a negligent selection action are few and old, this is irrelevant and does not entitle the cases to any less legal weight. For example, recently, in *Wickersham v. Ford Motor Co.*, 432 S.C. 384, 390, 853 S.E.2d 329, 332 (2020), the Supreme Court relied on a case from 1948 as the basis for a cause of action for wrongful death by suicide. That few cases discussed the issue and no case yet awarded recovery on the theory did not stop the Court from recognizing it already existed. Similarly, in this case, that few cases discuss negligent selection does not eliminate the law that the cause of action does exist.

Based solely on South Carolina law, the Court should find in Nelson's favor that Florence Concrete owed a duty to use reasonable care in the selection of an independent contractor because the work of hauling an oversize load involves danger to others.

In addition to the established South Carolina law discussed above, the Court may also consider that *Restatement (Second) of Torts* § 411 (1965) recognizes the duty of an owner to use reasonable care in the selection of an independent contractor for work that involves a risk of harm unless carefully done.

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). It is undisputed that 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.). Therefore, under § 411, the Court should find that Florence Concrete owed a duty to use reasonable care in the selection of an independent contractor to haul the oversize load.

Although no South Carolina case expressly adopts § 411, it has been the law in South Carolina since the *Conlin* case in 1868.⁶ Therefore, there has not been a need for express adoption. 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 (citing as “persuasive” a Restatement section and cases from other jurisdictions that relied on its reasoning).

Relying solely on South Carolina case law, or a combination of state law and the persuasive authority of § 411, the Court should hold 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.

ii. *Ruh* is not dispositive or even persuasive on the issue of negligent selection.

Florence Concrete will surely cite to *Ruh v. Metal Recycling Servs., LLC*, 436 F. Supp. 3d 844 (D.S.C. 2020)—an action that is currently on appeal to the United States Court of Appeals for the Fourth Circuit. *Ruh* is not binding on this Court and, regardless, it is factually distinguishable in several important respects.

⁶ South Carolina circuit courts have relied on § 411 to allow negligent selection causes of action to proceed. *See Tuten v. Jackson*, C/A No. 2012-CP-25-00203 (Order of Judge Mullen denying defendant’s motion for summary judgment in reliance on § 411 and finding a question of fact as to whether the defendant was negligent in selecting the independent contractor to haul timber) (attached as Exh. A).

Ruh suffered injuries when a truck owned by Norris Trucking hit her vehicle due to the truck driver's negligence. *Id.* at 845. Metal Recycling Services contracted with Norris Trucking to haul a load of scrap metal. *Id.* Ruh brought an action against Metal Recycling on the theory that it negligently selected Norris Trucking as an independent contractor because Norris Trucking had a history of violating federal safety regulations. *Id.* at 846. Metal Recycling argued it could not be liable for the actions of an independent contractor. *Id.* at 847.

The District Court granted Metal Recycling's motion to dismiss. It held the facts did not fall within the above-discussed inherent danger exception to the general rule of nonliability for an independent contractor. *Id.* at 850. Addressing the negligent selection of an independent contractor, the Court found that *Conlin*'s statement about negligent selection "is dicta" because the *Conlin* court did not decide that issue. *Id.* It then held that, regardless, *Conlin* addressed an owner's "duties when contracting for work posing a particular risk of harm" when Ruh's case did not involve a particular risk. *Id.* The Court did not address *Restatement (Second) of Torts* § 411.

Ruh appealed the decision to the Fourth Circuit, which recently certified the case to the Supreme Court of South Carolina. *Ruh v. Metal Recycling Servs.*, 2022 WL 203744 (4th Cir. 2022). It asks the Supreme Court to answer this question: "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 Fourth Circuit said *Conlin* "lends credence to the idea that South Carolina would recognize such a duty" to use due care in selecting an independent contractor. *Id.* at *6. The Fourth Circuit believed Ruh did not "establish that South Carolina has already expressly recognized a direct cause of action for the negligent selection of an independent contractor." *Id.* at *7-8. While South Carolina has not been asked to adopt *Restatement (Second) of Torts* § 411,

“every other state in the Fourth Circuit has either expressly adopted § 411 or otherwise recognized a duty to hire a competent independent contractor.” *Id.* at *5-6 (citing collection of cases).

Ruh does not bind this Court in any way. A federal court decision interpreting state law is not binding on state courts. *See Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 473, 674 S.E.2d 154, 161 (2009) (stating “a federal court decision interpreting state law is not binding on this Court”). Therefore, this Court is free to decide the issue based on its interpretation of the existing law of South Carolina.

There is no final decision in *Ruh* to even follow because the District Court’s decision is on appeal. Regardless, the District Court did not hold that South Carolina does not recognize a duty to use reasonable care in selection of an independent contractor. Rather, it held that, if *Conlin* does state such a duty, it applied to “contracting for work posing a particular risk of harm”—exactly what Nelson alleges in this case.

Ruh is also factually distinguishable. It did not involve contracting for a particular risk of harm. This case involves an oversize load that required a special permit with restricted travel times. In *Ruh*, the allegation is simply that general driver negligence caused injury. In this case, the allegation is that the independent contractor violated a safety requirement that specifically applied to the load it hauled for Florence Concrete.

Ruh is not dispositive, and this Court is free to answer question 1 without regard to it.

The Court should answer question 1 “yes” and find Florence Concrete owed a duty to Nelson under the facts of this case based on either the inherent danger exception or negligent selection, or both.

II. THE COURT SHOULD ANSWER “YES” TO QUESTION 2.

Based on one or both of the duties of care discussed above, the Court should answer “yes” to question 2 because the stipulated facts establish that Florence Concrete breached both duties

owed to Nelson. “A breach of duty exists when it is foreseeable that one’s conduct may likely injure the person to whom the duty is owed.” *Horne v. Beason*, 285 S.C. 518, 521, 331 S.E.2d 342, 344 (Ct. App. 1985). It was foreseeable that Florence Concrete’s conduct related to the oversize load would likely injury a member of the traveling public, and it is established as a matter of law that Florence Concrete knew the risk of danger.

A. Florence Concrete breached its duty to ensure that proper precautions were taken for the inherently dangerous work of transporting its oversize load over public roadways.

Over half of Florence Concrete’s business involved manufacturing and shipping oversize loads. (Order p. 2 ¶ 8.a.). Florence Concrete knew that its oversize loads required special permits from the SCDOT and NCDOT. *Id* at ¶ 8.a., c., j. Florence Concrete knew the oversize load permits “had travel restrictions imposed for the protection of the general public. *Id.* at ¶ 8.c. Florence Concrete knew “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.” *Id.* It dealt with oversize loads and permits for decades. (Order p. 4).

Florence Concrete had in its possession the oversize permits for the load that injured Nelson. *Id.* at pp. 2-3 ¶ 8.c. Florence Concrete employees attached the permits and travel directions to the trailer before it left Florence Concrete’s property. *Id.* at p. 3 ¶ 8.c. Further, Florence Concrete knew or should have known that the permit was unsigned and, therefore, invalid. *See* S.C. Code Ann. § 57-3-130(A) (“No person may violate the terms or conditions of the special permit.”).

Despite all of this knowledge, Florence Concrete failed to ensure proper precautions were followed for its oversize load. It breached its duty by failing to ensure the transportation company complied with the permits, failing to monitor when a load left its property, and allowing the oversize load at issue to leave its lot at a time expressly prohibited by the permits. If Florence

Concrete ensured the travel time precautions were followed, the oversize load would not have been on the road at the time of the accident, and Nelson would not be a quadriplegic.

Florence Concrete will likely argue that it did not know what time the driver left its lot because it did not monitor the lot. This is irrelevant and, regardless, does not mean that Florence Concrete lacked the ability to monitor the lot. Minimal conduct on Florence Concrete's part to simply ensure that an oversize load left its lot at a permitted time would have made the maximum difference to Nelson—the use of his body. Florence Concrete cannot hide behind its ignorance as to the time the load left its lot when it undeniably had the ability to know. Ignorance is not an excuse for negligent conduct.

The Court should find that Florence Concrete breached its duty to Nelson to ensure that proper precautions were taken for the inherently dangerous work of transporting an oversize load.

B. Florence Concrete breached its duty to use reasonable care in the selection of an independent contractor under the facts of this case.

It is established that Nesbitt Transportation's work in hauling the oversize load involved inherent danger to the public. Under the facts of this case, Florence Concrete breached its duty to use due care in selecting Nesbitt Transportation as the independent contractor.

Florence Concrete had no evaluation or qualification process or criteria for choosing a motor carrier for its oversize loads. (Order p. 4 ¶ 8.k.). The shipping manager did not know about the existence of a FCMSA safety rating for motor carriers. (Order p. 4 ¶ 8.j.).

Florence Concrete worked with Nesbitt Transportation since 1992. They never entered into a written contract or operated under a set of policies or procedures. (Order p. 4 ¶ 8.k.). In the 27 years from 1992 until 2019, Florence Concrete never looked into Nesbitt Transportation's publicly available safety rating. *Id.* at ¶ 8.j. Florence Concrete required only that Nesbitt Transportation get an oversize permit for the loads it hauled. *Id.* This alone is a failure to use

reasonable care because the fact that a load may be legally transported has nothing to do with the trustworthiness 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 took the time to look, 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). This meant Nesbitt Transportation “lack[ed] adequate management controls and systems necessary to operate safely which could lead to a number of safety violations.” *Id.* Florence Concrete’s failure to look at, or even consider, the safety rating is a breach of its duty.

Florence Concrete will likely argue that a conditional safety rating did not affect Nesbitt Transportation’s ability to operate and haul an oversize load. *Id.* at p. 4. That argument is an example of Florence Concrete’s lack of care for the safety of the carriers it uses. That a truck is legally allowed on the road, does not mean that the trucking transportation company was chosen with reasonable care.

The Court should find that Florence Concrete breached its duty to Nelson to use reasonable care in the selection of an independent contractor to haul an oversize load.

CONCLUSION

For these reasons, and based on argument at the hearing on the motion, the Court should answer “yes” to both questions.

(Signature Page to Follow)

Florence, South Carolina

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February 28, 2022

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ATTORNEYS FOR PLAINTIFF

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP2500403

Aileen Tuten

Wilbur Tuten

2014 MAY -9
FILED
CLERK OF COURT
HAMPTON COUNTY, SC
BY: _____
Melvin Brooks
Brooks Brothers Logging
M&J Express
Bowers Timber
Company LLC

Kelvin Brooks
Ossie Jackson
Allstate Insurance
Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: **CLERK OF COURT**

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: ORDER DENYING BOWERS TIMBER COMPANY, LLC MOTION FOR SUMMARY JUDGMENT SIGNED BY JUDGE MULLEN FILED 05-07-2014

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

William Franklin Barnes III PO Box 457 101 Mulberry
Street East Hampton, SC 29924-0457

John Martin Grantland PO Box 6648 Columbia, SC 29260
Benjamin B. Davis PO Box 650007 Mt. Pleasant, SC 29465
John Martin Grantland PO Box 6648 Columbia, SC 29260
David Starr Cobb PO Box 22129 Charleston, SC 29413-
2129

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Mylinda Nettles - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HAMPTON	)	CIVIL ACTION NO.: 11-CP-25-403
	)	
AILEENE TUTEN AND WILBUR TUTEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER DENYING
	)	BOWERS TIMBER COMPANY, LLC'S
	)	MOTION FOR SUMMARY JUDGMENT
	)	
OSSIE JACKSON D/B/A M & J EXPRESS, AND BOWERS TIMBER COMPANY, LLC.,	)	
	)	
Defendants.	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HAMPTON	)	CIVIL ACTION NO.: 2012-CP-25-00203
	)	
GLORIA TUTEN AS GUARDIAN AD LITEM FOR SETH GARVIN,	)	
	)	
PLAINTIFF,	)	
	)	
V.	)	
	)	
OSSIE JACKSON D/B/A M & J EXPRESS, KELVIN BROOKS D/B/A BROOKS BROTHERS LOGGING, AND BOWERS TIMBER COMPANY, LLC.,	)	
	)	
DEFENDANTS.	)	

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CLERK OF COURT
HAMPTON COUNTY, S.C.

This matter came before the Court on April 3, 2014 for hearing on Defendant, Bowers Timber Company, LLC's ("Bowers Timber") motion for summary judgment. Present before the Court were John E. Parker and William F. Barnes, III on behalf of the Plaintiffs, Aileen Tuten, Wilbur Tuten, and Gloria Tuten, Individually and as Guardian ad Litem on behalf of Seth Garvin. Julian K. Allen appeared on behalf of Bowers Timber. After hearing argument from counsel and reviewing the parties' submissions, the Court denies Bowers Timber's motion for summary judgment for the reasons set forth below.

FACTS

These cases arise out of a collision that occurred on December 1, 2010 near Estill, South Carolina between a vehicle driven by Aileen Tuten and log truck driven by Ossie Jackson. (Compl. ¶ 5). Seth Garvin was a passenger in the vehicle driven by Aileen Tuten. (Garvin Compl. ¶ 7). The facts as alleged state that on December 1, 2010, Defendant Jackson was operating a tractor-trailer and pulled from a stop sign on Secondary Highway 35 into Plaintiff's lane of travel, which caused the Plaintiff to collide with the tractor trailer operated by Defendant Jackson. The complaint further alleges that Defendant Jackson was hauling a load of timber cut by Kelvin Brooks on behalf of his employer, Bowers Timber Company, LLC." (3d Amd. Compl. ¶ 6). Specifically, as to Bowers Timber, the complaint alleges that it was negligent in "hiring and retaining an incompetent and unqualified independent contractor, Ossie Jackson d/b/a M & J Express; and [i]n failing to supervise." (3d Amd. Compl. ¶ 9). Wilbur Tuten allegedly suffered loss of consortium, support, and care of his wife, Aileen, due to the injuries she sustained in this collision. (3d Amd. Compl. ¶ 11).

STANDARD OF REVIEW

Summary judgment is only appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCF. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). On a motion for summary judgment, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ANALYSIS

In support of its motion for summary judgment, Bowers Timber provided an affidavit from Anthony Bowers. (Aff. of Bowers). Mr. Bowers is the president and owner of Bowers Timber. (Aff. of Bowers ¶ 2). Bowers attests that on December 1, 2010, Bowers Timber did not own any vehicle involved in the collision, did not direct or authorize Ossie Jackson to drive in the area where the collision occurred, and did not control any of the activities conducted by Jackson. (Aff. of Bowers ¶ 8). Bowers contends that “Ossie Jackson was an independent contractor of Brooks Brothers Logging.” (Aff. of Bowers ¶ 7). Bowers Timber asserts that there are two layers of independent contractors between itself and Ossie Jackson that warrant summary judgment – Kelvin Brooks and Brooks Brothers Logging together constitute an independent contractor of Bowers Timber and Ossie Jackson constitutes an independent contractor of Kelvin Brooks.

In opposition to Bowers Timber’s motion, the plaintiffs rely on the RESTATEMENT (SECOND) OF TORTS § 411 as the basis of liability against Bowers Timber. Section 411 provides that “[a]n 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.” (Pl. Ex. 14). There appear to be no South Carolina cases interpreting § 411 and Plaintiff’s theory of negligent selection of an independent contractor. Since this issue is novel, summary judgment would be inappropriate and as a result the Court denies Bower Timber’s motion on this basis.

Even if this was not a novel issue, there is evidence that presents a question of fact of whether Bowers Timber was negligent in the selection and hiring of Ossie Jackson as its independent contractor. The plaintiffs contend the evidence supports an inference that Brooks is an employee of Bowers Timber and therefore Bowers Timber may be liable for the negligent selection of Ossie

Jackson. Mr. Brooks testified that on December 1, 2010, he worked exclusively for Anthony Bowers. (Pl. Ex. 6 – Brooks Depo. p. 18, ll. 3-10). At the time of this collision, Brooks testified that the only insurance he maintained was worker's compensation obtained through Anthony Bowers. (Pl. Ex. 6 – Brooks Depo. p. 19, ll. 2-6). Plaintiffs also presented evidence that indicated Brooks forfeited Brooks Brothers Logging Company, Inc. on July 19, 1999. (Pl. Ex. 2). Additionally, on the South Carolina Traffic Collision Report Form, Kelvin Brooks is listed as the owner of the vehicle Ossie Jackson was driving. (Pl. Ex. 5). The Court finds the evidence supports an inference that Brooks was an employee of Bowers Timber.

The next issue is whether there is evidence that Brooks and/or Bowers Timber were negligent in the selection of Ossie Jackson as an independent contractor. Brooks testified that on December 1, 2010, at the time of the collision, Ossie Jackson had been in Allendale for “three or four years.” (Pl. Ex. 6 – Brooks Depo. p. 34, ll. 9-12). Jackson told Brooks he had a Georgia license but did not tell Brooks why he did not have a South Carolina license. (Pl. Ex. 6 – Brooks Depo. p. 34, ll. 13-20). Brooks does not think Bowers knew what kind of license Jackson had when this incident occurred. (Pl. Ex. 6 – Brooks Depo. p. 34, l. 21 – p. 35, l. 1). Brooks allegedly sold the 1983 Autocat tractor involved in this collision to Ossie Jackson on August 12, 2010. (Pl. Ex. 3). The address on the Bill of Sale for Ossie Jackson is 335 Walnut Street, Allendale, SC 29810. (Pl. Ex. 3). Both Jackson and Brooks signed the Bill of Sale. (Pl. Ex. 3). Jackson's address listed on the South Carolina Traffic Collision Report Form is 1326 Hillridge Drive, Macon, Georgia 31206. (Pl. Ex. 5). Jackson is listed as maintaining a Georgia drivers' license, number 032615949. (Pl. Ex. 5).

South Carolina law mandates that “[n]o person who has been a resident of this State for thirty days or longer may drive a commercial motor vehicle under the authority of a commercial driver license or commercial driver instruction permit issued by another state.” S.C. Code Ann. § 56-1-

2090(c). Section 56-1-2070 provides, in part, that “no person may drive a commercial motor vehicle on the highways of this State, unless the person has been issued, and is immediate possession of, a valid commercial driver license and applicable endorsements valid for the vehicle which the person is driving.” S.C. Code Ann. § 56-1-2070. In addition to Brooks’ testimony of three or four years, Jackson, at a minimum, indicated he was a resident of Allendale on August 12, 2010. (Pl. Ex. 3). As a result, Jackson had lost the privilege to drive a commercial motor vehicle on December 1, 2010, pursuant to S.C. Code Ann. § 56-1-2090(c). Section 56-1-2060 provides, in part, that an employer knowingly may not allow, permit, or authorize a person to drive a commercial motor vehicle during a period in which “the person’s commercial driver’s license is suspended, revoked, or canceled by a state, has lost the privilege to drive a commercial motor vehicle in a state, is disqualified from driving a commercial motor vehicle, or is subject to an out-of-service order in a state” S.C. Code Ann. § 56-1-2060(B)(1). This evidence when viewed in a light most favorable to the plaintiffs as the non-moving party presents a question of fact as to whether Bowers Timber was negligent in the hiring, selection, and retention of Ossie Jackson as an independent contractor.

The plaintiffs also presented evidence that Ossie Jackson’s authority under the US Department of Transportation had been revoked on July 13, 1999. (Pl. Ex. 1). Additionally, on December 1, 2010, Ossie Jackson maintained liability limits on the 1983 tractor in the amount of \$50,000.00 each person and \$100,000.00 each accident. (Pl. Ex. 4). This level of liability coverage violates the federal requirement of maintaining at least \$750,000.00. This evidence is an additional sustaining ground that warrants denial of Bowers Timber’s motion for summary judgment.

CONCLUSION

For the reasons set forth above, the Court denies Bowers Timber’s motion for summary judgment.



Carmen T. Mullen
Judge, 14th Judicial Circuit

Beaufort, South Carolina
4-21, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

CIVIL ACTION NO: 2021-CP-21-02042

Thomas Rodriquez Nelson,

Plaintiff,

v.

Florence Concrete Products, Inc.

Defendant.

**DEFENDANT FLORENCE CONCRETE
PRODUCTS, INC.'S MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, FOR DECLARATORY
RELIEF**

**TO: ASHLEY B. NANCE, ESQUIRE, LINWARD C. EDWARDS, ESQUIRE, AND
KATHLEEN BARNES, ESQUIRE, ATTORNEYS FOR PLAINTIFF, AND TO THE
PLAINTIFFS ABOVE NAMED:**

YOU WILL PLEASE TAKE NOTICE that the Defendant Florence Concrete ("Florence Concrete"), by and through its undersigned attorneys and pursuant to Rules 56 and/or 57 of the South Carolina Rules of Civil Procedure and the Declaratory Judgments Act, S.C. Code Ann. § 15-53-10 et seq, will move before the Presiding Judge of the Florence County Court of Common Pleas at 10:00 a.m. on March 10, 2022, for an Order granting Summary Judgment to Florence Concrete or, in the alternative, granting Declaratory Relief in favor of Florence Concrete. In support thereof, Florence Concrete states the following:

1. This matter is before the Court on Plaintiff's Amended Complaint for Declaratory Judgment filed on January 4, 2022, and Florence Concrete's Counterclaim for Declaratory Relief filed on January 21, 2022.

2. As set forth therein, this Court is asked to consider only the following two issues of law:

- a) 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?

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

3. The parties have stipulated to the facts in this case as set forth in the Consent Order originally filed with the Court on December 9, 2021. Therefore, no other discovery is needed, and these issues are ripe for the Court's review and declaratory judgment.

Accordingly, Florence Concrete moves for an Order granting it Summary Judgment or, in the alternative, to decide the questions of law presented on stipulated facts at the hearing on the merits to be held on March 10, 2022 and grant Declaratory Relief in favor of Florence Concrete as requested in its Counterclaim for Declaratory Relief. Florence Concrete's Motion is based on its accompanying memorandum of law filed with the Court on February 28, 2022; the stipulated facts in the Consent Order originally filed on December 9, 2021; and the oral argument scheduled for March 10, 2022.

Florence Concrete reserves the right to supplement its argument and Memorandum with any other materials permitted under Rules 56 and 57 of the South Carolina Rules of Civil Procedure.

Respectfully submitted this 1st day of March 2022.

[SIGNATURE TO FOLLOW]

MURPHY & GRANTLAND, P.A.

s/ Anthony W. Livoti

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

CIVIL ACTION NO: 2021-CP-21-02042

Thomas Rodriquez Nelson,

Plaintiff,

v.

**DEFENDANT FLORENCE CONCRETE
PRODUCTS, INC.'S MEMORANDUM IN
SUPPORT OF DECLARATORY RELIEF**

Florence Concrete Products, Inc.

Defendant.

Defendant Florence Concrete Products, Inc. ("Florence Concrete") hereby submits this Memorandum in Support of Declaratory Relief. As explained below, the Court should grant the relief sought by Florence Concrete because it did not owe a duty to Plaintiff for injuries sustained in an automobile accident between Plaintiff and Nesbitt Transportation, Inc., an independent contractor and motor carrier hired by Florence Concrete to transport a concrete slab. Further, Florence Concrete did not breach a duty to Plaintiff by contracting with Nesbitt Transportation.

FACTUAL BACKGROUND

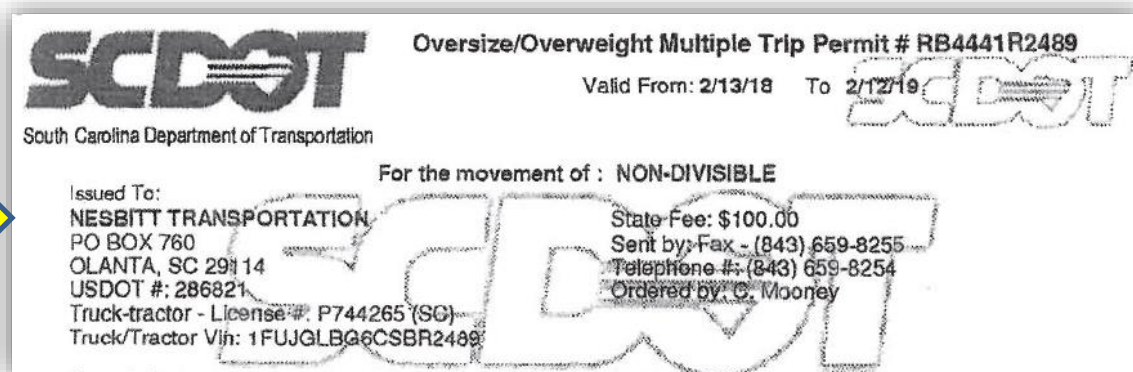
This case arises out of a motor vehicle accident on January 4, 2019, between Plaintiff and Calvin Rouse, an employee of Nesbitt Transportation, Inc. ("Nesbitt Transportation"). (Decl. Compl. ¶ 3).¹ At the time of the accident, Mr. Rouse was operating a tractor-trailer equipped with a seventy-two-foot concrete slab fabricated by Florence Concrete, who contracted with Nesbitt Transportation to transport the slab to a construction project site in North Carolina. (Consent Order ¶ 8(a)). As Mr. Rouse was turning left out of a parking lot and onto US Hwy 76, the Plaintiff, who

¹ The facts of this case have been fully stipulated pursuant to a Consent Order entered by the Court on December 9, 2021, and attached hereto as Exhibit A. As explained below, the Court is being asked to determine whether Florence Concrete owed a duty to Plaintiff arising from the negligent acts of Nesbitt Transportation, an independent contractor, and, if so, whether Florence Concrete breached that duty.

was traveling in the opposite direction, ran into Nesbitt Transportation's trailer, injuring the Plaintiff. (Consent Order ¶ 8(f)).

At all times relevant to this lawsuit, Florence Concrete was a concrete fabricator and "shipper" of its products. (Consent Order ¶ 7). Nesbitt Transportation, on the other hand, was the "motor carrier" responsible for transporting the concrete slab.² It is undisputed that Nesbitt Transportation was acting as an independent contractor at the time of this accident and that Florence Concrete did not control Nesbitt Transportation's work or dictate when or how the load should be moved. (Consent Order ¶¶ 7, 8(f)).

Prior to transporting the oversized freight, Nesbitt Transportation, the motor carrier, was required to obtain a permit from the South Carolina Department of Transportation ("SCDOT") and the North Carolina Division of Highways ("NCDOT"). (Consent Order ¶ 8(a)). Nesbitt Transportation applied for and received the permits, copies of which are attached hereto as Exhibit B. Both permits identify "NESBITT TRANSPORTATION" as the permittee, and both permits place the responsibility on Nesbitt Transportation, as the motor carrier, to comply with the terms of the permit and all state and federal laws and regulations.



² The terms "shipper" and "motor carrier" have separate meanings under the Federal Motor Carrier Safety Regulations, and the distinction is important as discussed below in this Memorandum. A "shipper" is a person who tenders property to a motor carrier for transportation, whereas a for-hire "motor carrier" is a person engaged in the transportation of goods or passengers for compensation. 49 C.F.R. § 390.5.



North Carolina DOT Division of Highways			
Single Trip Permit #901035Q0341			
Issued to: NESBITT TRANSPORTATION INC PO BOX 760 OLANTA, SC 29114		Valid From: 1/ 3/2019 to 1/12/2019 Phone: 843.659.8254	
Load Description: CONCRETE CORE SLAB		State Fee: \$24.00 (869839) Sent by: Email- nesbitttrans01@yahoo.com	
Power Unit: TRUCK-TRACTOR	License: P744266(SC)	Registered weight: 80,000	VIN: R2489 Escorts: 0
Dimensions - Length: 96'0"	Width: 8'6"	Height: 13'6"	Trailer: 73'0" Overhang - Front: NONE Rear: NONE
Gross Weight: 112,000	Steer Axle: 20,000	Single Axle: 25,000	Tandem Axle: 50,000 Tridem Axle: 60,000 Four or more Axles: 68,000

Nesbitt Transportation's driver, Mr. Rouse, picked up the cement slab from Florence Concrete's unmanned facility on January 3, 2019, the day before the accident, approximately two minutes after the designated time prescribed under the SCDOT permit. (Consent Order ¶ 8(d)). After leaving the lot, Mr. Rouse drove to his home in Lynchburg, South Carolina, and parked the tractor-trailer overnight in a parking lot next to US Hwy 76. (Consent Order ¶ 8(e)). The next morning, Mr. Rouse decided to get an early start on the day by hauling the cement slab to the construction site in North Carolina. (Consent Order ¶ 8(f)). The accident occurred that morning (January 4th) between 6:27 a.m. and 6:38 a.m., and the parties have stipulated that "[t]he truck was being operated on the road by Mr. Rouse at a time of day that violated the permitted time for travel" contained in the SCDOT permit. (Consent Order ¶ 8(f)) (emphasis added). It is undisputed that Mr. Rouse decided to transport the cement slab when he did, and that Florence Concrete did not provide instructions to Nesbitt Transportation or Mr. Rouse regarding when or how to move the load. (Consent Order ¶ 8(f)).

PROCEDURAL BACKGROUND

Plaintiff filed an Amended Complaint on October 21, 2019, in the Lee County Court of Common Pleas alleging general negligence claims against all defendants which, at that time, included Nesbitt Transportation, Inc.; Robert F. Nesbitt, Individually and as Registered Agent for

Nesbitt Transportation, Inc.; Robert T. Nesbitt d/b/a Rim Nesbitt Trucking; Calvin Rouse; and Florence Concrete Products, Inc. Later, the defendants were reconciled to Nesbitt Transportation, Inc.; Calvin A. Rouse; and Florence Concrete Products, Inc. On or about March 17, 2021, Plaintiff settled his claims against Nesbitt Transportation and its driver, Mr. Rouse, and entered a Stipulation of Dismissal as to those defendants only.

After settling with Nesbitt Transportation and Mr. Rouse, Plaintiff and Florence Concrete entered into a Settlement Agreement and stipulated to the facts in this case contained in the Consent Order. The Consent Order has been filed with the Court and is attached hereto as Exhibit A. As part of the Settlement Agreement, the parties stipulated to transfer this case to Florence County from Lee County so that the Court could consider whether Florence Concrete owed a duty to Plaintiff and, if so, whether it breached that duty. Plaintiff filed an Amended Complaint for Declaratory Judgment in Florence County on January 4, 2022, naming Florence Concrete, only. The Declaratory Complaint asks this Court to consider the following two legal issues which are before the Court now on the parties' cross-Motions:

- 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?

Florence Concrete timely filed an Answer and Counterclaim to Plaintiff's Declaratory Complaint denying that it owed Plaintiff a duty and, much less, that it breached any duty to Plaintiff.

STANDARD OF REVIEW

“The purpose of a declaratory judgment action is to settle and afford relief from uncertainty and insecurity to a party with respect to that party's rights, status, and other legal relations.” Town of Hilton Head Island v. Coal. of Expressway Opponents, 307 S.C. 449, 453–54, 415 S.E.2d 801, 804 (1992). “A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue.” Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011). However, where the parties have stipulated to the facts, as here, only a question of law is before the Court. Harleysville Mut. Ins. Co. v. R.W. Harp & Sons, Inc., 305 S.C. 492, 493, 409 S.E.2d 418, 418 (Ct. App. 1991). “In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them.” Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013).

ARGUMENT

For Plaintiff's negligence claim to prevail, Plaintiff must first establish that Florence Concrete owed him a duty. See Steinke v. S.C. Dep't of Lab., Licensing & Regul., 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). “Whether the law recognizes a particular duty is an issue of law to be determined by the court.” Oulla v. Velazques, 427 S.C. 428, 439, 831 S.E.2d 450, 455 (Ct. App. 2019). “If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law.” Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 135–36, 638 S.E.2d 650, 656 (2006).

I. Florence Concrete did not have a relationship with Plaintiff and, therefore, did not owe a duty to Plaintiff under South Carolina law.

For there to be a duty, Florence Concrete and Plaintiff “must have a relationship recognized by law as providing the foundation for a duty to prevent an injury.” McCullough v. Goodrich &

Pennington Mortg. Fund, Inc., 373 S.C. 43, 47, 644 S.E.2d 43, 46 (2007). “An affirmative legal duty exists only if created *by statute, contract, relationship, status, property interest, or some other special circumstance.*” Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) (emphasis added). “Even if a party acts negligently and injures another, he will not be liable under the law of negligence unless his actions violated *a specific legal duty* owed to the other party.” McCord v. Laurens Cty. Health Care Sys., 429 S.C. 286, 296, 838 S.E.2d 220, 225 (Ct. App. 2020) (emphasis added). “Where this relationship is ‘too attenuated,’ a duty will not arise.” Ravan v. Greenville Cty., 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993).

At all times relevant to this case, Florence Concrete was a concrete fabricator and shipper of its products. Florence Concrete was not acting as a motor carrier, like Nesbitt Transportation, whose transportation duties were the proximate cause of Plaintiff’s injury. It is important to distinguish a shipper (like Florence Concrete) from a motor carrier (like Nesbitt Transportation) because their activities and responsibilities are different, and their relationship, alone, does not create a duty that extends from Florence Concrete to Plaintiff. See Ruh v. Metal Recycling Serv., 436 F. Supp. 3d 844, 848–49 (D.S.C. 2020) (holding that the relationship between a shipper and a motor carrier, alone, does not create a duty, especially when the shipper is not acting as a motor carrier with respect to the transportation at issue);³ Harris v. FedEx Nat. LTL, Inc., 760 F.3d 780,

³ The District Court’s decision in Ruh was appealed to the Fourth Circuit, which recently certified the narrow question of whether an employer can be subject to liability under South Carolina law for harm caused by the *negligent selection* of an independent contractor, citing the Restatement (Second) of Torts § 411, which has not been recognized by South Carolina courts to date. See Ruh v. Metal Recycling Services, LLC, No. 20-1440, 2022 WL 203744, at *1 (4th Cir. Jan. 24, 2022). Importantly, the Fourth Circuit questioned whether South Carolina would recognize a cause of action for the negligent selection of an independent contractor under Restatement § 411 or otherwise. Id. at *4. However, the holding in Ruh – that the relationship between shipper and motor carrier, alone, does not create a duty – was not part of the certified question from the Fourth Circuit. In Section V of this Memorandum, below, Florence Concrete explains that Plaintiff’s negligent selection claim cannot prevail, even if South Carolina accepted Restatement § 411,

784 (8th Cir. 2014) (holding that FedEx, a shipper, was not liable for the negligence of Fresh Start, a motor carrier, because FedEx was not acting as a motor carrier for the transaction at issue). Here, there is simply no relationship or connection between Florence Concrete and Plaintiff for which the law recognizes a duty, especially because Florence Concrete was *not* acting as a motor carrier, like Nesbitt Transportation, when the accident occurred. Florence Concrete did not control any aspect of Nesbitt Transportation's work. (Consent Order ¶ 8(f)). Florence Concrete did not apply for or obtain the SCDOT and NCDOT permits for Nesbitt Transportation. (Consent Order ¶ 8(c)). And Florence Concrete did not instruct Nesbitt Transportation or its driver how or when to move the concrete load. (Consent Order ¶ 8(f)). Therefore, there is no connection between Florence Concrete and Plaintiff that creates a duty.

The Court of Appeals' recent decision, Oulla v. Velazques, provides an analogous example of why there is no duty between Florence Concrete and Plaintiff in this case. 427 S.C. 428, 831 S.E.2d 450 (Ct. App. 2019). There, the plaintiff was injured in a motor vehicle accident on I-26 when a load of sod fell off a truck owned and operated by Harbison Community Association ("Harbison"). Id. at 432–33, 831 S.E.2d at 452. Harbison had ordered two pallets of sod from Super-Sod to use in a landscaping project. Id. Harbison arranged for its employees to pick up the sod from Super-Sod's facility in Orangeburg, South Carolina. Id. Upon arrival, Harbison instructed Super-Sod's employee to load the sod (using a forklift) onto Harbison's trailer. Id. After the sod was loaded, Harbison's employees realized that they had forgotten to bring tie down straps to secure the sod to the trailer. Id. Harbison's employees asked Super-Sod if it had straps they could borrow but Super-Sod did not have any. Id. Nonetheless, Harbison headed back

because Plaintiff has failed to establish a causal link between Florence's alleged negligent selection and the accident that caused his injuries.

on the interstate towards Columbia even though they had not secured the sod to the trailer with straps. Id. As Harbison was entering onto the interstate, several pallets fell off their trailer, causing traffic to slow and an accident to occur that injured the plaintiff. Id. The plaintiff sued several entities as a result of the accident, including Super-Sod.

The plaintiff's allegations against Super-Sod are similar to Plaintiff's allegations against Florence Concrete in this case. For example, in Oulla, the plaintiff alleged that Super-Sod owed him a duty because Super-Sod loaded the sod onto Harbison's trailer. The court disagreed, holding that the Court would be extending the concept of duty beyond its reasonable limits if it were to hold that Super-Sod assumed a duty of ensuring the pallets were properly secured to Harbison's trailer by merely placing the pallets on the trailer as Harbison directed. Id. at 444, 831 S.E.2d at 458. This reasoning applies equally to the current case. Here, Plaintiff has alleged that the concrete slab was pre-loaded onto Nesbitt Transportation's trailer and stored at Florence Concrete's facility. (Consent Order ¶ 8(b)). But as illustrated in Oulla, this does not create a duty for Florence Concrete. Just as Super-Sod did not assume a duty by pre-loading sod onto Harbison's trailer at Super-Sod's facility, neither did Florence Concrete assume a duty by pre-loading the concrete slab onto Nesbitt Transportation's trailer at Florence Concrete's facility.

Next, the plaintiff in Oulla alleged that Super-Sod owed him a duty because it knew that Harbison did not secure the sod before leaving Super-Sod's facility and that it was foreseeable that an injury may occur to the public as a result. But again, the Court disagreed with the plaintiff, stating: "Although it was likely foreseeable the pallets of sod were a danger to other drivers, such as the [plaintiff], if they were not properly secured, our supreme court has rejected the idea that one who undertakes a duty to render services to another should recognize a duty *to third persons*." Id. at 444, 831 S.E.2d at 458 (emphasis added). "We find the mere fact it was foreseeable an

unsecured load could be a danger to the [plaintiff] and other drivers is insufficient to impose liability on Super-Sod under the common law.” Id. at 445, 831 S.E.2d at 458. “Foreseeability itself does not give rise to a duty.” Id. at 444, 831 S.E.2d at 458.

Again, the reasoning in Oulla applies to this case. Here, Plaintiff alleges that Florence Concrete was aware of loading restrictions for the concrete slab and that transporting it may create a risk to the public, but as explained in Oulla, this does not create a duty for a party like Florence Concrete. In Oulla, the Court held that Super-Sod did not owe a duty to the plaintiff even if Super-Sod had knowledge that Harbison was traveling with an unsecured load that created a risk to the public. Likewise, in this case, Florence Concrete did not owe a duty to Plaintiff even if it had knowledge that transportation of the oversized load created a risk to the public. Again, “foreseeability of injury...is an insufficient basis on which to rest liability,” Oulla at 444, 831 S.E.2d at 458, and under South Carolina law, Florence Concrete does not have a duty to act, nor does it have a duty to control Nesbitt Transportation’s conduct or warn of any dangers created by Nesbitt Transportation’s drivers. See Johnson v. Robert E. Lee Acad., Inc., 401 S.C. 500, 504, 737 S.E.2d 512, 514 (Ct. App. 2012) (“Ordinarily, the common law imposes no duty on a person to act.”); McCord, 429 S.C. at 296, 838 S.E.2d at 225 (“In general, our common law recognizes no affirmative duty to control the conduct of another or to warn a third person of danger.”).

Florence Concrete does not owe a duty to Plaintiff because there is no relationship between them that is recognized by law as creating a duty. Florence Concrete is a concrete fabricator that ships its products via a motor carrier. That is all. Therefore, in the absence of a legally recognized relationship creating a duty, Plaintiff’s claims cannot prevail, and the Court should find for Florence Concrete.

II. Florence Concrete cannot be liable to Plaintiff for the negligent acts of Nesbitt Transportation, an independent contractor.

It is undisputed that Florence Concrete contracted with Nesbitt Transportation – an independent contractor – to transport the concrete slab, and it is also undisputed that Nesbitt Transportation’s negligent performance of its transportation duties caused Plaintiff’s injury. In South Carolina, however, the general rule is that a company (like Florence Concrete) is not liable for the acts of an independent contractor (like Nesbitt Transportation). See Duane v. Presley Const. Co., 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978) (“Generally, an employer is not liable for the torts of an independent contractor committed in the performance of contracted work.”). This is because a company (like Florence Concrete) does not have the right or authority to control the independent contractor’s work. Cherry v. Myers Timber Co., 404 S.C. 596, 601, 745 S.E.2d 405, 407 (Ct. App. 2013). An independent contractor “contracts to do a piece of work according to *his own methods*,” just like Nesbitt Transportation did in this case. Id. (emphasis added).

Florence Concrete did not control Nesbitt Transportation’s work, nor does Plaintiff even allege such. It was Mr. Rouse’s decision to pick up the cement slab from Florence Concrete’s unsupervised lot on January 3rd, the day before the accident, and take it to a commercial parking lot on Hwy 76. The next morning, when the accident occurred, Mr. Rouse made the decision to “get an early start on his day” by beginning to transport the cement slab during the early morning hours, which Plaintiff alleges violated the terms of the SCDOT permit. (Consent Order ¶8(f)). As stipulated to by the parties, “Florence did not provide instructions to Nesbitt Transportation or Mr. Rouse *on when to move the load*. Mr. Rouse testified that it was his choice to leave early that morning to get an early start on his day.” (Consent Order ¶ 8(f)) (emphasis added). For these reasons, Florence Concrete is not liable for the actions of Nesbitt Transportation, an independent contractor, whom Florence Concrete did not control.

III. There is no exception to the nonliability rule that applies to the facts in this case.

A narrow exception to the nonliability rule exists when a party has a *nondelegable duty* that it cannot pass to an independent contractor. See Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005). The nondelegable duty doctrine is essentially another way of describing a form of vicarious liability. Our Supreme Court has described the nondelegable duty doctrine as follows: “The term ‘nondelegable duty’ is somewhat misleading. A person may delegate a *duty* to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains *liable* for that breach. It actually is the liability, not the duty, that is not delegable.” Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000).

The nondelegable duty exception is applied in only limited circumstances, and as explained below, Florence Concrete did not owe a nondelegable duty to Plaintiff for three reasons.

A) Florence Concrete never owed Plaintiff a duty from the start, and therefore, the nondelegable duty exception cannot apply to Florence Concrete.

It follows that Florence Concrete *must first* owe Plaintiff a duty before the nondelegable duty exception can apply on its face. If there is no duty to begin with between Florence Concrete and Plaintiff, there can be no nondelegable duty. Florence Concrete must first have a duty before this Court can consider whether that duty is nondelegable. But as explained above, Florence Concrete never owed a duty to Plaintiff because they did not share a relationship that our law recognizes as creating a duty. In the absence of a duty, the “nondelegable duty exception” cannot apply on its face and, therefore, cannot be used to defeat the well-established rule in South Carolina that a party (like Florence Concrete) is not liable for the acts of an independent contractor (like Nesbitt Transportation).

B) South Carolina courts have not recognized a nondelegable duty exception in this transportation context.

Second, the nondelegable duty exception cannot apply to this case because South Carolina has never recognized the exception as existing between an ordinary shipper (like Florence Concrete) and the public (like Plaintiff) for the acts of an independent motor carrier (like Nesbitt Transportation). If it did, then every manufacturer/seller who shipped its products via a motor carrier would be vicariously liable for injuries to third parties on the roadway caused by the motor carrier's negligence. Such a broad, sweeping application would produce a detrimental outcome on businesses and the marketplace in general, and it would expand the scope of a "duty" to unimaginable lengths.⁴

Because of the potent implications caused by the nondelegable duty exception, our Supreme Court has applied it only in a limited number of cases, none of which are like this case:

- 1) An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control;
- 2) A landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly;
- 3) A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured, and remains vicariously liable for injuries caused by an unsecured load;⁵

⁴ Professor Martin McWilliams explained that in our tort-based fault system, the nondelegable duty exception is "*strong medicine*, assigned only on the basis of *potent policy*." Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431, 453 (1996) (emphasis added).

⁵ Florence Concrete is not a "common carrier" as this term is used here. A common carrier is defined as "one who undertakes for hire to transport from place to place the property of others who may choose to employ him, offering such services to the public generally, and neither the maintenance of a station nor the issuance of a bill of lading is required." Huckabee Transp. Corp. v. W. Assur. Co. of Toronto, Canada, 238 S.C. 565, 571, 121 S.E.2d 105, 108 (1961). In this case, Nesbitt Transportation is the common carrier, not Florence Concrete. Therefore, if there is a nondelegable duty at all in this case, it starts with Nesbitt Transportation and would run

- 4) A bail bondsman has a nondelegable duty to supervise the work of his employees, and remains vicariously liable for injuries caused by those employees;
- 5) A municipality has a nondelegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs; and
- 6) A hospital owed a nondelegable duty, but not an absolute duty, to render competent services to emergency room patients.

Simmons at 42–43, 533 S.E.2d at 317–18. These examples illustrate two important points. First, the application of a nondelegable duty is an *exception* to the general rule of nonliability, and the exception should not be applied cavalierly or as a matter of default to expand liability. Second, and most importantly, the nondelegable duty exception is formulated from public policy,⁶ which is enacted by our General Assembly or the Supreme Court – not our trial courts.⁷ As set forth above, there is no nondelegable duty exception recognized as existing between a shipper (like Florence Concrete) and an independent motor carrier (like Nesbitt Transportation), and therefore, this Court should not create a nondelegable duty now when the exception has not been previously recognized by either the General Assembly or the Supreme Court. In South Carolina, our trial courts apply policy – they do not *make* it.

downstream to any independent contractors with whom *Nesbitt* contracts to do *its* transportation work.

⁶ “While it is difficult to define the exact circumstances under which a nondelegable duty will be found, a review of case law reveals that our courts’ decisions regarding whether to apply the nondelegable duty doctrine are *primarily grounded in public policy considerations*.” Gary v. Askew, 417 S.C. 232, 249, 789 S.E.2d 94, 103 (Ct. App. 2016) (emphasis added).

⁷ As explained in Taghivand v. Rite Aid Corp., the creation of public policy requires an “exercise [in] restraint” and should be developed only after “the utmost circumspection.” 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015) (citing Patton v. United States, 281 U.S. 276, 306 (1930)); Rhoades v. Savannah River Nuclear Sol., No. 1:21-CV-03391-JMC, 2021 WL 5761761, at *14 (D.S.C. Dec. 3, 2021) (“[D]eterminations of public policy fall within the exclusive province of the legislature, or, if there is no clear legislative mandate, the Supreme Court of South Carolina.”).

C) The nondelegable duty exception cannot apply because Nesbitt's work was not an inherently dangerous activity.

Finally, the nondelegable duty exception cannot apply to this case because Nesbitt Transportation's work was not an inherently dangerous activity. In 1949, our Supreme Court recognized a limited nondelegable duty exception where "*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) (emphasis added). However, as set forth below, the Allison exception cannot apply to this case for three reasons.

First, no South Carolina appellate decision has applied the Allison exception to the transportation context involving a shipper and a motor carrier. Second, the Allison exception cannot apply because Florence Concrete (a shipper) was not acting as a motor carrier at the time Plaintiff was injured. When analyzing the Allison exception, the Court must consider whether the "*means or manner of the activity of the owner*" is inherently or intrinsically dangerous to others. Id. (emphasis added). To quote Allison, the "owner" in this context is Florence Concrete whose "activity" is that of a concrete fabricator/shipper. Plaintiff was not injured while Florence Concrete fabricated the concrete slab; instead, Plaintiff was injured during Nesbitt Transportation's work as a motor carrier. At no time did Florence Concrete act as a motor carrier during this incident or have control over Nesbitt Transportation's work, and therefore, Florence Concrete's activity – fabricating and shipping concrete – was not the activity that injured Plaintiff. Therefore, on its face, the Allison exception is inapplicable to Florence Concrete.

Furthermore, in Harris v. FedEx Nat., the Eighth Circuit considered this exact issue and held that the relationship between a shipper and a motor carrier does not create a nondelegable duty when the shipper is not acting as a motor carrier during the transaction that injures a third

party. 760 F.3d 780, 784 (8th Cir. 2014). There, defendant FedEx, a shipper, hired defendant Fresh Start, a motor carrier, to transport two trailers owned by FedEx. Id. at 782. While transporting the trailers, the driver for Fresh Start lost control and rolled his tractor-trailer, causing a motor vehicle accident that fatally injured the plaintiff. Id. The plaintiff's estate argued that because FedEx is a motor carrier for other transportation jobs, it had a nondelegable duty under the FMCSR to ensure that Fresh Start and its drivers, as independent contractors, adhered to safety standards set forth by the FMCSR. Id. at 784.

The court disagreed, holding that because FedEx was not acting as a motor carrier during the transportation that killed the plaintiff, FedEx had no duty – nondelegable or otherwise – to require Fresh Start and its drivers to observe FMCSR duties. Id. In support, the court cited to the FMCSR directly, which states, “[w]henver ... in this subchapter a duty is prescribed for a driver or a prohibition is imposed upon the driver, it shall be the duty of the *motor carrier* to require observance of such duty or prohibition.” Id. (citing 49 C.F.R. § 390.11) (emphasis added). The court reasoned that even though “FedEx is a federally registered motor carrier and acts as such in delivering goods for its customers, ... *in this case* it was a shipper of goods that hired Fresh Start, also a registered motor carrier, to provide transportation services.” Id. (emphasis added). “Thus, the relevant inquiry is whether FedEx acted as a motor carrier *in the specific transaction at issue*.” Id. (emphasis added). Although FedEx hired Fresh Start to move goods from one service center to another, Fresh Start selected its drivers without FedEx oversight and operated under its own authority as a registered motor carrier, rather than under FedEx's authority. Id. For these reasons, FedEx did not have a nondelegable duty and could not be vicariously liable for the acts of Fresh Start, the independent motor carrier.

The court's reasoning in Harris applies equally to this case. Plaintiff alleges that Florence Concrete had a duty to "make sure that all parties were in compliance with all permits required to ship oversized loads, and to take preventative measures where necessary to ensure that the oversized freight is being shipped at times that do not violate laws, regulations, permits and industry standards." (Decl. Compl. ¶13). However, the Harris decision negates Plaintiff's broad allegations. At the time of the incident, Florence Concrete was acting as a shipper, not a motor carrier, and therefore, Florence Concrete did not have a duty to make sure that Nesbitt Transportation's driver was complying with the federal and state law. Furthermore, like in Harris, Florence Concrete did not control Nesbitt Transportation's selection of drivers or apply for the permits that Nesbitt Transportation needed as a motor carrier to transport the concrete slab. Florence Concrete also did not control the performance of Nesbitt Transportation's work as a motor carrier. For these reasons, as in Harris, Florence Concrete did not owe a nondelegable duty to ensure that Nesbitt Transportation's drivers complied with federal and state law.⁸

Finally, the Allison exception does not apply to this case because the transportation of a concrete slab is not an inherently or intrinsically dangerous activity. To trigger this exception, the inherent risk must be a heightened, "special risk." As explained in Ruh v. Metal Recycling, "[t]he limited circumstances in which a nondelegable duty has been imposed suggest the typical relationship between a shipper of goods and the public would not support imposition of such a duty, at least where the goods themselves do not present *any special risk*." 436 F. Supp. 3d 844,

⁸ Plaintiff's allegations bely this state's other well-established common-law principles. Although Plaintiff alleges that Florence Concrete had a duty to take "precautionary measures" to safeguard the public from Nesbitt Transportation's negligence, the general rule in South Carolina is that "there is no common law duty to act. Thus, a person usually incurs no liability when he fails to take steps to protect others from harm not created by his own wrongful conduct." Cummins Atl., Inc. v. Sonny's Camp-N-Travel Mart, Inc., 481 F. Supp. 2d 531, 534–35 (D.S.C. 2007).

851 (emphasis added). Similarly, in Harris v. FedEx, the Eighth Circuit held that the nondelegable duty exception was based on “special risks or dangers,” which the Supreme Court of Nebraska held did not apply to motor vehicles and the transportation of cattle in a tractor-trailer. 760 F.3d at 784. Likewise, in Professor McWilliams’ analysis of the nondelegable duty doctrine, he explained: “‘Inherently dangerous activities’ came into the lexicon to describe activities that posed an inherent threat or danger *even when performed with all reasonable care, such as blasting or keeping vicious animals.*” McWilliams & Russell, supra, at 453 n.117 (emphasis added); see also F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts 744–45 (4th ed. 2011) (imposing vicarious liability for injuries resulting from *abnormally dangerous activities*) (emphasis added).⁹ In this case, Nesbitt Transportation’s work hauling oversized freight is not an inherently dangerous activity, and no South Carolina case has applied the Allison exception in this context. Moreover, Florence Concrete’s activity – concrete fabricator and shipper – is not an inherently dangerous activity creating a duty under Allison.

Furthermore, for the Allison exception to apply, this Court must find that the activity was abnormally dangerous *even in the presence of reasonable care*. In Ruh, the district court considered a similar case involving an accident that occurred while a motor carrier was transporting scrap metal from a shipper’s facility in North Carolina to a facility in South Carolina. Ruh at 850. There, the court reasoned that the nondelegable duty exception did not apply because transporting scrap metal (which the court called “nonhazardous goods”) could be done safely “without any extraordinary precautions or protections.” Id. at 850. Likewise, in this case, transporting oversized freight can be done safely without any extraordinary precautions or

⁹ South Carolina courts have defined “inherently or intrinsically dangerous” in other contexts to include “firearms, explosives, etc.” Springfield v. Williams Plumbing Supply Co., 249 S.C. 130, 135, 153 S.E.2d 184, 186 (1967).

protections, and in fact, had Mr. Rouse used reasonable care, the accident would have been avoided. This illustrates that the concrete slab, itself, is not inherently dangerous for purposes of creating a nondelegable duty exception to the general nonliability rule.

These points are developed in S.C. Nat. Gas Co. v. Phillips. 289 F.2d 143 (4th Cir. 1961). There, the Fourth Circuit considered the inherently dangerous element from the Allison decision and equated it to “ultrahazardous work.” Id. at 147. In that case, Phillips Construction Company contracted with King Brothers Construction Company to obtain dirt for use in a nearby construction site. Id. at 145. While King Brothers performed the work using a 30-ton earth mover, it fractured a high-pressure gas line owned by the plaintiff. Id. Large quantities of gas and fire escaped that took almost two days to put out, causing “substantial” damage. Id. The plaintiff sued Phillips Construction, only, alleging that it should be liable for the ultrahazardous activity performed by its independent contractor.

The Fourth Circuit disagreed, holding that “procurement of borrow” (i.e., moving earth) is not ultrahazardous work that triggers the exception. “The principle, however, is applicable only to work not of common occurrence which of itself involves risk of serious harm to others. Procurement of borrow is not that kind of work. *It is done routinely and commonly without harm to others, and of itself creates no extraordinary risk of harm.*” Id. at 147 (emphasis added). Likewise, in this case, moving oversized freight is also a common activity performed without harming others and of itself creates no extraordinary risk.

In Phillips, the Fourth Circuit also acknowledged that the plaintiff’s argument failed to focus on “the general nature of the work” involved (moving earth), and instead, focused on the dangers associated with operating powerful earth moving equipment over high-pressure gas lines.

Id. The Fourth Circuit's distinction between these two concepts is important for the current case.

Specifically, the Fourth Circuit stated that:

Almost any activity which has caused harm would appear highly dangerous, however, when so particularized that the view is restricted to the immediate activity which in fact has caused the harm. If the same equipment had been operated in the vicinity of playing children and the operator did not watch where he was going, he might be charged with recklessness and said to have created grave risk of harm to the children, *but that is a risk which does not necessarily inhere in the work of procuring borrow*. It is the kind of hazard which may be created by the immediate actor, but which does not arise out of the nature of the work generally to be done.

Id. at 147–48. The Fourth Circuit explained that although operating heavy machinery near gas lines may be dangerous, the risk can be avoided altogether by using reasonable care, and therefore, operating heavy machinery is not an inherently dangerous activity. Id. at 148. Likewise, in this case, Plaintiff's injury could have been avoided altogether had Mr. Rouse used reasonable care in transporting the oversized freight. The concrete slab, itself, did not cause Plaintiff's injury, and hauling oversized freight like this is so common that it is normally completed without injuring others. Therefore, transporting oversized concrete slabs is not an inherently dangerous activity because it can be done safely if the motor carrier uses reasonable care.

In this case, there is no special risk created by the concrete slab, itself. It is not hazardous or explosive, and it does not contain toxic or poisonous materials. When transported with reasonable care, it is not a danger to the public. In Fike v. Peace, the Alabama Supreme Court specifically held that transporting an oversized load is not an inherently dangerous activity because the major risk of harm was not the heavy load, but rather, the motor carrier's negligence, which could be alleviated had the driver used reasonable care. 964 So. 2d 651, 660-61 (Ala. 2007). Therefore, the Allison exception does not apply to this case because the act of transporting the concrete slab was not inherently or intrinsically dangerous to the public and could have been alleviated had Mr. Rouse used reasonable care.

IV. It was Nesbitt’s responsibility as the motor carrier to comply with all federal and state laws, including the requirements under the SCDOT and NCDOT permits.

Plaintiff alleges that Florence Concrete had a duty to ensure that Nesbitt Transportation complied with federal and state law (Decl. Compl. ¶ 13), but ironically, it is *federal and state law* that requires the motor carrier, which is Nesbitt Transportation, to ensure compliance. See 49 C.F.R. § 390.11 (“Whenever...a duty is prescribed for a driver or a prohibition is imposed upon the driver, *it shall be the duty of the motor carrier to require observance of such duty or prohibition*. If the motor carrier is a driver, the driver shall likewise be bound.”) (emphasis added); S.C. Code Ann. § 57-3-130(B)(3)(c) (“The following are general provisions applicable to all oversize and overweight loads: ... *All vehicles* shall meet the requirements of all applicable laws and regulations.”). Even the terms of the SCDOT and NCDOT permits expressly allocate responsibility to Nesbitt Transportation, the motor carrier and permittee:

SCDOT Permit:

In pursuant to SC Code of Law 57-3-130 (B)(3)(c), it is the responsibility of the carrier to comply with all Federal Motor Carrier Safety Regulations and applicable State and Federal Laws, including, but not limited to, speed, tire size, brakes and lighting.

NCDOT Permit:

Permittee is responsible for any/all damages to persons/property.

I CERTIFY THAT I AM FAMILIAR WITH ALL LAWS/ REQUIREMENTS GOVERNING THIS MOVE AND WILL BE IN FULL COMPLIANCE DURING MOVEMENT. ANY ALTERATION(S) WILL RESULT IN VOIDING PERMIT AND SUSPENSION OF NC PERMIT PRIVILEGES. REPEATED PERMIT VIOLATIONS MAY RESULT IN SUSPENSION AND/ OR DENIAL OF NC PERMIT PRIVILEGES.

For these reasons, Nesbitt Transportation – not Florence Concrete – had a duty to ensure that its drivers were compliant with federal and state law, and that duty was not transferrable upstream to Florence Concrete by way of their independent contractor relationship. See e.g., Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 392, 611 S.E.2d 235, 238 (2005) (holding

that a permit issued by SCDOT was enforceable only between SCDOT and the permittee and did not create a nondelegable duty for independent contractors).

V. Plaintiff has failed to establish that Florence Concrete was negligent in contracting with Nesbitt Transportation, the motor carrier.

Plaintiff alleges that Florence Concrete owed him a duty “in the selection and hiring of motor carriers.” (Decl. Compl. ¶ 14). However, assuming such a duty exists between a shipper (like Florence Concrete) and an independent contractor (like Nesbitt Transportation),¹⁰ Plaintiff’s claim cannot prevail because he has failed to establish any facts proving causation, which is required in all negligent hiring/supervision claims.

In effect, “negligent hiring cases generally turn on two fundamental elements – knowledge of the employer and foreseeability of harm to third parties.” Kase v. Ebert, 392 S.C. 57, 63, 707 S.E.2d 456, 459 (Ct. App. 2011). These two elements contain a proximate cause component that Plaintiff has failed to satisfy in this case. As explained by our Court of Appeals: “These elements are analyzed in terms of *the number and nature of prior acts of wrongdoing* by an employee, and

¹⁰ There is no caselaw in South Carolina directly addressing whether an injured party can pursue a negligent hiring/selection claim against an entity (like Florence Concrete) for contracting with an independent contractor (like Nesbitt Transportation). To bring such a claim, the current law requires an employer-employee type relationship. See Sarvis v. The United Methodist Church S. Carolina Conference, No. 2004-CP-23-2766, 2005 WL 5337864 (S.C. Com. Pl. Apr. 29, 2005) (“Only employers can be subject to liability for negligent hiring, supervision, and retention, which is a cause of action arising out of activities specifically associated with, and performed by, employers.”). Very recently, the Fourth Circuit certified this question on appeal to the South Carolina Supreme Court. See Ruh v. Metal Recycling Serv., No. 20-1440, 2022 WL 203744, at *1 (4th Cir. Jan. 24, 2022). Specifically, the Fourth Circuit asked whether South Carolina would recognize Restatement (Second) of Torts § 411 as an exception to the general nonliability rule between employers and independent contractors for negligent hiring/selection claims. However, even if the South Carolina Supreme Court recognized an exception under Restatement § 411, it would still not apply to this case to save Plaintiff’s claims because Plaintiff has failed to establish a causal link between Florence Concrete’s alleged negligent hiring and the accident that injured Plaintiff. Restatement § 411 contains a mandatory causation requirement that Plaintiff cannot satisfy for the same reasons identified in this Section.

the nexus or similarity between the prior acts and the ultimate harm caused.” Doe v. ATC, Inc., 367 S.C. 199, 206, 624 S.E.2d 447, 450 (Ct. App. 2005) (emphasis added).¹¹ Therefore, for Plaintiff to prevail on this claim, he must produce evidence regarding (1) the number and nature of prior acts of wrongdoing committed by Nesbitt Transportation and its driver; (2) the causal nexus or similarity between the prior acts and Plaintiff’s injuries; and that (3) Florence Concrete had knowledge of Nesbitt’s prior bad acts. However, Plaintiff has failed to produce any evidence supporting these elements. The facts of this case have been fully stipulated in the Consent Order, but there are no facts proving that Nesbitt Transportation or its driver, Mr. Rouse, committed prior wrongdoings, to Florence Concrete’s knowledge, and that are causally related to Plaintiff’s injury.

In Holcombe v. Helena Chemical Co., the court dismissed Plaintiff’s claims for failing to establish a prior history of wrongdoing related to the accident. 238 F. Supp. 3d 767 (D.S.C. 2017). There, the plaintiff, a tractor-trailer driver, was in an automobile accident with another tractor-trailer operated by Michael Rogers, an employee of Helena Chemical. Id. at 769. The accident occurred as Mr. Rogers attempted to make a delivery to a landscaping store that, as he was in the left-hand lane, was located off the road to his right. Id. To make his turn, Mr. Rogers executed a “jug-handle maneuver,” which consists of steering his rig to the left and onto the paved median followed by a sharp turn back to the right across lanes of traffic. Id. Materials in the record established that the move was unsafe. Id. An accident occurred and the plaintiff filed several claims against Mr. Rogers and his employer, Helena Chemical, including a negligent hiring claim.

¹¹ As explained by the Court of Appeals, when a party, like Plaintiff in this case, fails to produce evidence to support these elements, the party’s claims must be dismissed. Id. (“The court should dispose of the matter on a dispositive motion when no reasonable factfinder could find the risk foreseeable or the employer’s conduct to have fallen below the acceptable standard.”).

However, the court held that the plaintiff failed to establish any facts supporting the proximate cause element of his claim and, as a result, granted Helena Chemical's motion for summary judgment. The court stated:

The record before the Court lacks information about Rogers' pre-hiring driving history. It reveals only that one of Rogers' prior jobs involved driving pick-up trucks in rural settings and that he may have lacked prior experience driving tractor-trailers in high-traffic areas. The record contains no evidence of any pre-hiring acts of wrongdoing by Rogers, *let alone acts that might be similar to the incident here*. That scant evidence of Rogers' past is not sufficient to allow a reasonable jury to conclude that Helena Chemical should have foreseen the risk Rogers posed.

Id. at 770 (emphasis added). The plaintiff in Holcombe also alleged that Helena Chemical did not adequately investigate Rogers' driving experience and qualifications before it hired him. Id. Although the court in Holcombe recognized that the plaintiff had provided "some evidence" that Helena Chemical failed to thoroughly vet Rogers, it held that "nothing in the record shows how that failure proximately caused [the plaintiff's] injuries." Id. at 771.

In this case, Plaintiff makes similar allegations that fail for the same reasons outlined in Holcombe. First, Plaintiff has not developed any facts regarding Nesbitt Transportation's and/or Mr. Rouse's "prior acts of wrongdoing" or whether such acts are causally related to *this* accident. If Plaintiff's allegation is that Nesbitt Transportation and/or Mr. Rouse had a history of hauling oversized loads in violation of terms in an SCDOT or NCDOT permit, then Plaintiff has failed to establish any evidence supporting that fact or that Florence Concrete had knowledge of it. Such a record does not exist in this case. Next, just like in Holcombe, Plaintiff alleges that Florence Concrete did not thoroughly investigate Nesbitt Transportation and its drivers prior to contracting with them. However, like in Holcombe, Plaintiff has failed to put forth any evidence showing that Nesbitt Transportation and/or Mr. Rouse had a bad driving record and, if true, how that is causally connected to Plaintiff's injuries. Simply, the record is completely void of any facts establishing

that Nesbitt Transportation and/or Mr. Rouse had a history of committing prior wrongdoings and that those wrongdoings were present at the time of this accident.

Plaintiff also alleges that in 2015 – approximately four years before this accident – Nesbitt Transportation received a “conditional safety” rating from the Federal Motor Carrier Safety Administration (“FMCSA”), and therefore, Florence Concrete had a duty to investigate Nesbitt’s rating but failed to do so. However, Plaintiff’s claims cannot rest on this mere allegation for the same reasons stated immediately above.

For the Court’s context, federal regulation instructs the FMCSA to assign one of three safety ratings to motor carriers: satisfactory, conditional, or unsatisfactory. 49 C.F.R. § 385.3. A conditional safety rating means that a motor carrier did not, *at the time of the inspection*, have adequate safety management controls in place. *Id.* Plaintiff has not established what violation(s) contributed to Nesbitt Transportation’s conditional safety rating in 2015. Importantly, it is well established that a motor carrier assigned a conditional safety rating is **not** deemed incompetent or unfit to act as a motor carrier. *See* 49 C.F.R. §§ 385.11–13 (establishing restrictions for motor carriers who received an “unsatisfactory” rating, only); *see also* Fisher v. Nat’l Progressive, Inc., No. CIV-12-853-C, 2014 WL 12029275, at *3 (W.D. Okla. Dec. 31, 2014) (“The regulations do not state a motor carrier with a conditional safety rating is incompetent or ‘unfit’ to continue operating in interstate commerce.” (citing 49 C.F.R. 385.11)); MST Express v. Dep’t of Transp., 108 F.3d 401, 403-404 (D.C. Cir. 1997) (“A carrier that receives a conditional rating is permitted to continue its normal operations.” (citing 49 C.F.R. § 385.13)). Plaintiff recognized this fact and stipulated to it in the Consent Order, where the parties agreed that:

There are no restrictions placed on a motor carrier that has been assigned a conditional safety rating by the FMCSA or the [SCDOT]. A motor carrier with a conditional safety rating is permitted to operate on all roads in the United States. Additionally, a conditionally rated motor carrier is permitted to haul oversized

loads. Finally, there are no restrictions for a shipper, such as Florence Concrete, in hiring a conditionally rated motor carrier.”

(Consent Order, ¶ 8(i)). These facts are undisputed.

For Plaintiff’s claim to prevail based on Nesbitt’s conditional safety rating in 2015, Plaintiff must show, just like in Holcombe, that the alleged violations leading to the rating were present at the time of the accident *and* causally related to the accident.¹² Plaintiff, alone, has the burden to produce evidence to support his claims, and with the facts fully developed in the Consent Order, Plaintiff cannot rely on speculation and empty allegations to prove his case.¹³

There is nothing in the stipulated facts to show how a conditional safety rating given to Nesbitt Transportation – four years prior to this accident – is causally related to this accident and Plaintiff’s injuries. Plaintiff broadly asserts that the conditional safety rating was assigned “after a failed safety audit due to violations of numerous safety regulations,” (Consent Order ¶ 8(h)), but on the most basic level, Plaintiff has failed to develop what those violations were. Plaintiff has produced no evidence explaining what violation(s) Nesbitt Transportation allegedly committed in 2015 when it received the conditional safety rating. In addition, Plaintiff has produced no evidence showing that the same violation(s) – whatever they may have been – continued to exist at the time

¹² The existence of a conditional safety rating does not establish negligence per se. See e.g., Fisher at *3 (“Thus, the fact that Best-1 had a conditional safety rating is not sufficient, by itself, to support Plaintiff’s claim that JMTT negligently selected Best-1.”); Jones v. Schneider Nat., Inc., 797 N.W.2d 611, 616 (Iowa Ct. App. 2011) (“We further decline to assume the bare allegation that Mr. Fehrle, or Fehrle Trucking has a ‘conditional’ safety rating automatically arises to the level of negligent hiring.”).

¹³ It is reversible error for a ruling to be wholly unsupported by the evidence. Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013) (“In an action at law tried without a jury, the appellate court will not disturb the trial court’s findings of fact unless there is no evidence to reasonably support them.”); Steinke v. S.C. Dep’t of Lab., Licensing & Regul., 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999) (“This Court will reverse the trial court only when there is no evidence to support the ruling below.”).

of this accident and are causally related to it. Furthermore, Plaintiff has produced no evidence that Florence Concrete had knowledge of Nesbitt Transportation's violations in 2015 or that Florence Concrete was aware those violation(s) existed at the time of the accident. Because Plaintiff failed to develop these facts in evidence, this Court cannot possibly determine whether the alleged violations were causally related to this accident, and therefore, Plaintiff cannot prevail in a negligent hiring/supervision claim against Florence Concrete based on the existence Nesbitt Transportation's conditional safety rating in 2015.

CONCLUSION

Plaintiff's claims cannot prevail against Florence Concrete for several reasons. First, Florence Concrete did not share a relationship with Plaintiff that the law recognizes as creating a duty. Second, it is well-established in South Carolina that a company (like Florence Concrete) is not vicariously liable for the negligent acts of an independent contractor (like Nesbitt Transportation). No exception applies to these facts for purposes of creating a duty or defeating the general nonliability rule. Florence Concrete, acting solely as a concrete fabricator and shipper, was not acting as a motor carrier at the time of the accident and it did not control Nesbitt Transportation's work.

Furthermore, Florence Concrete's activity (concrete fabricator/shipper) was not inherently dangerous or a cause of Plaintiff's injury, and therefore, the nondelegable duty exception from Allison cannot apply in this case. Had Mr. Rouse complied with the terms of the SCDOT permit, the accident would not have happened and, therefore, this Court cannot conclude that the concrete slab itself was inherently dangerous for purposes of attaching a nondelegable duty to Florence Concrete.

Finally, Plaintiff has failed to establish that Nesbitt Transportation and/or Mr. Rouse had a history of committing prior bad acts, to Florence Concrete's knowledge, and that were present at the time of the accident and causally related to it. In the absence of such evidence, our courts require that Plaintiff's claims be dismissed.

For these reasons, Florence Concrete requests that the Court grant it declaratory relief and find that Florence Concrete did not owe Plaintiff a duty or breach a duty to him.

Respectfully submitted this 28th day of February, 2022.

MURPHY & GRANTLAND, P.A.

s/ Anthony W. Livoti

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Attorneys for Florence Concrete Products, Inc.

State of South Carolina	)	In the Court of Common Pleas
	)	Twelfth Judicial Circuit
County of Florence	)	Case No. 2021-CP-21-02042
	)	
	)	
Thomas Rodriquis Nelson,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Transcript of Record
	)	
	)	
Florence Concrete Products,	)	
Inc.,	)	
	)	
Defendant.	)	
	)	

March 10, 2022
Florence, South Carolina

B E F O R E:

The Honorable Michael G. Nettles, Judge

A P P E A R A N C E S:

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Attorneys for the Plaintiff

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Attorneys for the Defendant

Krystal J. Smith
Official Circuit Court Reporter

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I N D E X

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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(No Exhibits Presented)

COURT REPORTER LEGEND

dashes	--	intentional or purposeful interruption
		or change in thought
ellipses	. . .	trailing off
[ph]		phonetically written
[sic]		written as said

1 MARCH 10, 2022

2 (WHEREUPON, the proceedings began at 10:08 a.m.)

3 THE COURT: Madam Court Reporter, this is Thomas
4 Rodriquis Nelson, plaintiff, versus Florence Concrete
5 Products, and I'll be glad to hear from the moving party.
6 And it's Civil Action 2021-CP-21-02042.

7 Mr. Nance?

8 MR. NANCE: Thank you, Your Honor. May it please the
9 Court.

10 THE COURT: Yes.

11 MR. NANCE: Good to see you this morning.

12 THE COURT: Good.

13 MR. NANCE: Thank you for setting this hearing this
14 morning on our declaratory relief that we're seeking from the
15 Court.

16 By way of introduction and for purposes of the record, I
17 would like to introduce who we have here in the courtroom.
18 To my far left is Mr. Linward Edwards, to my nearest left is
19 Ms. Kathleen Barnes and, of course, we all represent Mr.
20 Thomas Rodriquis Nelson, who is sitting here at the table
21 with us.

22 THE COURT: Mr. Nelson.

23 MR. NANCE: Right behind him are his mother and his
24 stepfather, Sandra Nelson and Jerry Harrison, along with my
25 paralegal, Ms. Leslie Wiggins.

1 Your Honor, before we get started, there's some
2 preliminary matters that I think we need to take up and I
3 wanted to make sure that we're clear on before we get started
4 with our arguments on the merits.

5 As Your Honor is aware, we filed -- all right. As Your
6 Honor is aware, we filed an amended summons and complaint for
7 declaratory relief on January the 4th, 2022. Okay? Within
8 that amended summons and complaint are two questions or legal
9 issues, if you will, that the Court is going to be asked to
10 determine as a result of this action and this hearing today.

11 Within those two legal issues, the parties entered a
12 stipulated set of facts, and the stipulated set of facts is
13 set forth in the consent order which was signed by Your
14 Honor. The consent order sets forth how we got here, what
15 we're doing, and lays the stipulated facts out for both
16 parties to use in their arguments.

17 Your Honor, we went to great lengths to establish the
18 stipulated set of facts. They were agreed upon by both
19 parties over about a two-month exchange between us between
20 emails, etc., and then Your Honor, of course, signed the
21 consent order which certifies a part of the settlement in
22 this case. Okay?

23 I mention that because in reviewing the defendant's
24 brief, it appears that they have taken upon themselves to go
25 out of bounds on those stipulated facts, Your Honor. There

1 are two parts in their brief where they go out of bounds, and
2 I want to -- I want to lay it out for the Court because we
3 would object to the Court considering anything outside of
4 those stipulated facts. We worked hard and that is a part of
5 the settlement of this case, and it's also part of the order
6 that exists in this case.

7 The first set of facts that I'm going to mention is --
8 if Your Honor has their brief, defendant's brief, it's at the
9 bottom of page 1. As Mr. Rouse was turning left out of a
10 parking lot and onto U.S. Highway 76, the plaintiff, who was
11 traveling in the opposite direction, ran into Nesbitt
12 Transportation's trailer, injuring the plaintiff.

13 Now, Your Honor, if you review the consent order and the
14 stipulated facts, that is nowhere to be found in those facts.
15 That has no place in that brief, and we would certainly
16 object to the Court even considering that. And they are
17 aware of that and they know that, but yet they put it in
18 there.

19 Additionally, on page 3 of their brief right at the top
20 they say Nesbitt Transportation's driver, Mr. Rouse, picked
21 up the cement slab from Florence Concrete's unmanned facility
22 on January the 3rd, 2019, the day before the accident,
23 approximately two minutes after the designated time
24 prescribed under the SCDOT permit. That's incorrect. Not
25 only is it not contained in the facts, that's also an

1 incorrect statement.

2 Judge, the correct statement, the one that we stipulated
3 to, states that that load left their lot two hours and two
4 minutes after it could legally be on the road. So for them
5 to state that in there, they know it's untrue, but they put
6 it in there. They somehow felt the need to put that in
7 there. So we would object to the Court even considering that
8 as well.

9 THE COURT: Well, let's -- let's back up to the first
10 objection. What do you all have to say about that? We'll
11 deal with it piecemeal.

12 MR. LIVOTI: Your Honor, to be quite frank with you,
13 that's exactly just how the collision occurred and I don't
14 think we -- I don't think we're going outside of the facts.
15 The accident happened when Mr. Nelson struck the trailer that
16 was being driven by Mr. Rouse. I don't think that -- I don't
17 think that that's a fact that --

18 THE COURT: It's not material to what we're talking
19 about here today?

20 MR. LIVOTI: Right. The collision occurred. I think we
21 all agree with that, and I think certainly all we did was
22 allude to the fact that the collision occurred. The
23 collision occurred between the vehicle being driven by Mr.
24 Nelson and the vehicle being transported by Calvin Rouse on
25 behalf of Nesbitt Transportation.

1 THE COURT: Okay. But I -- do you have an objection
2 with amending it to -- amending?

3 MR. NANCE: I do, Judge. I do. I certainly have an
4 objection. Judge, there is much more involved in the
5 accident than simply Mr. Nelson running into a trailer.

6 THE COURT: Right.

7 MR. NANCE: We spent months in discovery on conspicuity
8 issues and all of this, the angle of the trailer in the
9 roadway. None of that is mentioned. You know, if we had had
10 the opportunity to do that, they should have done that before
11 we stipulated to the facts.

12 Judge, before we even settled the case, before we even
13 signed the settlement agreement, we had to stipulate to these
14 facts. That was a part of the settlement.

15 And so for them to now come in and just throw that
16 blanket statement out there, what we think they're doing,
17 Judge, and what we're going to show the Court here shortly,
18 very shortly, is that they want to distract the Court. They
19 want to distract whatever appellate court is going to hear
20 this matter from the real issue in this case, which is their
21 own negligence in this case. Okay?

22 It's not about what Mr. Nelson did. Damages have
23 already been stipulated to. Proximate cause of those damages
24 has already been stipulated to. The only issues before the
25 Court today are the extent of their duty under the law in

1 South Carolina and whether they breached that duty. That's
2 it.

3 MR. LIVOTI: Your Honor, if I may just very briefly?

4 THE COURT: Yes.

5 MR. LIVOTI: I think counsel is alluding to paragraph F
6 in the -- in the stipulated facts. Plaintiff was involved in
7 an accident with Nesbitt Transportation and -- a Nesbitt
8 Transportation truck and the extended trailer hauling the
9 oversize load belonging to Florence Concrete on U.S. Highway
10 76 in Lynchburg.

11 Your Honor, we simply are alluding to that fact that the
12 -- that the collision occurred. He was involved with the
13 accident and collision. I completely agree with Mr. -- with
14 Mr. Nance that that is -- that that is not an issue. How Mr.
15 Nelson may have come into contact with the trailer is not an
16 issue for the Court. That was just the way that we talked
17 about the fact that this accident happened.

18 THE COURT: Okay. I understand. All right.

19 MR. NANCE: And again, if they're going to talk about
20 how the accident occurred, I would just simply reference our
21 brief, Judge. An accident occurred when that trailer in the
22 wee -- in the pitch-black dark, you know, time of day is what
23 happened. That's it. That's how we referenced it. I didn't
24 go in there and say that. And I know, Your Honor, it may not
25 seem like a big issue for the Court, but I want -- you know,

1 we want to make sure that the issues are identified in this
2 case as to what the Court is going to be determining.

3 There is no issue as to proximate cause. I don't want
4 any statement to be made about the accident of him running
5 into a trailer to affect the issues that are before the Court
6 to decide today and in the future for the appellate court to
7 determine. Damages have already been stipulated to. It's
8 just simply whether it's a breach of duty -- a duty and then
9 a breach of duty.

10 THE COURT: All right. We -- we can -- you can -- the
11 second question that you have is what? The second objection
12 with regard to what?

13 MR. NANCE: Yeah. The second objection was there on
14 page -- bear with me, Your Honor. It was on page 3, and
15 again, Judge, it -- first of all, it's an incorrect
16 statement. That's not in the facts. If you -- if you review
17 the consent order -- and I'll read the relevant section of
18 the consent order. It's under paragraph 8(d), and in
19 paragraph 8(d), I'll read it to you, Your Honor.

20 Calvin Rouse, an employee of Nesbitt Transportation,
21 picked up the load from Florence Concrete at 5:02 p.m. on
22 January the 3rd, 2019, which violated the permitted time of
23 travel contained in the South Carolina Department of
24 Transportation oversize/overweight permit.

25 According to the permit, the SCDOT permit, the oversize

1 load in question could not have been on the road in Sumter,
2 South Carolina, after 3:00 p.m. on that day. Pursuant to the
3 permit, the earliest time that the oversize load in question
4 could have been on the road in Sumter, South Carolina, would
5 have been 9:00 a.m. the next day, which was approximately
6 over two hours after the accident in this case occurred,
7 which rendered Mr. Nelson a quadriplegic.

8 They have stated in their facts that it left the
9 facility on January the 3rd, 2019, the day before the
10 accident, approximately two minutes after the designated
11 time. Now, Judge, we negotiated. We stipulated to these
12 facts. That is a stipulation that has been signed by the
13 Court.

14 I don't know how they articulate it any other way other
15 than to try to mislead the Court here. That is one of the
16 biggest issues, if not the biggest issue in this case is when
17 that load left their lot.

18 THE COURT: All right.

19 MR. LIVOTI: Your Honor, there is no --

20 THE COURT: Mr. Livoti?

21 MR. LIVOTI: There's no dispute about that. We -- if we
22 referenced it the way we referenced it about 5:02, the actual
23 language of the permit talks about it being within 30 minutes
24 of sunrise, but the permit language also talks about it and
25 it was agreed to in the stipulated facts that because of

1 where this was in proximity to a larger area that it could
2 not have been out on the road after 3 o'clock. So that's
3 just an error on our part in terms of referring to that.

4 THE COURT: Okay. I don't -- I don't anticipate --
5 that's really -- the issues that we're dealing with --

6 MR. LIVOTI: We acknowledge that the movement on the 3rd
7 was in violation of the law.

8 THE COURT: Right.

9 MR. LIVOTI: We acknowledge that when Rouse picked it up
10 for Nesbitt.

11 THE COURT: And the issues are legal issues, and I don't
12 think -- I'll allow you to put anything you want to on the
13 record, but really it's the legal matters that we're here
14 about today.

15 MR. NANCE: That's right. That's right, Your Honor. We
16 are here about those legal matters, and that fact, that
17 particular fact has been established as to time --

18 THE COURT: All right. Your -- your objection is noted.

19 MR. NANCE: Okay.

20 THE COURT: All right.

21 MR. NANCE: One other issue that I want to make sure is
22 noted for the record too. In reviewing the defendant's brief
23 -- and again, we haven't filed a reply brief. So we both
24 agreed to just file simple -- you know, our standard briefs
25 the same day, February the 28th, and we would reserve reply

1 for this hearing.

2 But in reviewing their brief, it appears the defendants
3 are taking the position they owe absolutely zero duty to Mr.
4 Nelson as the plaintiff. Your Honor, again, it goes to the
5 legal issues in this case.

6 It's our position if you review the first question that
7 has been submitted to the Court, the question states this,
8 and this is the question that the Court is going to be asked
9 to determine today.

10 Did defendant Florence Concrete Products, Inc., as a
11 shipper of oversize loads that require an oversize/overweight
12 permit for travel over the highway owe a duty of care to
13 plaintiff to take measures beyond verbally contracting for
14 the shipment of the load when the shipper contracts with a
15 properly insured independent contractor motor carrier that
16 has U.S. Department of Transportation operating authority and
17 where the independent contractor motor carrier has secured
18 the proper permits in South Carolina and North Carolina
19 Departments of Transportation for such oversize/overweight
20 loads?

21 Your Honor, that's the first question the Court has to
22 consider. By virtue of us, again, as a part of the
23 settlement of this case coming to an agreement on the
24 question that was going to be submitted to the Court, this
25 question concedes that they owe a duty. The only issue for

1 the Court -- the legal issue for the Court to consider is if
2 they owe a duty beyond what's contained in that question.

3 And so if you read their brief, nothing in their brief
4 acknowledges any duty whatsoever, and I want to make sure
5 that we are -- the issues are clearly defined for the Court
6 and what the Court is going to be asked to do today.

7 THE COURT: Mr. Livoti?

8 MR. LIVOTI: Your Honor, I mean the whole issue of
9 whether a duty is owed is the exact thing that the Court is
10 being asked to answer. We deny that we owed a duty in the
11 amended complaint seeking declaratory relief. We asserted a
12 counterclaim for declaratory relief stating that we do not
13 owe a duty, and this is really part of our argument is that
14 plaintiffs have sort of bootstrapped a reading of the
15 question presented as some kind of admission on our part that
16 a duty was owed. That is not the case. We deny that any
17 duty was owed whatsoever and deny, as you will see in our
18 memorandum --

19 THE COURT: By virtue of the fact there was an
20 independent contractor it obviates the duty, and that's what
21 y'all are asking me to --

22 MR. LIVOTE: That's exactly right, Your Honor.

23 THE COURT: -- make a ruling on.

24 MR. LIVOTI: That's exactly right.

25 THE COURT: That's kind of my understanding.

1 MR. LIVOTI: So I want -- I want to be very clear that
2 we are not admitting that any duty exists and that this does
3 not fall into any exception under the independent contractor
4 rule that Your Honor is well familiar with, and that is the
5 whole issue in this case as whether that duty exists. Their
6 reading of that question presented is trying to put upon us
7 that we somehow assume that some duty exists, and we deny
8 that it does.

9 THE COURT: All right. Yes, sir?

10 MR. NANCE: Okay. Your Honor, I would simply state that
11 the question which states that we know that they -- they have
12 to take measures of at least contracting for the shipment of
13 a load with a properly-insured independent contractor, with
14 someone who has U.S. Department of Transportation operating
15 authority, and where that independent contractor has secured
16 proper permits.

17 I mean what we're asking the Court to do is determine
18 the extent of that duty beyond that. So they have conceded
19 that there is a duty.

20 THE COURT: All right.

21 MR. LIVOTI: We haven't, but that's the issue for the
22 Court to decide.

23 THE COURT: Right. I understand.

24 MR. NANCE: Okay.

25 THE COURT: And I'll be glad to hear from you with

1 regard to the merits of your position.

2 MR. NANCE: Okay. Thank you, Your Honor. And I
3 appreciate you allowing us to put those matters on the record
4 before we get started.

5 Your Honor, by way of background history, today is the
6 hearing on our motion for summary judgment on the declaratory
7 relief that is being asked of the Court. How we got here is
8 we -- this case was originally filed in October of 2019, Your
9 Honor, and in October of 2019 we filed a summons and
10 complaint in Lee County against the defendants, Florence
11 Concrete and, of course, the motor carrier in this case,
12 Nesbitt Transportation, their -- their driver, Calvin Rouse,
13 in this case, as well as some of the agents involved in that
14 -- in that motor carrier business.

15 We went through significant discovery over the last
16 several years in this case, Your Honor, and successfully
17 settled the case as to all parties. Okay? We settled first
18 against Nesbitt Transportation and Calvin Rouse together.

19 We continued discovery after that settlement and last
20 May with Karl Folgens reached a settlement with Florence
21 Concrete. We reached a settlement, but the settlement and
22 the obligations of the insurance carriers for Florence
23 Concrete are contingent upon how the Court answers these
24 legal issues that we've put before the Court in the -- in the
25 consent order and in the declaratory relief complaint that we

1 filed. So that is why we are here today, Your Honor, and
2 that's how we've gotten here.

3 And the declaratory relief that we are seeking from the
4 Court involves answering two questions in the affirmative.
5 The first one we went through I just put on the record was
6 regarding the duty beyond the issues that we mentioned. The
7 second question was or is was there a breach of that duty in
8 this case. Again, proximate cause has been stipulated to,
9 the damages that Mr. Nelson has sustained as a quadriplegic
10 has been stipulated to, and that's why we're here today.

11 Your Honor, in reviewing the stipulated facts, let's --
12 I want to go through some of the highlights for the case here
13 for the Court to consider before we really get into the
14 merits of our argument. And before I do that, I do want to
15 mention that we're going to present two independent grounds
16 under the first question for the Court to consider.

17 We're going to have two options and, in our opinion, I
18 think both options the Court can rule in the plaintiff's
19 favor for declaratory relief on this case and find that there
20 was a duty under two circumstances, one being that Florence
21 Concrete Products owed a duty to ensure that proper
22 precautions were taken for the inherently dangerous work of
23 transporting its oversize load over public highways. Okay?
24 That's the first ground.

25 The second ground that we're asking the Court to also

1 rule in the affirmative on is that the Court should find that
2 Florence Concrete owed a duty to exercise reasonable care in
3 the selection of an independent contractor under the
4 particular facts of this case. So in doing that, Your Honor,
5 the facts that we've used and stipulated to -- and I know
6 Your Honor has reviewed the consent order, but I do just want
7 to point out a few things.

8 This -- this matter involves a motor vehicle accident
9 that occurred on January 4th, 2019, in Lynchburg, South
10 Carolina. This was in Lee County, Your Honor. The load that
11 was being hauled was a 72-inch by 24-inch cement slab. Okay?

12 It was fabricated by the defendant, Florence Concrete
13 Products, Inc. It was used for a bridge construction project
14 in North Carolina. Okay? The load was going to have to be
15 shipped from their facility in Sumter, their manufacturing
16 facility in Sumter, all the way to Enfield, North Carolina,
17 which required oversize permits in South Carolina and North
18 Carolina for all of it.

19 The South Carolina Department of Transportation
20 regulates that any load longer than 60 feet has to have an
21 oversize permit to be able to ship over interstate highways
22 or over any highways. Okay? Approximately 50 to 75 --
23 excuse me -- 50 to 70 percent of the loads that are hauled
24 and the products fabricated by defendant Florence Concrete
25 are oversize in nature. Okay? So 50 to 70 percent of the

1 products that they manufacture at their plant in Sumter are
2 oversize in nature, Your Honor. And that -- I mention that
3 because they're a very sophisticated company. They're not --
4 you know, these are not random rare loads that come through
5 their facility. It happens quite frequently, Your Honor.

6 Florence Concrete hired Nesbitt Transportation to
7 transport this particular cement slab. The cement slab
8 itself was preloaded on a Nesbitt Transportation trailer.
9 The trailer was owned by Nesbitt Transportation. It was
10 preloaded onto their trailer and placed at a lot on Florence
11 Concrete's property. This is a lot where they place all of
12 their loads that are ready for travel when they are ready to
13 be picked up by Nesbitt Transportation drivers.

14 A couple of things that are particular about that lot,
15 Your Honor, is that this lot is not monitored by Florence
16 Concrete. Okay? It's their property. All right? It's not
17 monitored. There's no gate. It's not enclosed. They don't
18 know who's coming and going on this property, which is the
19 exact issue in this case. Okay?

20 Permit -- Florence Concrete -- through depositions we
21 learned this, Your Honor. Florence Concrete through its
22 shipping manager, Lance Robertson, was aware that these
23 oversize loads require oversize permits, and he testified
24 that being on the road in an oversize load that requires an
25 oversize permit at times that are not allowable under the

1 permits creates an inherent risk and danger to the public.
2 Okay? He testified to that. That's stipulated to. That's
3 contained in the facts. All right?

4 He realizes that and has this knowledge and so does
5 Florence Concrete that these loads require very specific time
6 travels because of the ingress-egress issues coming through
7 large urban areas like Sumter, going through downtown areas
8 on school days where there's a lot of traffic. These
9 trailers are very long, and they create ingress and egress
10 issues.

11 Florence Concrete confirmed in this case that Nesbitt
12 Transportation had the necessary motor carrier operating
13 authority, and they had the insurance in place. They also
14 confirmed that they obtained the necessary permits, Your
15 Honor, and Florence Concrete actually had possession of these
16 permits.

17 Now, what I find very interesting is that the permit in
18 this case requires the party to sign it. It requires the
19 party motor carrier to sign the permit. The permit in this
20 particular case was not signed by any representative of
21 Nesbitt Transportation. Okay? South Carolina law and South
22 Carolina Department of Transportation regulations require
23 these permits to be signed, and it has to be signed to be a
24 valid permit.

25 So, Your Honor, we would argue even from the inception

1 they had possession of this permit, they knew that it wasn't
2 signed. So it wasn't even a valid permit. So they didn't
3 even carry that duty. But they had the permit and they
4 attached it to the trailer itself.

5 Your Honor, if I could, I've got a copy of this permit
6 here. Would you like to have a copy of it?

7 THE COURT: Yes.

8 MR. NANCE: Okay.

9 MR. LIVOTI: It's actually attached to the consent
10 order.

11 THE COURT: Okay.

12 MR. NANCE: I beg the Court's indulgence, Your Honor.

13 Your Honor, what you're going to see there are two
14 highlighted portions on that permit. The -- the first
15 highlighted portion is on the first page and that gives the
16 travel restrictions. Okay? And I'm going to simply read
17 that out.

18 Travel permitted one-half hour after official sunrise to
19 one-half hour before official sunset, Monday through
20 Saturday, except travel prohibited in close proximity of
21 large urban areas between 7 a.m. and 9 a.m. all days and 3
22 p.m. to 6 p.m. on school days and 4:30 to 6 p.m. on non-
23 school days. Okay? That sets forth the travel restrictions
24 for an oversize load, which is what we're dealing with in
25 this case.

1 If you flip to the second page, the bottom says special
2 restrictions, and in all caps it says original permit shall
3 be signed and carried in towing vehicle during movement.
4 Just underneath that it has the permittee signature.

5 Your Honor, what you have there is the original permit
6 that we obtained in discovery. It was not signed, and it
7 would be our position and according to the South Carolina
8 Department of Transportation regulations that this -- this
9 permit was invalid. And moving forward, Your Honor, the --
10 the load required this permit. So it set the travel
11 restrictions.

12 On January the 3rd, 2019, which was the day before this
13 accident occurred on January the 4th, 2019, Calvin Rouse, an
14 employee of Nesbitt Transportation, drove into Florence
15 Concrete's unmonitored lot, unsecured lot, with his truck,
16 picked up the --

17 THE COURT: Where is that lot located?

18 MR. NANCE: In Sumter, South Carolina. In Sumter, South
19 Carolina, Your Honor. That's their manufacturing facility.
20 You may be aware Florence Concrete Products has a store here
21 in Florence, but their manufacturing facility is located in
22 Sumter.

23 THE COURT: Okay.

24 MR. NANCE: He shows up to the lot which is unmonitored
25 and unsecured at 5:02 p.m. Your Honor, this is still during

1 business hours out there at Florence Concrete. 5:02 p.m.,
2 and left with that trailer, two hours and two minutes after
3 this could have been on the road. There was no one at
4 Florence Concrete monitoring the lot. There was nobody at
5 Florence Concrete to secure that trailer in the lot. There
6 was nobody that prevented him from leaving. There was nobody
7 that even knew that he had left with a 72-foot load, Your
8 Honor. He left.

9 Now, this is the -- why we talked about this before we
10 got into our arguments, Your Honor, because that is to me the
11 single biggest issue in this case is their failure to take
12 any precautionary measures. Okay?

13 The load leaves their lot, Your Honor, at 5:02, two
14 hours and two minutes after it could've been on the road
15 legally. Okay? So it is illegally on the road at this point
16 traveling through downtown Sumter. The load legally could
17 not have been on the road until 9:00 a.m. the next day in
18 Sumter, South Carolina. Now, why is that important, Your
19 Honor? Because the accident in this case occurred on January
20 the 4th, 2019, the next day when Mr. Nelson was driving to
21 work at approximately 6:30 in the morning, Your Honor.

22 And if Your Honor is aware of the geography there,
23 Lynchburg is about 30 minutes away from Sumter. So if you do
24 that, if he was on time and he left at 9 o'clock in the
25 morning on January the 3rd, 2019, he would not have been

1 passing through the stretch of road where this accident
2 occurred until approximately 9:30 in the morning on January
3 the 4th, 2019.

4 Your Honor, if they had done anything, anything to take
5 precautionary measures, this accident would have never
6 happened and Mr. Nelson would not be a quadriplegic today.
7 It could not leave the lot.

8 Now, beyond that, Your Honor, in the facts, we're aware
9 that Mr. Rouse did leave the next day. He left the next day
10 at 6:30 a.m., which was in the pitch-black dark. The sun was
11 not up. That time also violated the permit, Your Honor. So
12 at no point when this truck and trailer were on the road was
13 it ever legal. It was illegal ever since the moment it left
14 Florence Concrete's lot.

15 Your Honor, the other biggest issue in this case -- I
16 say that because there's really two issues and that's why we
17 have two different grounds on the facts, Your Honor. At the
18 time of the accident, Nesbitt Transportation had been
19 assigned a conditional safety rating by the Federal Motor
20 Carrier Safety Administration. Your Honor, the FMCSA for
21 short is the regulatory agency for motor carriers in the
22 United States. They enforce all the regulations. Okay?
23 They're the ones that conduct all these safety audits.

24 A conditional safety rating is a rating that simply says
25 that a motor carrier lacks adequate management controls and

1 systems necessary to operate safely, which could lead to a
2 number of safety violations regulated by the FMCSA.

3 Your Honor, in going through discovery, we learned that
4 Nesbitt Transportation had failed a number of safety audits
5 -- okay? -- and had had numerous safety regulations. They
6 had a conditional safety rating as early as 2015. Okay?
7 This accident occurred in 2019. So for four years they had
8 carried this conditional safety rating, which says that they
9 don't have the adequate measures in place to adhere to the
10 safety fitness standards that the FMCSA prescribes.

11 Your Honor, there's a simple way to get out of that.
12 You file a corrective action plan with the FMCSA if you're
13 the motor carrier and you say, you know what, we made some
14 mistakes, we've got some problems, we're going to correct
15 that. That's a corrective action plan. It basically says
16 we're going to correct these problems and we're going to
17 operate safe. They never even sought to do that, Your Honor.
18 Not only did they carry the conditional rating, they never
19 sought to upgrade it to a satisfactory rating, which I'll get
20 into here in a second.

21 Now, the interesting part is that when we conducted our
22 deposition of Florence Concrete's shipping manager, the man
23 that is tasked with being in charge of shipping at Florence
24 Concrete, he doesn't even know what a conditional safety
25 rating is. He never even heard of it. He never even heard

1 of it until -- until we deposed him. He had never even heard
2 of it. Furthermore, he knew nothing about what the
3 definition of a conditional safety rating is, Your Honor.

4 Now, beyond that, if you go back to the initial
5 relationship with Florence Concrete and Nesbitt
6 Transportation, Florence Concrete had been doing business
7 with Nesbitt Transportation since 1992. Your Honor, this was
8 a long time. They are very familiar with each other and how
9 they do their work.

10 They never even had a written contractual agreement
11 between them, Your Honor, nor were there any written policies
12 or procedures between the companies to do business. There
13 was no qualification process at Florence Concrete used to
14 qualify or determine whether Nesbitt Transportation was
15 qualified to be hauling this freight, Your Honor.

16 They basically did nothing. They did business on
17 nothing but a smile and a handshake, Your Honor. That's it.
18 There was no qualification process. They don't know if
19 they're a safe company or not. They're just saying, hey, you
20 want to do business? Sure. We'll let you do business with
21 us. That's it.

22 They relied upon the fact that Florence Concrete had
23 been issued a Department of Transportation number. Okay?
24 Motor carrier operating authority from the FMCSA. It had
25 obtained these oversize permits which were invalid because it

1 wasn't signed, but they -- those factors. They relied upon
2 the fact that they were going to be a safe carrier to haul
3 these items. Okay, Your Honor? And they did nothing more.

4 Your Honor, those are essentially the facts that we've
5 stipulated to. Okay? And I've highlighted some of the facts
6 that we think are fairly egregious, but again, those are the
7 facts that we're going off of on this case for the Court to
8 determine our avenues for declaratory relief.

9 Now, in moving forward and talking about our case on the
10 merits, Your Honor, and we submitted our memorandum of law
11 which very well states our position, but I do want to go
12 through some of these issues as we highlight some of the --
13 some of the -- some of the strengths that we have and the
14 claims we're making for the avenues for relief here, Your
15 Honor.

16 With regard to the first question, as we've said, Your
17 Honor, we're giving two independent grounds for the Court to
18 consider here. Okay? We believe that the Court can and
19 should answer both questions in the affirmative that there
20 was a duty here, Your Honor, and the first of that is that
21 Florence Concrete owed a duty to ensure that proper
22 precautions were taken for the inherently dangerous work of
23 transporting these oversize loads on public highways, Your
24 Honor.

25 And based upon the stipulated facts that we've entered

1 into, Your Honor, there is no doubt that no precautions were
2 taken, none. We started with a lot, unsecured, unmonitored.
3 It wasn't just this truck and trailer. I mean there are
4 numerous other trucks and trailers. Anybody can come on this
5 lot. The fact that Mr. Rouse did, and he left two hours and
6 two minutes before he could have been on the road legally and
7 took that trailer, which is what caused the injuries to Mr.
8 Nelson, who is a quadriplegic now, Your Honor.

9 Had they done anything, anything, simply said, whoa,
10 whoa, whoa, you can't leave at this time of day, stopped him,
11 done something, this would have never happened, Your Honor.
12 The load couldn't have been on the road until 9 o'clock the
13 next day, well after the accident occurred at 6:30 in the
14 pitch-black dark early hours of the morning. It couldn't
15 have happened.

16 So in looking at some of the case law in South Carolina
17 that supports our position, Your Honor, it really goes back
18 70 years. Okay? And we've got three cases here that we've
19 cited that I think are very, very important to the claims in
20 this case. Okay?

21 For 70 years, South Carolina appellate courts have held
22 that a defendant cannot avoid liability by using an
23 independent contractor to do work that is inherently or
24 intrinsically dangerous unless proper precautions are taken.
25 In other words, while an employer is generally not liable for

1 the work, Your Honor, of an independent contractor, there is
2 an exception to that rule, and that exemption is that an
3 employer remains liable for injuries that occur for work that
4 is inherently dangerous and the proper precautions aren't
5 taken. Okay?

6 The first case that we've cited is *Allison v. Ideal*
7 *Laundry & Cleaners*, and that's -- that was a case from 1949
8 and it is still valid and good case law in South Carolina.
9 In that court -- in that case, the defendant Laundry -- Ideal
10 Laundry & Cleaners replaced its coal boilers with a propane
11 gas system. After a few days after installation, it
12 exploded, Your Honor, and when adjoining property owners had
13 damage from the explosion, they sued the laundry company
14 because they had these boilers that blew up. All right?

15 The lower court granted direct verdict to the laundry
16 because the gas system was installed by an independent
17 contractor and there was, quote/unquote, no evidence of
18 negligence on the part of the laundry. Okay? On appeal, the
19 plaintiffs argued that laundry had absolute liability
20 regardless of negligence, and the Supreme Court rejected that
21 argument.

22 It then addressed the general rule of non-liability for
23 independent contractors and said there is a well-established
24 exception to the general rule of non-liability where injury
25 results in the means or the manner of the activity of the

1 owner done by an independent contractor or not may be found
2 to be inherently or intrinsically dangerous to others. Okay?

3 And this case is important because of the analysis of
4 the exception that the Supreme Court had, Your Honor. It
5 considered that the factor -- the, quote/unquote, factor that
6 the liability was important in such cases depends upon his
7 antecedent knowledge of the danger inherent in the work or
8 find that an average reasonably prudent man or corporation
9 should in exercising due diligence have known.

10 Your Honor, going back to the stipulated facts, Lance
11 Robertson is the shipping manager. He is the go-to guy, the
12 man that is responsible for all shipping of Florence
13 Concrete's products. He admitted under oath. He testified
14 that hauling an oversize load at hours that aren't allowed by
15 permit are inherently dangerous and are at a risk to the
16 public. Your Honor, that's stipulated to.

17 So when we talk about the *Allison* case and the
18 antecedent knowledge, he knew it. They knew it. Everybody
19 knew it. They just simply didn't think it was important to
20 monitor their lot, Your Honor.

21 Now, I think what differentiates this case, a big issue
22 in that *Allison* case with our case is that in *Allison* this
23 was a one-time installation, Your Honor, one time, a one-time
24 installation for these new gas boilers. Okay?

25 You've got a vast difference in this case, Your Honor.

1 They've been doing business since 1992 and still are doing
2 business from what I hear, Your Honor. They haul -- 50 to 70
3 percent of the loads they haul are oversize in nature, Your
4 Honor. This happens all the time, and they still leave these
5 lots unmonitored, even though they know it's dangerous and
6 they're right in the middle of downtown Sumter. They know
7 this, that there are restrictions. They know it, but they
8 still leave it unmonitored, and this is repetitive. It's not
9 an isolated event.

10 Now, the next case that we've cited, Your Honor -- and I
11 think this is important. All of these are important cases,
12 but they kind of give you different angling used to look at
13 them, and I'll tell you I'll stop right now because I do want
14 to mention this.

15 When you go through the body of case law that we've
16 cited and, of course, a lot of the cases the defendants have
17 cited, the one common theme throughout all of them, even
18 though there's different ways to look at it and articulate
19 it, Your Honor, the one common theme between all of these
20 cases is that the rationale that the Court uses is based upon
21 particular facts of the case in every single one.

22 So there's no general template they try to fit all the
23 facts through. It's based upon the particular facts of the
24 case, Your Honor, and when you look at the particular facts
25 of this case, this case is very nuanced, Your Honor, very

1 nuated. I mean it took us a significant amount of discovery
2 to get to and prove these points, but when we did, we found a
3 big problem, and the big problem is that Florence Concrete
4 had their head in the sand and they were literally asleep at
5 the wheel. Head in the sand and asleep at the wheel.

6 Now, in looking in this *Alexander v. Seaboard Air Line*
7 *Railroad Company* case that we've cited, this was a case that
8 involved a railroad company, Your Honor, and, you know,
9 around the railroad tracks they hired an independent
10 contractor to spray weed killer out there. And as you know,
11 you can't have weeds and bushes and trees growing up around
12 the railroad tracks because back in 1952 when this case came
13 out, you know, we didn't have all the fancy, you know, lights
14 and all this stuff. I mean a lot of these were on back rural
15 roads and you could come up on a railroad track and, you
16 know, a train was right on top of you before you knew it.

17 So they sprayed weed killer out there. Okay? Now, the
18 only problem is when they were going to hire this company,
19 Spray Services, Inc., to spray the weed killer, it was near a
20 cotton field, Your Honor, and the problem is when they
21 sprayed the weed killer, it killed a lot of the cotton in
22 that field. And so Alexander sued the railroad company
23 alleging it knew the spray was destructive to growing plants
24 and it placed the spraying under the control of a negligent
25 entity. Okay?

1 Now, let's stop right there. The railroad company
2 wasn't in the business of manufacturing pesticides. They
3 weren't in the business of, you know, spraying pesticides and
4 all these weed killers, Your Honor. They were in the
5 business of running a railroad, but guess what?

6 The Supreme Court -- or the jury in that case returned a
7 verdict for the plaintiff and the railroad appealed, raising
8 as an issue that they hired an independent contractor to
9 spray that weed killer on that -- those weeds and, therefore,
10 they are responsible for killing the cotton. The Supreme
11 Court stated an exception to the general rule that an
12 employer is not liable for the negligence of an independent
13 contractor. Liability cannot be evaded by employing an
14 independent contractor to do work which is inherently or
15 intrinsically dangerous unless the proper precautions are
16 taken.

17 In arriving at that conclusion, Your Honor, the Court
18 considered whether the railroad knew or could have learned by
19 reasonable inquiry of the injurious effect of weed killer.
20 And then guess what? They affirmed that jury verdict
21 because, yeah, they said that the railroad could have known
22 about it. They knew that that stuff could kill, you know,
23 cotton or whatever else it was sprayed on, not just the weeds
24 that it was sprayed on.

25 Now, also the rationale was the fact that day it was

1 windy. Okay? And the Court looked at that and said, well,
2 it was a windy day. They should have known they shouldn't
3 have been spraying weed killer that day.

4 Well, look at this particular day. It was 3 o'clock in
5 the afternoon. That was the last time that a load could have
6 -- an oversize load could have left Sumter's lot, 3 o'clock
7 in the afternoon. And lo and behold, about two hours later,
8 two hours and two minutes later, at 5:02 p.m. the load was
9 rolling right off their lot. That's the particular facts of
10 the case that we're talking about here, Your Honor, and why
11 it's such a big deal and why it goes in line with these cases
12 from the Supreme Court.

13 Now, *Duane v. Presley Construction* is the next case I
14 want to talk about, Your Honor. The *Duane v. Presley*
15 *Construction* case is actually one of the few cases that we
16 have cited in both our briefs, although I find it interesting
17 that the defendants only cited the first half of the quote
18 and they left out the second half, and I think it's a big
19 second half, Your Honor, because *Duane v. Presley*
20 *Construction*, which was decided by our Supreme Court in 1978
21 which is still good case law, stated that generally an
22 employer is not liable for the torts of an independent
23 contractor committed in the performance of contracted work,
24 but it is responsible, however, if an injury is caused by his
25 own negligence in failing to take preventive measures.

1 Your Honor, they left out that second part of the quote.
2 It's in their brief. They cited the first part, the general
3 rule that an owner can't be liable for an independent
4 contractor's negligence. They just decided to leave out that
5 second part. Okay? Your Honor, just like they decided to
6 leave out the two hours in their facts. These are all
7 important parts, and they fall in line with the current
8 existing case law in the body of case law in South Carolina,
9 Your Honor.

10 In that case, in the *Duane* case, there was a developer
11 who hired a construction company to clear his land, Your
12 Honor, and he hired the independent contractor to do all the
13 clearing. What happened was is when they went to clear the
14 land, there was a washing of silt into a pond of an adjacent
15 neighbor. Okay? The Supreme Court said that even though --
16 even though the developer hired an independent contractor to
17 handle the clearing, the developer was still liable for that
18 because they failed to take any preventive measures before
19 the independent contractor did his work.

20 That's exactly what we're dealing with here, Your Honor.
21 That case is the most important case to this claim that we're
22 making, Your Honor, and that's why I made a point to mention
23 in the brief that it wasn't two minutes. It was two hours
24 and two minutes.

25 Now, it could have been two seconds, Your Honor, but if

1 it was two seconds late, it's still illegal according to the
2 South Carolina Department of Transportation. He still could
3 have been cited for it, but we're not talking about two
4 seconds. We're not talking about two minutes. We're talking
5 about two hours and two minutes late.

6 In support of those cases, Your Honor, you know, that
7 was the case law before the Restatement Section 416, the
8 Second -- Restatement (Second) came out. That was the body
9 of case law already in South Carolina before that Restatement
10 came out. And when you look at Restatement 416, which by the
11 way South Carolina hasn't adopted because we've already got
12 the case law that says it, but it even uses an unsafe load as
13 an example.

14 If a contractor is employed to transport an employer's
15 goods by truck over a public highway, the employer is not
16 liable for the contractor's failure to inspect the brakes on
17 his truck or for his driving in excess of the speed limit
18 because the risk is in no way curable and only ordinary
19 precautions called for. But if the contractor is employed to
20 transport giant logs weighing several tons over the highway,
21 the employer will be subject to liability for the
22 contractor's failure to take special precautions to anchor
23 them on his trucks. Your Honor, the cases that I've gone
24 over all -- are all cited there under Restatement Section 416
25 and, coincidentally enough, it uses an unsafe load as an

1 example.

2 So in sum, Your Honor, those cases I think set forth why
3 we made this claim. It's the biggest issue in this case.
4 They spend half their memorandum time talking about vicarious
5 liability through nondelegable duties, Your Honor. We are
6 not claiming that. I'll make their job easy. I'll make that
7 job easier. We're not talking about that, Your Honor. We've
8 never mentioned that. I don't think it's ever been mentioned
9 from day one since the original summons and complaint was
10 filed in this case.

11 We are talking about their own negligence. We are
12 talking about their own failure to take preventive measures.
13 We are talking about their own failure to take precautionary
14 measures when they know that dangerous work is being
15 performed in hauling oversize loads. We're -- they know it
16 requires a special permit to be signed and has special travel
17 restrictions on it, Your Honor.

18 It's called sticking your head in the sand and not
19 caring a thing about it, Your Honor. Had they done one
20 thing, one thing to keep that lot -- that load from leaving
21 the lot that day, one thing, Mr. Nelson wouldn't be a
22 quadriplegic, Your Honor. He would not be a quadriplegic.
23 One thing.

24 The alternative that we've offered, Your Honor, for
25 creating a duty is this theory of reasonable care in the

1 selection of an independent contractor, Your Honor, and the
2 body of case law on this area goes back even longer. We're
3 talking 150 years, Your Honor. The case that we've cited is
4 *Conlin v. City Council of Charleston*. That case is from
5 1868, and it is still good case law.

6 The facts in that case are as such. Mr. Conlin fell
7 through open trapdoors in a church steeple and died, Your
8 Honor. He worked as a steepleman for a steeple controlled by
9 the Charleston City Council.

10 City Council hired an alleged independent contractor to
11 put a bell in the steeple, Your Honor, and the contractor
12 that they hired left the doors -- the trapdoors open so that
13 when Mr. Conlin came in at night to do his work, he fell
14 through the trapdoors all the way to the ground of the church
15 and died. Okay? His widow is the one that brought an action
16 against City Council. Okay?

17 On appeal the Supreme Court granted a new trial on the
18 basis that the jury instructions seemed to have held that the
19 contractor must have had exclusive possession of the steeple
20 to qualify as an independent contractor when the law required
21 only that he have had such control of the place as was
22 convenient for doing the job.

23 In the independent contractor discussion, this is very
24 important, Your Honor. The Court stated that under suitable
25 allegations the owner might be made responsible for the

1 misconduct or negligence of a contractor who is known to be
2 unworthy of trust to whom a work involving a danger to others
3 was entrusted, Your Honor.

4 And I'm going to repeat that because that's very
5 important. Back in 1868 they said you could be liable for
6 the independent contractor's work if that -- the negligence
7 of that contractor, known to be unworthy of trust, to whom
8 work involving danger to others was entrusted.

9 Your Honor, that's exactly what we're dealing with here.
10 Nesbitt -- there's no argument Nesbitt Transportation was
11 negligent. We know they were. They were hauling at times
12 they shouldn't have been the road. Okay? We also know they
13 were unworthy of trust.

14 Why were they unworthy of trust? Because the only
15 regulatory agency that our country has, the Federal Motor
16 Carrier Safety Administration who conducts all the safety
17 audits and regulates that industry, said that they did not
18 have the adequate controls in place to adhere to the safety
19 fitness standard.

20 They said it. The regulatory agency did. It was right
21 there right on their website. Your Honor, if you Google it,
22 you can go to the website and you can look it up. You can
23 find out the safety ratings and the safety history of every
24 single motor carrier in this country. Okay?

25 Now, I want to mention that because in the FMCSA, there

1 are three safety ratings that you can obtain as a motor
2 carrier. The first is a satisfactory rating. That's the
3 highest rating available, and it says that it's a safety
4 rating that says the carrier has adequate safety measures and
5 controls in place to ensure that its operations are conducted
6 in compliance with the Federal Motor Carrier Safety
7 Regulations. Okay?

8 The next level, which is the next level down which is
9 the one that Nesbitt had, was a conditional safety rating.
10 It means safety -- excuse me. It means the carrier lacks
11 adequate safety measures and controls to ensure compliance
12 with the Federal Motor Carrier Safety Regulations, which
13 could result in one or more of the safety fitness standard
14 issues being violated.

15 Now, they actually list several potential violations
16 that can occur if someone has a conditional safety rating.
17 I'm going to -- I'm going to just read through some of these,
18 Judge, because they're all applicable.

19 Commercial driver's license standard violation.

20 Inadequate levels of financial responsibility.

21 The use of unqualified drivers.

22 Improper use in driving of motor vehicles.

23 Unsafe vehicles operating on the highways.

24 Failure to maintain accident registers and copies of
25 accident reports.

1 The use of fatigued drivers.

2 Inadequate inspection of repair and maintenance of
3 vehicles.

4 Transportation of hazardous materials driving and
5 parking rule violations.

6 Violation of hazardous materials regulations.

7 Motor vehicle accidents and hazardous materials
8 incidents.

9 Your Honor, this is all public information. Certainly,
10 you would think it would be incumbent upon a shipping manager
11 who controls the shipping for a major corporation like
12 Florence Concrete to be familiar with this. He didn't even
13 know, hadn't even heard of it, Your Honor, and the issue in
14 this case is exactly what we're dealing with, hauling -- you
15 know, violating regulations, violating permits, driving
16 recklessly, causing an accident. Those are the exact issues
17 that all of these are pertaining to, Your Honor.

18 Now, I mentioned one other rating, and that's the --
19 that's the unsatisfactory rating, which is the one that's
20 below conditional. An unsatisfactory rating means that the
21 carrier lacks adequate management controls to ensure
22 compliance with the FMCSRs which has resulted in one or more
23 of the safety fitness standard issues above.

24 So, you know, again, unsatisfactory, you've got
25 problems, and a conditional rating, you've got problems as

1 well. Okay? And then all of that information was readily
2 available to the shipping manager for Florence Concrete, Your
3 Honor.

4 There's a case right now that is pending before the
5 Supreme Court. It's the *Ruh* case. Okay? It's a case that
6 we have mentioned and it's a case that they've cited as well,
7 and surely they would cite this.

8 Your Honor, it arose out of the division of Rock Hill,
9 the Rick Hill division of the United States District Court in
10 South Carolina. It involved a motor carrier that was hauling
11 scrap metal. Okay? It wasn't an oversize load. It was just
12 a simple standard load full of scrap metal.

13 An accident was caused when the driver was driving this
14 truck, and the plaintiffs sued not only the motor carrier for
15 negligence but sued the group that hired the motor carrier to
16 haul the scrap metal. Okay? Basically what we have here.

17 The only difference is the plaintiff in that case was
18 not -- is not a quadriplegic and the facts are certainly
19 different, Your Honor, and again, it goes back to what I told
20 you earlier. Every case is based on a particular set of
21 facts. Okay?

22 The -- that was not an oversize load that they were
23 hauling. There were no allegations that it was out of permit
24 or being carried down the road illegally, but one thing it
25 did have in common with this case is that the carrier had a

1 conditional safety rating. It had violated numerous safety
2 regulation, as has Nesbitt Transportation in this case.

3 And so in the *Ruh* case, the district judge granted the
4 motion to dismiss -- okay? -- based upon this negligent
5 selection of an independent contractor cause of action not
6 being allowed as a cause of action in South Carolina. The
7 case was appealed, and the Fourth Circuit has now certified a
8 question to the South Carolina Supreme Court asking them to
9 determine whether the current body of South Carolina law
10 would recognize a cause of action for a negligent selection
11 of an independent contractor.

12 The case at the heart of that is the *Conlin v. City*
13 *Council of Charleston* case, Your Honor, the one that I just
14 spoke about. That is at the heart of that case. So the
15 Supreme Court is going to be taking that up.

16 But, Your Honor, we would even submit that that case is
17 on appeal. Okay? That case has no mandatory authority right
18 now. Okay? We've attached as an exhibit to our order an
19 order from Judge Carmen Mullen down in Beaufort -- Beaufort
20 County, Your Honor, where she denied a motion for summary
21 judgment in that case and she -- it was based upon a timber
22 company. Okay? A company that was hauling logs. All right?
23 And then a wreck happened and -- bear with me here, Your
24 Honor.

25 THE COURT: Yes.

1 MR. NANCE: But in any event, the plaintiff made the
2 same claims that we're making in this case, very similar type
3 claims that it was a negligent selection of an independent
4 contractor. In that case there were allegations that the guy
5 didn't have a proper license and things like that.

6 And citing the Restatement Section 411, which I'll get
7 to that in a second, Carmen Mullen said, yeah, there are
8 inferences here that can be drawn that there was negligence
9 in selecting this motor carrier and, as a result, this case
10 has to be decided by a jury. It can't -- I can't grant
11 summary judgment on this case. Okay?

12 So I mention that, Your Honor, because that case is a
13 perfect example for a trial judge to look at to say you know
14 what? We're not siding with them. There are certainly
15 issues here.

16 And again, I'll go back to what we said initially.
17 Proximate cause has already been stipulated to. Damages have
18 already been stipulated to. The Court can decide this as a
19 matter of law. So based upon that, we've had other trial
20 judges in our state, Your Honor, that have denied summary
21 judgment. We've already gotten proximate cause and damages
22 proven. So that -- this case is ripe for the Court to make a
23 decision on.

24 Now, in -- I mentioned the Restatement (Second) of Torts
25 411, Your Honor. That -- that is a Restatement that has not

1 been fully adopted in this state.

2 Now, in our -- in discussing that *Ruh* opinion, I think
3 it is, you know, certainly persuasive here to keep in mind
4 too. That case is within the District of South Carolina.
5 The District of South Carolina is within the Fourth Circuit.
6 Every state within the Fourth Circuit has formally recognized
7 a negligent selection of an independent contractor claim.

8 South Carolina has a body of case law and I think the
9 *Ruh* case is going to be ripe for South Carolina finally
10 coming down and saying, but our position is, Your Honor, we
11 don't need *Ruh*. You don't need that because for purposes of
12 today your job is to solely decide whether there was a duty
13 and they breached that duty, and I think based upon that
14 Tuten order, you certainly can do that, Your Honor.

15 Section 411 of the Restatement says an employer is
16 subject to liability for physical harm to third persons
17 caused by its failure to exercise reasonable care to employ a
18 competent and careful contractor (a) to do work which will
19 involve a risk of physical harm unless it is skillfully or
20 carefully done. Okay? Or to perform any duties which the
21 employer owes to third persons.

22 Your Honor, we actually -- this case would fall under
23 Subsection A of Section 411 of the Restatement, to do work
24 which would involve a risk of physical harm unless it is
25 skillfully and carefully done.

1 Your Honor, you're not going to hear us stand up and say
2 that hauling a standard load of metal scrap is necessarily
3 inherently dangerous. What you are going to hear us say is
4 how our case differs from that. Our case is different
5 because it was a cement slab 72 feet in length, 72 feet in
6 length. Your Honor, that's much longer than this -- it's
7 probably roughly the size of this courtroom, the length of
8 it.

9 That the South Carolina Department of Transportation
10 says that work is dangerous, you have to have a permit to
11 haul that down the road, and you can only travel at certain
12 periods of day. It has to be skillfully and carefully done,
13 Your Honor. So again, even under Section 411, we believe
14 that that rationale applies. They're locked in here too.

15 And again, I keep going back to this. The Court is not
16 asked to determine proximate cause and damages. They're
17 simply asked to determine whether there was a duty beyond
18 what has already been prescribed in the question and whether
19 there was a breach of that duty.

20 Your Honor, in addressing this negligent selection cause
21 of action, I do want to state some things about the
22 defendant's position based upon their memorandum. And again,
23 this is -- we agreed to kind of give a reply instead of doing
24 briefs.

25 In their section, Your Honor, they've taken the position

1 of comparing a negligent hiring claim in South Carolina to a
2 negligent selection of an independent contractor claim, Your
3 Honor, and all of the cases they cite deal with negligent
4 hiring. Okay? Negligent hiring of an employee, not
5 negligent selection of an independent contractor, Your Honor.

6 They've almost by doing that -- I say almost. They
7 have. They're arguing that South Carolina should adopt this
8 theory that the same rationale for negligent hiring should
9 apply to the negligent hiring of an independent contractor,
10 and they've proposed some causal link and there's no
11 proximate cause in this case, Your Honor.

12 Again, that's not before the Court. What's before the
13 Court is whether there was a duty beyond what's prescribed in
14 that question and whether there was a breach of that duty. I
15 would respectfully request that the Court don't get confused
16 with these causal links and proximate cause that they've
17 cited in negligent hiring. Your Honor, that's an entirely
18 separate cause of action.

19 If you go back through these cases in the Fourth Circuit
20 Federal Court that have all adopted negligent hiring of
21 independent contractors, in those cases they cite that
22 checking the safety statistics is something that a reasonably
23 prudent and a reasonably careful shipper or broker should do,
24 Your Honor.

25 They don't want to mention that stuff. They know the

1 same law. In fact, one of the attorneys is from Virginia.
2 He knows what the law is up there. It's reasonable to check
3 the safety statistics. It's reasonable to go to that free
4 website that costs something and check, hey, these people
5 we're doing business with, are they safe?

6 Because again, we're not hiring them to haul metal
7 scrap. We're hiring them to haul 50 to 70 percent of our
8 fabricated work that is oversize, 50 to 70 percent of our
9 oversize work that South Carolina says -- the Department of
10 Transportation says you've got to have a permit to haul. You
11 can't travel certain times of day.

12 They did nothing but do business on a smile and a
13 handshake, Your Honor, no written contract, no qualification
14 process, don't even know what the FMCSA is, no vetting,
15 nothing, nothing. They did nothing.

16 They are going to stand up here in a few moments and
17 argue that all we have to do, you know, is check and make
18 sure that they're properly licensed by the Federal Motor
19 Carrier Safety Administration as a motor carrier, Your Honor,
20 they have proper insurance as is required under the law, and
21 they've got a valid permit.

22 Your Honor, they didn't even do that. You know why?
23 Because they didn't have a valid permit to operate that day.
24 It wasn't even signed.

25 And why are we here, Your Honor? You know, we're here

1 because of this, Your Honor, this man sitting behind me, this
2 young man sitting beside me. I've lived this case, as has
3 Linward, Kathleen recently, Sandra is living every day. I've
4 been with him since about a month after the accident, Your
5 Honor. He's a quadriplegic.

6 The things that we take for granted, getting up every
7 single day, getting out of your bed, brushing your teeth,
8 taking a shower to get here to court, just for them to get
9 here today, for him to put that suit on, Your Honor, it is
10 something that takes a minute's work. It takes an hour for
11 two or three people, 24/7.

12 All they had to do was simply get their head out of the
13 sand and monitor that lot. That's at a minimum, not to
14 mention the other stuff we've talked about, responsible
15 contracting.

16 That day, that particular day under the particular facts
17 of this case, all they had to do what say, Mr. Rouse, you
18 can't be on the road right now. That's all they had to say,
19 and this accident could have never happened because that load
20 would not have been on the road until 9 o'clock the next
21 morning, well after this accident occurred.

22 Mr. Nelson was on his way to work that morning, Your
23 Honor, pitch-black dark, and he encountered a hazard that I
24 hope nobody ever has to go through. He's lucky to be alive,
25 but he's here and he has a purpose. I've told him that.

1 The bare minimum -- the bare minimum of a precautionary
2 measure would have prevented all of this. They know it.
3 That's why they don't talk about it in their brief, Your
4 Honor. Absent from their brief is everything about the
5 inherent danger exception. Absent from their brief is their
6 own negligence. You won't see that there because they know
7 it's staring them right in the face. Absent from their brief
8 -- and they call it a mistake -- is the fact that they were
9 on the road two hours and two minutes after it should've been
10 on the road.

11 They know the facts of the case. I'd love to show you
12 the emails that Mr. Livoti and I have exchanged about that.
13 They know. They know what they're doing. They're trying to
14 distract the issues. Good thing is we've got it stipulated,
15 it's in an order, and that's an issue before the Court.

16 So, Your Honor, what we are asking the Court to do --
17 and I'm going to have -- if Your Honor is okay with it, I'm
18 going to have Ms. Barnes stand up here in a second and go
19 through a couple of nuances with you.

20 Okay. Ms. Barnes will handle the reply, Your Honor.
21 Okay?

22 THE COURT: Okay.

23 MR. NANCE: What we're asking the Court to do -- we have
24 two independent grounds, Your Honor. The first is, again,
25 that they had a duty to exercise proper precautions to

1 conduct the work of hauling -- inherently dangerous work of
2 hauling an oversize load on a public road, a major road.
3 We're asking the Court to say, yes, you had a duty to them.
4 We're also asking the Court to say, yes, you breached that
5 duty.

6 Your Honor, on the second independent ground, we're
7 saying -- we are asking the Court to say, yes, you had a duty
8 at law to not negligently select an independent contractor.
9 You had a duty to do that. In this particular case with
10 these particular sets of facts, we're also asking the Court
11 to say, yes, you breached that duty. We're asking for an
12 affirmative under both theories for both questions, Your
13 Honor.

14 THE COURT: All right. All right. These are important
15 matters.

16 Ms. Barnes, if you'd like to say anything at this
17 juncture, I'll allow everybody to. You know, these are very
18 important matters. I'll allow anybody that would like to
19 speak.

20 MS. BARNES: Thank you, Your Honor. I think a lot of
21 what I plan to talk about is actually a response to their --

22 THE COURT: Okay.

23 MS. BARNES: -- argument. So it might -- it might flow
24 and make a little bit better sense going and --

25 THE COURT: Okay.

1 MS. BARNES: -- letting Mr. Livoti talk and then I'll
2 start after that, but thank you.

3 THE COURT: We'll give everybody an opportunity to talk.
4 Mr. Livoti?

5 MR. LIVOTI: May it please the Court, Your Honor.

6 THE COURT: Yes.

7 MR. LIVOTI: Your Honor, I'm Anthony Livoti with the law
8 firm of Murphy & Grantland here on behalf of Florence
9 Concrete. With me is Cordes Kennedy and John Owen, who is
10 from Richmond, Virginia.

11 THE COURT: Good to have you here.

12 MR. OWEN: Thank you, Your Honor.

13 MR. LIVOTI: Your Honor, what I'd like to do is rather
14 than go through a full recitation of the facts, I would like
15 to just highlight some things because I think it's pretty
16 well-established what exactly the facts are here.

17 But the thing I'd like to start with is that in coming
18 to this Court, basically the plaintiff is asking this Court
19 to find that Florence Concrete is liable, to ignore the long-
20 standing rule that an entity like Florence Concrete is not
21 liable for the negligent acts of its independent contractors.

22 And also, Your Honor, that this case does not fit into
23 any of the narrow exceptions, to include whether or not that
24 activity is inherently dangerous or intrinsically dangerous,
25 and that inherently dangerous or intrinsically dangerous

1 exception to this long-standing rule that the plaintiffs --
2 that the defendants have talked about has never been applied
3 in the transportation context, and we'll talk a little bit
4 about that.

5 And so for these reasons, Your Honor, we want the Court
6 to answer the question of whether or not there was a duty
7 owed by Florence Concrete no and also answer the question as
8 to whether -- if the Court does, in fact, find a duty was
9 owed that the duty was not breached.

10 Your Honor, with respect to the facts of the case,
11 there's no question that this load was an oversize load and
12 it was placed by Florence Concrete on a trailer provided by
13 Nesbitt Transportation on January 3rd, 2019. That load and
14 that trailer was at a lot that is unmanned and unmonitored.

15 And, Your Honor, I was making some notes of some of the
16 things that Mr. Nance was talking about. He was talking
17 about the fact of at the time that this was picked up
18 somewhere around 5 o'clock in the afternoon, this was during
19 business hours that somebody should've been there. There's
20 no stipulation about that in the facts.

21 The only thing that is stipulated in this is that it is
22 an unmanned lot and it is a lot where the loads are picked up
23 or placed for them to be picked up by the transportation
24 company. So -- so this is not -- there isn't any facts that
25 are in the record that this is a manned lot or a monitored

1 lot and, of course, there's actually no duty on the part of
2 Florence Concrete to have that lot manned.

3 Your Honor, some of the other things that were discussed
4 with respect to the conditional safety rating I'll address
5 later, but as the facts are, Mr. Rouse came and picked up
6 that load at 5:02 p.m. on January 3rd. Under the terms of
7 the permit, the load is not allowed to be on the road within
8 30 minutes of sunrise or sunset and also during these hours
9 if the area where this load would be transported is in close
10 proximity to a large urban area.

11 It's been stipulated to that because this area would
12 have been in close proximity to Sumter, it counted as a large
13 urban area. The load could not be on the -- on the road
14 after 3 p.m. on January 3rd.

15 Rouse picks up the load, leaves the lot, drives to a
16 place close to his home near Lynchburg, South Carolina, parks
17 the load overnight. He makes the decision independent of
18 Florence Concrete or anybody else to get on the road at
19 roughly 6:30 in the morning on January 4th, acknowledged that
20 that is a time that the load could not have been on the road.
21 It could not have been on the road until 9 a.m., but that's a
22 decision that Rouse and Nesbitt Transportation made.

23 And, Your Honor, just to jump into this little bit of an
24 argument here in terms of talking about the facts, Mr. Nance
25 makes a big deal out of the fact that the load left Florence

1 Concrete's possession at a time where it should not have been
2 on the road. If the load had left Florence Concrete at some
3 time before 3 o'clock on the afternoon of January 3rd and
4 Rouse drove it while permitted to be on the road before 3
5 o'clock and still took the same action and stopped off at his
6 house to get on the road the next morning, the decision by
7 Rouse to violate the terms of the permit are all on Rouse and
8 Nesbitt. Florence Concrete would not be liable for that act
9 of negligence.

10 So this whole idea of the lot -- the load leaving an
11 unmanned lot, Your Honor, is -- is really irrelevant because
12 it's all of the negligent actions of Rouse in transporting
13 this on the day that this accident happened that is really
14 the only relevant inquiry.

15 So, Your Honor, in terms of the rest of the facts, I'm
16 going to address some of those facts as we go along with our
17 argument.

18 Your Honor, the thing that we want to highlight to the
19 Court -- or several things. Number one, Florence Concrete
20 does not owe a duty. It does not owe a duty to Mr. Nelson
21 under this set of facts. Florence Concrete is also not
22 liable for the negligent acts of its independent contractor.
23 That is the general law in this state.

24 There are some exceptions to that general rule that
25 somebody like Florence Concrete would be liable for the

1 negligent acts of its independent contractor. Nondelegable
2 duty is one of those exceptions. The other exception is if
3 the conduct by the independent contractor is inherently
4 dangerous or intrinsically dangerous work. It's because an
5 owner whose work is inherently dangerous or intrinsically
6 dangerous still has an absolute duty to others to make sure
7 that that is carried out correctly.

8 And, Your Honor, what we would argue is that this act
9 and this work is not inherently dangerous. So, therefore,
10 there still is no duty that would fall within this exception
11 to the inherently dangerous and intrinsically dangerous
12 exception.

13 THE COURT: How long --

14 MR. LIVOTI: It is an exception --

15 THE COURT: How long was the trailer, this particular
16 trailer?

17 MR. LIVOTI: I believe the trailer was -- the load was
18 72 feet. That's been stipulated to in the facts.

19 THE COURT: That's what I thought.

20 MR. LIVOTI: 72 feet by 24 inches.

21 THE COURT: Okay.

22 MR. LIVOTI: Whether that was the -- that was the length
23 of the load, 72-feet and 24-inch concrete slab.

24 THE COURT: All right.

25 MR. LIVOTI: Any other questions on that, Your Honor?

1 THE COURT: No.

2 MR. LIVOTI: And then because this is not an inherently
3 dangerous activity, there's no exception to that and, Your
4 Honor, there just isn't a cause of action recognized for
5 negligent selection of a contractor in this scenario. And
6 even so, Your Honor, there's just an insufficient record to
7 put Florence Concrete on notice of any issues with respect to
8 that, and I will address those things as we go along.

9 Your Honor, I believe Mr. -- Mr. Nance has done a good
10 job of outlining why we're here. We're on cross motions for
11 summary judgment, Your Honor. We've filed a motion actually
12 that this could also be just viewed as a nonjury trial held
13 on stipulated facts, but either way the question is just
14 simply a question of law to be answered by the Court, and
15 those are those two stipulated questions that we have.

16 Your Honor, let me first address the issue of why
17 Florence Concrete does not have a duty. And again, Your
18 Honor, the plaintiffs just completely jump over this question
19 as to whether a duty exists and use this -- their reading of
20 the question presented as if there's somehow an admission on
21 the part of Florence Concrete that a duty exists.

22 Your Honor, no duty exists, and we would point out the
23 *Oulla* case. It's actually spelled O-u-l-l-a -- v. *Velazques*,
24 and we cite that -- we cite that in our memorandum. Your
25 Honor, I think this case is instructive as to why Florence

1 Concrete did not owe a duty to Mr. Nelson in this situation.

2 Very briefly about the facts of that case, Harbison
3 Community Associates is an organization up in the northeast
4 part of Columbia. They needed to buy some sod from Super-Sod
5 down in Orangeburg. They sent a flatbed truck and two
6 employees from Harbison down to Orangeburg to pick up two
7 pallets of sod.

8 They got to -- they got to Super-Sod in Orangeburg. The
9 pallets of sod were shrink-wrapped. The employees from
10 Harbison said put the sod on this flatbed trailer and put it
11 over here. Super-Sod complied and did that. The employees
12 then said we need straps to tie this down. We've got to tie
13 this load down. We don't have -- we didn't bring any straps.
14 Super-Sod, do you guys have any straps? No, we didn't have
15 any straps either.

16 So the law requires that the load be secured. Despite
17 that, the driver from Harbison left the Super-Sod location
18 and started heading back up to Columbia, and the Super-Sod
19 employees knew that the load was not secured.

20 Of course, when the driver of the load gets on the
21 interstate, a vehicle pulls into his lane of travel. He has
22 to swerve. The sod goes off the back of the truck, gets into
23 the lane of travel. Emergency crews are called to clean up
24 the load, to clean up the debris.

25 As you all well know, on I-26 traffic begins to back up.

1 In that back-up traffic, the plaintiffs, the Oullas, has
2 stopped in that stop-and-go traffic that was going on.
3 Velazques runs into the back of Oulla, causing an injury.

4 The plaintiffs sued Harbison, who was the driver of that
5 sod truck, they sued Velazques, who struck the plaintiffs,
6 and they sued Super-Sod. And the allegations against Super-
7 Sod were that because Super-Sod loaded the trailer that they
8 owed a duty to the plaintiff and because they let that
9 trailer leave their facility unstrapped.

10 Your Honor, the Court looked at that because the
11 plaintiffs argued under South Carolina Code 56-5-4110 that
12 the load -- they argued that the loader had the duty to make
13 sure it was secured. Your Honor, that statute actually says
14 that the owner or the operator of the vehicle is the one who
15 owes the duty. So the Court looked at that and said that is
16 not a sufficient duty. There's no duty imposed on Super-Sod
17 in that situation to comply with the statute. So the Court
18 granted summary judgment and rejected that argument.

19 So even though Super-Sod knew that the load was
20 unsecured when it left its facility, the Court said that is
21 not a breach of any duty that was owed to the plaintiff.
22 That's instructive here because the plaintiffs continue to
23 argue that Florence Concrete knew or should have known that
24 the load left their unmanned facility and was being done at a
25 time that violated the terms of the permit.

1 Your Honor, the obligation to comply with the permit
2 with the times that that load should need to be moved is on
3 the permittee. The permittee is Nesbitt Transportation. It
4 is not Florence Concrete. So all the duties and obligations
5 of the movement and compliance with that, those are all on
6 Nesbitt, not on Florence Concrete. That is the same analysis
7 that the Court applied in the *Oulla* case, and the Court
8 should apply that analysis here to find that there is no duty
9 owed.

10 So the Court -- the plaintiffs in that case -- they
11 argued under the common law, well, this activity that was
12 done negligently could be dangerous. It could be foreseeable
13 that unsecured pallets of sod on a truck could be a danger to
14 the public.

15 Your Honor, the Court rejected that argument. I want to
16 just focus on language because I think it's instructive.

17 Quote, foreseeability of an injury in the absence of a
18 duty to prevent that injury is an insufficient basis on which
19 to rest liability. Foreseeability does not give rise to a
20 duty. Holding Super-Sod assumed the duty of ensuring the
21 pallets were properly secured to the trailer by merely
22 placing them on the trailer as its customer directed would
23 extend the concept of duty and tort liability beyond
24 reasonable limits.

25 Although it was likely foreseeable the pallets of sod

1 were a danger to other drivers, such as the plaintiffs, if
2 they were not properly secured, our Supreme Court has
3 rejected the idea that one who undertakes a duty to render
4 services to another should recognize a duty to a third
5 person. We find the mere fact that it was foreseeable that
6 an unsecured load could be a danger to the plaintiffs and
7 other drivers is insufficient to impose liability on Super-
8 Sod under the common law.

9 Your Honor, all this -- all this reasoning is
10 instructive in this case. They are arguing -- the plaintiffs
11 are arguing because the movement of the load violated the
12 terms of the permit and happened because it left an unmanned
13 and an unmonitored lot of Florence Concrete that Florence
14 Concrete should be liable and responsible for that. Our
15 Court has said that is not the case.

16 They want to keep coming back to Mr. Robertson or
17 whoever the shipping manager is for Florence Concrete. That
18 he knew if movement is done in violation of the permit that
19 it can impose an inherent risk for danger.

20 Your Honor, that's exactly what this Court is talking
21 about. That things done negligently can be dangerous, but
22 that is not enough to trigger a duty. So under the *Oulla*
23 case, Your Honor, we think that that case is very analogous
24 to our situation. The Court has identified that there is no
25 duty on the part of an entity like Florence Concrete and so

1 we think that the Court should find that there is no duty
2 owed by Florence Concrete.

3 Your Honor, the next point we want to raise is that
4 generally an entity like Florence Concrete is not liable for
5 the negligent acts of its independent contractors. Your
6 Honor, I think everyone acknowledges it. I think I've heard
7 Mr. Nance acknowledge it that Nesbitt is an independent
8 contractor of Florence Concrete.

9 The general rule and the general law is in this state
10 and many other states that an entity like Florence Concrete
11 cannot be liable for the negligent acts of its independent
12 contractor and, Your Honor, I've already alluded to the fact
13 of why this is important. They keep harping on the fact that
14 this load was picked up at a time that violated the permit.
15 It would've been two hours after it could've been on the road
16 on January 3rd, and if the load -- and if the lot had been
17 monitored, this doesn't happen.

18 Again, if the load got picked up at 2:30 in the
19 afternoon and Rouse brought it back to his house at times
20 that were permitted under the permit, then that would have
21 been okay, but he makes the decision the next day to get on
22 the road in a time that violates the permit. That is not
23 something that Florence Concrete controlled. Those were
24 decisions that were made by Rouse, and you know what? He is
25 responsible for that act of negligence. His employer is

1 responsible for that act of negligence, not Florence
2 Concrete. So again, there's no liability for the negligent
3 acts of Florence Concrete's independent contractor, which was
4 Nesbitt.

5 Your Honor, there are exceptions to that rule. These
6 are the exceptions of the nondelegable duty and whether or
7 not the work being done by the independent contractor is
8 inherently dangerous or intrinsically dangerous. Those are
9 the exceptions to the general rule that there would not be
10 any liability as to Florence Concrete.

11 I heard Mr. Nance say that they're not arguing that this
12 falls into the nondelegable duty doctrine. So I don't need
13 to go through all of what those exceptions are because none
14 of those exceptions apply here anyway, but the inherently
15 dangerous and the intrinsically dangerous work is an
16 exception to this general rule.

17 So the work that is being done by Nesbitt, the work of
18 Florence Concrete has to be inherently dangerous and it has
19 to be intrinsically dangerous and, Your Honor, for this point
20 the plaintiff simply takes two things and argues that this
21 converts this --

22 THE COURT: So --

23 MR. LIVOTI: -- core work of --

24 THE COURT: -- what -- let me ask you this.

25 MR. LIVOTI: Yes, sir.

1 THE COURT: Because I want to hear what you have to say
2 about it. If it falls within the inherent dangerous
3 situation, it means that it's almost like strict liability.
4 If something goes wrong, then the person who hired the
5 independent contractor would be liable.

6 MR. LIVOTI: Your Honor, I don't think it is a strict
7 liability analysis if it is because the case law does not
8 seem -- there still is a negligence component to it because
9 the real question is is if whether or not the proper
10 precautions are taken by the independent contractor to carry
11 out the inherently dangerous work.

12 And if the independent contractor is negligent in
13 carrying out that work, then that independent contractor
14 should be liable for that work. But, Your Honor, if the work
15 is not inherently dangerous, then that would not trigger that
16 exception.

17 I don't know if I've answered your question.

18 THE COURT: All right. Go ahead.

19 MR. LIVOTI: I don't believe -- well, I guess in getting
20 to your question is I don't think that would be strict
21 liability because, again, I don't think that the -- that the
22 courts find that it is strict liability because at this point
23 what's being -- really what is the analysis is it's a
24 vicarious liability standard because what is happening is the
25 owner is --

1 THE COURT: Yeah. That's probably more appropriate what
2 I -- yeah.

3 MR. LIVOTI: Yeah. If the owner is engaged in
4 inherently dangerous or intrinsically dangerous work because,
5 Your Honor, this still keeps getting back to whether a duty
6 exists because they've completely glossed over that question.
7 They just read the question presented as this assumption that
8 we have a duty.

9 The duty is fundamental. The duty is the threshold
10 inquiry for this Court. The duty to make sure that work that
11 is inherently dangerous or intrinsically dangerous be done is
12 because whoever does that work, the owner doing that work
13 still has an absolute duty, even though he contracts it out
14 to a subcontractor. So if the work is not inherently
15 dangerous or intrinsically dangerous, then there's no duty
16 that the -- that the owner has for the work that was
17 subcontracted.

18 THE COURT: Wouldn't you agree that a trailer that is 72
19 feet long causes a problem with getting in and out of a
20 parking lot, inherently so?

21 MR. LIVOTI: It could, Your Honor, but here's the --
22 here's the point of this, Your Honor, and I want to point to
23 -- I want to point to this because there's some language in
24 some of the cases that we have talked about that help define
25 what an inherently dangerous activity is because simply the

1 plaintiff has just gone and said that because the South
2 Carolina DOT restricts this work or restricts the movement of
3 this load to certain times during the day, daylight hours,
4 that that makes it inherently dangerous. That's not what
5 makes it inherently dangerous. It has to be the nature of
6 the work itself that is inherently dangerous, and we'll talk
7 -- I want to talk a little bit about that.

8 THE COURT: The fact that it's so long.

9 MR. LIVOTI: Pardon me?

10 THE COURT: The thing that makes it so inherently
11 dangerous is that it's so long.

12 MR. LIVOTI: Well, Your Honor, I -- the thing that makes
13 it inherently dangerous is if the activity in and of itself
14 is dangerous. For example, Your Honor, I'd like to cite the
15 Court a case that actually happened out of the Supreme Court.
16 So *Norris v. Bryant*. It's not in our materials, but I can
17 hand up a copy of the case. It is 60 S.E.2d 844.

18 That's a case where a logging truck had injured the
19 plaintiff, and the plaintiff was hanging out on the side of a
20 pickup truck. The truck that he was in was coming along a
21 narrow bridge and the logging truck passed along the vehicle
22 and severed his leg.

23 The plaintiffs argued that the timber company should be
24 liable for the acts of the independent contractor -- the acts
25 of its independent contractor, the trucking company, and they

1 made the argument that -- acknowledging the general rule,
2 they made the argument that the act of hauling heavy logs in
3 a load like that is inherently dangerous or intrinsically
4 dangerous work.

5 The Supreme Court rejected that argument. So the
6 Supreme Court said that just the act of hauling -- the act of
7 hauling logs is not intrinsically dangerous.

8 Your Honor, I would like to just cite --

9 THE COURT: But maybe it would have been if it had been
10 72 feet long.

11 MR. LIVOTI: Well, Your Honor, I want to cite to you the
12 case that we cite in our materials. It's *Fike v. Peace*.
13 This is from the Alabama Supreme Court, and this is the court
14 or one of the courts that has actually looked at this issue
15 as to whether or not hauling an oversize load is an
16 inherently dangerous or intrinsically dangerous activity.

17 Your Honor, this case out of Alabama is very instructive
18 for us because their law that they have in Alabama is nearly
19 identical to what we have. They have the general rule that
20 one is not liable for the independent -- for the negligent
21 acts of its independent contractor, but they also have this
22 exception with the inherently dangerous work.

23 The thing that was going on in this case was an injury
24 that took place when a -- when an oversize load being
25 operated on an oversize permit injured the plaintiff. Your

1 Honor, I think the language that is in that case is very --
2 is very instructive here. The Court provides some helpful
3 language, and I want to just go over it.

4 Intrinsically dangerous work is work that adheres to the
5 performance of the contract and results directly from the
6 work to be done, not from the collateral negligence of the
7 contractor.

8 And, Your Honor, the Court also looked at another case
9 out of Indiana that was very similar hauling a 48,000 steel
10 -- ton steel coil, an overweight load, and the Court in
11 Indiana found that that was not inherently dangerous or
12 intrinsically dangerous work. The Court ultimately held
13 this.

14 The accident in this case was not caused by the oversize
15 load, but by the collateral negligence of the owner and/or
16 operator of the tractor-trailer. Thus, the hauling of a
17 heavy load does not meet the definition of an inherently
18 dangerous activity because the major risk of harm from the
19 oversize load could have been alleviated if the trucking
20 company had used reasonable care. This accident could have
21 been alleviated if the trucking company had used reasonable
22 care.

23 What would reasonable care have been? It would have
24 been compliance with the terms of the permit that restricted
25 the time that it could have been on the road. If Rouse had

1 not gotten on the road before -- had waited until 9 o'clock
2 in the morning to get on the road on January 4th, this
3 accident doesn't happen, but that is an act and a decision by
4 Rouse, one that Mr. -- that Florence Concrete is not
5 responsible for. So the act and why this accident happened
6 was the ordinary negligence of the driver, Florence
7 Concrete's independent contractor, and not because the load
8 itself was oversize.

9 Your Honor, again, just because the plaintiffs say that
10 this is inherently dangerous work is -- it doesn't make it
11 so. Every -- every decision that addresses this question,
12 it's the appellate courts that look at these acts and make
13 the determination as to whether or not this work is
14 inherently dangerous or intrinsically dangerous.

15 And so we've given you examples of why courts have
16 looked at this in the transportation context and found that
17 it doesn't -- the work itself of Florence Concrete is not
18 dangerous. They manufacture concrete. They manufacture
19 concrete. They ship concrete. Sometimes it's on an oversize
20 load. Sometimes it's on a regular-size load.

21 And, Your Honor, the nature of the work itself, whether
22 it's an oversize load, is not inherently dangerous. Concrete
23 is not inherently dangerous. The fact that the load was
24 oversize is not the reason that this accident happened. In
25 fact, it has nothing to do with the concrete. The concrete

1 wasn't part of what the -- how the accident happened. It was
2 simply the negligence of Rouse in not complying with the
3 permit.

4 THE COURT: You're saying --

5 MR. LIVOTI: The obligation of --

6 THE COURT: -- that he -- if he'd have left at the
7 appropriate time, the wreck wouldn't have happened because it
8 would have been daylight?

9 MR. LIVOTI: Pardon, Your Honor?

10 THE COURT: You're saying that it was the negligence of
11 the driver for leaving too early?

12 MR. LIVOTI: Correct.

13 THE COURT: And I assume it was -- it was good and dark
14 at that time?

15 MR. LIVOTI: Yes, sir.

16 THE COURT: All right.

17 MR. LIVOTI: Yes, sir. I think we've both acknowledged
18 that in the stipulated facts. And again, that is a decision
19 and that is a negligent act that Rouse undertook and that
20 Nesbitt and Rouse are responsible for. It should not -- it
21 should not trigger liability for Florence Concrete, again,
22 because the work itself is not inherently dangerous or
23 intrinsically dangerous.

24 Your Honor, the case law that we cite and that we talk
25 about, all of the courts, even when I talked about it in the

1 *Oulla* case and the *Fisk* [sic] case, they all -- all the
2 courts talk about the fact that if something is done
3 negligently, it can be dangerous. It can pose a risk to
4 others. That's exactly what happened in this case, and the
5 -- the admission that Mr. Nance wants to continue to point to
6 to Florence Concrete is nothing more than that.

7 If the movement is in violation of a permit, do you
8 agree that that composed an inherent risk and danger to the
9 public? Well, sure, because it's in violation of the permit
10 that controls the movement. That is an act of negligence,
11 just like the *Fisk* court talked about. It's a collateral act
12 of negligence of the operator. It's not inherent and it does
13 not adhere into the work itself that makes it dangerous.

14 So, Your Honor, we think that the inherently dangerous
15 or intrinsically dangerous exception just does not apply
16 here. It's not for Mr. Nance to determine and declare that
17 it is inherently dangerous or intrinsically dangerous. It's
18 for the Court to make that determination.

19 And when other courts -- this Court talking about it in
20 the transportation context in *Norris v. Bryant*, the Alabama
21 Supreme Court in the transportation context with an oversize
22 load, the Indiana Supreme -- or the Court of Appeals with an
23 overweight load, all of those courts have looked at that.
24 The hauling of that is not inherently dangerous or
25 intrinsically dangerous and, Your Honor, we think that this

1 exception does not apply to trigger liability for -- for
2 Florence Concrete.

3 Your Honor, the last thing I want to talk about is,
4 again, the compliance with the permit. The obligation to
5 comply with the permit is all on the permittee. It's all on
6 Nesbitt.

7 Mr. Nance made a lot of discussion about the fact of the
8 permit wasn't signed. Well, that's actually not a stipulated
9 fact, but the permit is required to be signed by the
10 permittee. It's required to be signed by Nesbitt. So I
11 don't know if the permit is stuck on a -- on a load, it's the
12 obligation of the permittee to sign it and under his argument
13 and under his theory to make it valid. Again, that's an act
14 of negligence of Nesbitt for not signing it, which I think is
15 immaterial and I think it's a distraction to the ultimate
16 argument, but these are, again, all acts of negligence on the
17 part of Nesbitt and Rouse that do not adhere to -- to
18 Florence Concrete.

19 Finally, Your Honor, on the negligent selection issue,
20 he spends a lot of time talking about how *Ruh* isn't good law.
21 He talks a lot of time about this *Conlin* case and the fact
22 that the Supreme Court is being asked to adopt Section 411 of
23 the Restatement because this cause of action isn't really
24 recognized in South Carolina, but even if it is, there has to
25 be some something that would put Florence Concrete on notice

1 that the acts that gave rise to this accident were things
2 that their independent contractor routinely engaged in to
3 provide this nexus to show that there is, in fact, a breach.

4 And, Your Honor, there's just simply nothing in the
5 record to support that. The only thing that the plaintiff is
6 pointing to is the fact that Nesbitt Concrete [sic] had a
7 conditional safety rating, one that was given to them four
8 years before this accident. He continued to read all sorts
9 of things, which again were not part of the record, and
10 talking about what kind of things might give rise to a
11 conditional safety rating.

12 There's nothing in this record to show what, in fact,
13 did give rise to a conditional safety rating for Nesbitt
14 Concrete four years before this accident happened, and he
15 talks about the fact that Mr. Robertson did not know all of
16 these things going on. Your Honor, there has to be some
17 showing of knowledge on the part of Florence Concrete about
18 this conduct in order for there to be anything to show that
19 there was a breach of any duty owed for a negligent selection
20 of Nesbitt Transportation.

21 THE COURT: I think what they're maintaining is there
22 was an affirmative duty for them to look.

23 MR. LIVOTI: Your Honor, there is no -- there is no
24 affirmative duty for them to look. There's no duty.

25 THE COURT: I think that's what they're alleging.

1 MR. LIVOTI: Well, I'm sure it is because here's the --
2 here's the thing. There's nothing that prevents Florence
3 Concrete from contracting with a carrier who has a
4 conditional safety rating. That is throughout the Federal
5 Motor Carrier statutes and regulations. The fact that a
6 motor carrier gets a conditional safety rating does not
7 affect their ability to operate whatsoever.

8 And the other thing that I want to point out too is in
9 the stipulated facts he wants to talk about the fact of they
10 had this conditional safety rating for four years and he
11 didn't know about it. You know what Mr. -- you know what the
12 shipping manager did know about though?

13 The shipping manager knew about under paragraph K in the
14 stipulated facts of working with Florence Concrete since 1992
15 and had never had a major accident that caused any personal
16 injury at all. So he had 30-something years of -- 30 --
17 almost -- close to 30 years of experience in work with this
18 particular contractor and nothing would give him notice or
19 nothing would put him on notice that there was any reason why
20 he wouldn't contract with Nesbitt Transportation.

21 And again, the DOT regulations very clearly stipulate
22 that if some -- if a motor carrier has a conditional safety
23 rating, that does not impair or affect their ability to haul
24 for under contract and it does not affect their DOT operating
25 authority, Your Honor.

1 THE COURT: Now, you're saying that there's no
2 affirmative duty for them to look into why they have the
3 conditional?

4 MR. LIVOTI: No, Your Honor, I don't believe so. Now,
5 because -- because the conditional safety rating doesn't
6 impair or it doesn't affect their ability to contract with --
7 with Nesbitt Transportation because Nesbitt Transportation is
8 validly -- has a valid DOT authority and has valid operating
9 authority. So this conditional safety rating doesn't do
10 anything to impact their ability.

11 THE COURT: I'm asking you because I don't know. How do
12 you get from a conditional to a full certification --

13 MR. LIVOTI: Your Honor, I mean that --

14 THE COURT: -- because of some infraction that took
15 place or something?

16 MR. LIVOTI: That's clearly -- I mean that's obviously
17 clearly beyond the stipulated facts in terms of all of those
18 things.

19 THE COURT: So you don't know?

20 MR. LIVOTI: Well, I mean I do, but --

21 THE COURT: Okay.

22 MR. LIVOTI: -- it's -- Your Honor, the other thing I'd
23 probably point out too if we're talking about some of these
24 things is that the Federal Motor Carrier Safety
25 Administration actually does these surveys on just a very

1 small fraction of motor carriers. So this idea that, you
2 know, satisfactory and conditional and unsatisfactory --
3 they're not -- the numbers are just not there in terms of how
4 many of these carriers do -- there's actually a fairly small
5 number that actually have these safety audits, but the safety
6 audits can be -- the conditional safety rating could be
7 because of a number of things.

8 But my point in this is just because a motor carrier has
9 a conditional safety rating does not impair its ability to
10 contract. It does not impair their ability to have DOT
11 operating authority. So Nesbitt is still a valid motor
12 carrier for Florence Concrete to contract with.

13 And there's no showing in the record of all of these
14 things that Mr. Nance was reading off of something. I'm not
15 even sure what it was. It's outside the record, but there's
16 no evidence, there's no showing that any of these safety
17 violations that may have triggered this conditional safety
18 rating involve the movement of an oversize load at times that
19 weren't permitted under the permit.

20 And that is the inquiry. When you're talking about a
21 negligent selection claim, there has to be some showing that
22 the conduct by the -- by the independent contractor was of
23 the same frequency, same nature to put you on notice that you
24 shouldn't contract with them because of what ended up
25 happening in this particular accident.

1 There's no showing of that. The only thing they have is
2 it's a conditional safety rating, which does not impair their
3 ability to operate under DOT authority.

4 So, Your Honor, in conclusion, Your Honor, the other
5 thing I would point out when we're talking about inherently
6 dangerous activity and intrinsically dangerous activity of an
7 oversize trailer, Your Honor, whether this was a regular-size
8 trailer or whether this was an oversize trailer, the
9 negligence and the act of negligence of pulling out from this
10 particular lot is the -- was what happened and was the cause
11 of Mr. -- Mr. Nelson's injury.

12 It's the -- so whether it was a regular-size trailer or
13 an oversize trailer, Rouse still pulls out in front of Mr.
14 Rouse [sic] and causes this accident. So the fact -- again,
15 these are all acts of negligence on the part of Mr. Rouse and
16 Nesbitt that Florence Concrete should not be responsible for
17 or liable for.

18 So, Your Honor, I think I've spent a good bit of time
19 talking about it. We don't believe there's any duty. The
20 well-accepted rule is that an entity like Florence Concrete
21 is not liable for the negligent acts of its independent
22 contractor. This does not fit into any of the well-known
23 exceptions, most importantly the inherently dangerous or
24 intrinsically dangerous exception, for all the reasons I've
25 stated, and there's just not sufficient evidence in this

1 record to show that Florence Concrete was on notice of these
2 particular acts of negligence that would put it on notice
3 that it should not have contracted with Nesbitt -- Nesbitt
4 Transportation.

5 THE COURT: All right. Would y'all like to say
6 anything?

7 MR. OWEN: No, sir, Your Honor. Thank you very much.

8 MR. KENNEDY: Nothing at the time, Your Honor. Thank
9 you.

10 THE COURT: All right. Ms. Barnes?

11 MS. BARNES: Good morning, Judge Nettles. I want to
12 start with an objection to the last thing that Mr. Livoti
13 said, which was that the size of the load wouldn't have made
14 a difference.

15 There's nothing in the consent order about what the size
16 of the load was, where it was on the roadway, where the
17 vehicles impacted, any of those types of things. Okay? So
18 that's not in the consent order and I don't think it should
19 be part of the consideration.

20 There's also -- I'm going to try to go through his
21 argument somewhat sequentially, but he started out with
22 talking about the timing of leaving. Okay? And it wouldn't
23 have really made a difference, you know, what time he left.
24 If he left at 2 o'clock, you know, there's still -- this
25 accident still could -- could have occurred. That's not what

1 we're talking about.

2 There are very, very particular unique facts in this
3 case, which is what in our opinion makes it fall just
4 squarely within the inherent danger exception. And under the
5 very particular facts of this case, that load could not be on
6 the road from 3 p.m. until 9 a.m. So if they had left at
7 2:59, it still would've actually been illegal because it
8 couldn't have been on the road again for 18 hours or
9 something like that. But it doesn't matter what time it
10 could or couldn't have happened. It matters what time it did
11 happen in this case and why, why the accident happened, why
12 the load was on the road.

13 There's obviously back and forth about duty. Okay?
14 That -- that duty question plainly says is there a duty
15 beyond this. You didn't hear Mr. Livoti stand up and say we
16 could have chosen anybody we wanted to. It didn't matter if
17 they had insurance, if they had permits, nothing.

18 They have to acknowledge that this case involves an
19 oversize load, and that is an extremely important unique fact
20 that almost none of the other cases that really anybody has
21 cited deal with. And it makes this case very unique because
22 an oversize load has been regulated by the General Assembly
23 through them by DOT and then Florence Concrete itself has
24 admitted the inherently dangerous nature of an oversize load
25 being on the road at a time it's not allowed to.

1 The General Assembly says that is a dangerous load on
2 our -- traveling our public roadways. DOT, you figure out if
3 it can be safely done. DOT says we can permit for this. We
4 are only allowed on the road at certain times. What's that
5 for? That's obviously for public safety. Okay?

6 So they've said through the General Assembly and DOT and
7 their admission it is inherently dangerous for this to just
8 be on the road at a time that it's not allowed to be. That's
9 a very important fact in this case that distinguishes it from
10 pretty much all of the law they've cited.

11 THE COURT: What do you think about what Mr. Livoti said
12 about the fact that if the truck had been 30 feet long and he
13 had pulled out, he'd have hit it and the length wasn't the
14 proximate cause?

15 MS. BARNES: Well, that's why I started out with that
16 objection. Okay? Because I wasn't part of these
17 discussions, but as I understand and what Mr. Nance said,
18 they went back and forth a lot about what went into that
19 order. And so the length of the load, where it was on the
20 roadway, where they hit, all those types of things, they're
21 not in here.

22 MR. NANCE: Judge?

23 THE COURT: Well, I don't -- I'm not saying where it
24 actually hit. He's just saying logically if you pull out, it
25 doesn't make any difference whether it's 10 feet or 72 feet.

1 MS. BARNES: It does make a difference because it makes
2 a difference how much of the road it's covering up. I mean
3 if you -- if you pull out a normal trailer, you might be able
4 to maneuver that thing and stay only in your lane.

5 THE COURT: Right.

6 MS. BARNES: So I mean that's why the oversize load part
7 of it is what's so unique and important --

8 THE COURT: Okay.

9 MS. BARNES: -- in this case.

10 MR. NANCE: That's correct, Your Honor. If I could
11 address it?

12 Ms. Barnes was not involved in the litigation of this
13 case. She came on recently for this part, but I can tell you
14 since Mr. Livoti has opened that door, there were numerous
15 experts involved in this case. All of the discussion
16 centered around the conspicuity, the angle of the --

17 THE COURT: But what?

18 MR. NANCE: The conspicuity tape that's attached to the
19 trailer. You know, reflective tape?

20 THE COURT: Okay.

21 MR. NANCE: A lot of discussion and opinions on the
22 angle of the trailer in the roadway. Judge, there is no
23 doubt that the length of this trailer, yes, changed the
24 trajectory of how this accident occurred. If it's a shorter
25 truck, this accident never occurred. I mean that's just the

1 bottom line.

2 MS. BARNES: I mean, again, none of that stuff is in the
3 consent order and we think for you to make your decision, it
4 really only matters that it was an oversize load out on the
5 road while the time it was not allowed to be there.

6 THE COURT: Right.

7 MS. BARNES: And that the important point is not so much
8 when it pulled out the next morning. The important point is
9 when it left Florence Concrete's lot because we're talking
10 about Florence Concrete's negligence, and that is something
11 that I think is another extremely unique fact in this case
12 that's not in any of the cases that they have cited. Okay?

13 We're not talking about an accident that happened
14 because of driver negligence. We're not alleging vicarious
15 liability. We're not alleging nondelegable duty. We're
16 saying you're liable for your own conduct in allowing that
17 trailer to leave your lot when it was an illegal time for it
18 to do that.

19 So I'm going to start with -- I'm not sure how this is
20 pronounced -- the *Oulla* case --

21 THE COURT: Well --

22 MS. BARNES: -- that he talked about.

23 THE COURT: One of the things Mr. Livoti says is it
24 really makes no difference what happened the day before.
25 It's more relevant what happened on the day that the accident

1 took place.

2 MS. BARNES: Well, and that's where we disagree on where
3 --

4 THE COURT: Right.

5 MS. BARNES: -- the analysis should go.

6 THE COURT: Right.

7 MS. BARNES: Because, again, they would like to reframe
8 this whole entire thing. A little bit these arguments are
9 kind of like ships passing in the night. Which -- which way
10 are you going to look at it?

11 They want it to be all -- be all about Mr. Rouse because
12 then they can say we don't have anything to do with that,
13 that's not our problem, he did what he wanted to do, he's an
14 independent contractor, and we're saying, no, this is an
15 oversize load which really as a matter of law is inherently
16 dangerous when it's on the road at a time it's not allowed to
17 be.

18 And under this exception to the general rule of
19 nonliability for independent contractors, you had a duty to
20 make sure that proper precautions were taken. And in this
21 particular case under these very unique facts, that proper
22 precaution was making sure it left your lot at a legal time.

23 And here, it doesn't matter what could have been at 2
24 o'clock or what could have been the next morning, it matters
25 what happened, what the stipulated facts are. It left the

1 lot at an illegal time and, under these particular facts, if
2 they kept it on their lot instead of it leaving at 5:02, it
3 couldn't have legally been on the road until the next day at
4 9 a.m. and the injuries would not have occurred.

5 So I mean I hate to use the term red hearing, but I mean
6 it's really -- they're trying to focus you somewhere that we
7 think is not -- not the focus of the analysis because of the
8 particular facts of this case.

9 That *Oulla* case is completely off point factually and
10 legally. Factually, it's not an oversize load. Okay? So
11 you don't have the inherent danger of the --

12 THE COURT: Now, the facts of that one was what again?
13 Remind me of that.

14 MS. BARNES: That was the sod case.

15 THE COURT: Oh, okay. Yes. Okay.

16 MS. BARNES: Okay. So two people showed up. They pick
17 up a load of sod.

18 THE COURT: Right.

19 MS. BARNES: Somebody puts it on there and they say,
20 hey, do you have straps. No, we don't have any. They get on
21 the road anyway, and they tried to hold the sod company that
22 put it on there liable in that situation.

23 So there it was not an oversize load. It was not the
24 negligence of Super-Sod itself the way the --

25 THE COURT: And they had -- and the driver had a

1 statutory obligation to strap it down?

2 MS. BARNES: Right. There was driver negligence, a
3 backup, you know, accident on the interstate, and it was not
4 an independent contractor case, importantly. That was not
5 one where they were saying where there was any independent
6 contractor issue. The duty that they argued was a statutory
7 duty that they lost on and then they said essentially under
8 common law it was like a gratuitous duty. You took it upon
9 yourself to load this and so you should have done it in a
10 safe manner, and the Court rejected that. That law really
11 doesn't have anything to do with the way that the plaintiffs
12 are arguing this case. So we don't think that that case has
13 anything to do with the legal issues before the Court.

14 You asked a question about strict liability, and I'm
15 glad because --

16 THE COURT: I think -- I think really that was probably
17 inappropriate. What I was saying really was vicarious
18 liability --

19 MS. BARNES: Well --

20 THE COURT: -- by whatever trans -- whatever the
21 independent contractor does, the employer is responsible just
22 by virtue of the fact that it's inherently dangerous is
23 really what I was trying to say.

24 MS. BARNES: And which is a very valid question, and
25 neither one of those things apply here. Okay? So it's not

1 strict liability and it's also not vicarious liability, and
2 the reason it's not vicarious liability is we are not saying
3 that you're liable because Mr. Rouse pulled out the next
4 morning. We're saying you're liable for your own conduct in
5 letting it leave your lot at a time that was illegal. So
6 that's why we've said it's not about nondelegable duty, it's
7 not about vicarious liability. It's about your own
8 negligence.

9 And the *Duane* case that we've cited and Mr. Nance talked
10 about says the owner is responsible, however, if the injury
11 is caused by his own negligence in failing to take preventive
12 measures. That's exactly what we're arguing here.

13 The reason I said I was glad you brought up abnormally
14 dangerous and what that is relevant to is there's also I
15 think a lot of confusion that the defendant has created about
16 what's inherently dangerous and they're saying, well, you
17 know, just putting the concrete load on the road is not an
18 inherently dangerous activity. And they've cited to that
19 *Fike v. Peace* case out of Alabama, which honestly is not
20 controlling law because it's from another jurisdiction.

21 If you read that case --

22 THE COURT: Thank God we're not Alabama.

23 MS. BARNES: You said that, not me.

24 If you read that case, the Supreme Court in Alabama is
25 really equating inherent danger to abnormally dangerous. Let

1 me find it. They say intrinsically dangerous work is work
2 fraught with danger no matter how skillfully or carefully it
3 is performed.

4 Well, here the inherent danger exception specifically
5 applies to something that is inherently dangerous unless
6 proper precautions are taken. So there's really a difference
7 in this inherent danger exception with proper precautions
8 versus something that is abnormally dangerous, which is
9 normally strict liability. So I don't think that even the
10 law in *Fike* applies to the situation that we have in this
11 case.

12 Now, as to what is actually inherently dangerous or what
13 is not, you know, they've said, well, we manufacture
14 concrete. You know, that's what we do. That's not
15 inherently dangerous.

16 Well, the analysis is the work that you contracted to be
17 done. Okay? It's not what you do, what you generally do in
18 your business. Obviously, as part of their business they
19 have to have their products shipped or they wouldn't make any
20 money, but the analysis is not do you manufacture concrete.
21 It's what did you hire somebody else to do. Was that work
22 you hired the independent contractor to do inherently
23 dangerous?

24 And as we've said, it is. It's an oversize load that
25 the General Assembly and DOT have said is dangerous on the

1 road unless it's on the road at permitted times under these
2 specific situations. So also, I don't want there to be
3 confusion about, you know, inherently dangerous versus
4 abnormally dangerous or what -- what is the analysis of what
5 is inherently dangerous.

6 *Norris v. Bryant*. They brought up that case. It wasn't
7 cited in their brief, but I've read that. And that case
8 also, again, is distinguishable, and you're going to hear me
9 say this over and over again because this -- these are very
10 particular unique facts of this case.

11 *Norris* was not an oversize load. Okay? So the fact
12 that the Court there said, you know, hauling trucks is not
13 inherently dangerous doesn't matter because there wasn't
14 something from the General Assembly and DOT that said by the
15 very nature of this thing being on the road there's an
16 inherent danger to the traveling public. So *Norris* I don't
17 think is dispositive at all.

18 We talked about *Fike v. Peace*. Let me make sure I've
19 covered everything that they've talked about.

20 The permit not being signed. Mr. Livoti said it's not a
21 stipulated fact. Well, it really is because it's attached to
22 the consent order, the permit is, and the permit itself, I
23 think as Mr. Nance read, says it's not valid until it's
24 signed and you can see it's not signed. So that's something
25 that's within the Court's consideration.

1 THE COURT: I'm not -- I don't -- it seems like a
2 ministerial thing of signing it really makes very little
3 difference to me.

4 MS. BARNES: Well, the reason that -- that we discussed
5 that is it goes to the fact that, you know, Florence Concrete
6 -- I mean they had that permit. They -- their employees -- I
7 think it's in the consent order -- attached it to the load so
8 that when the Nesbitt Transportation guy came, he could pick
9 up the permit and be on his way. So they had that permit.
10 They could have seen that it wasn't signed.

11 THE COURT: Who was supposed to sign it?

12 MS. BARNES: The permittee. So Nesbitt Transportation
13 --

14 THE COURT: Would have been -- oh, okay.

15 MS. BARNES: -- was supposed to sign it. So we say that
16 just for the fact that they had that permit in their
17 possession. They could have seen that it wasn't signed in
18 the same way that they knew and could have seen what the
19 travel restrictions were on the permit when they attached it
20 to the trailer.

21 Let me make sure I've covered everything I was supposed
22 to. The first part of this -- okay.

23 Going to negligent selection, again we're kind of like
24 ships passing in the night because they're talking about all
25 this negligent hiring case law, and negligent hiring is

1 extremely different than negligent selection of an
2 independent contractor. Okay? Negligent hiring is for an
3 employee that then you create a master-servant relationship
4 and you're vicariously liable for them. That's a whole
5 different set of law than negligent selection of an
6 independent contractor.

7 And while there aren't a lot of cases in South Carolina
8 on that, we do have that *Conlin* case, and I want to read a
9 little bit from that. I went back and reread it this
10 morning, and things always make more sense right before you
11 have to get in front of the Court. And the next-to-last
12 sentence of that case -- and that was the one where it was
13 the steeple bell. Do you want me to go through the facts?

14 THE COURT: I think -- I think I remember it.

15 MS. BARNES: Oh.

16 THE COURT: But you might go ahead and tell me again. I
17 think he left a trap door open and he fell to the church
18 floor and died.

19 MS. BARNES: Yeah. The decedent -- he was a steepleman,
20 which I guess maybe he was supposed to go ring the bell in
21 the steeple, but somebody was replacing the bell and there
22 was a trap door multiple levels up and the guy who was an
23 independent contractor -- or it was disputed whether he was
24 -- left the trap door open. So then when the decedent went
25 up there in the dark to go do what he did, he didn't know the

1 trap door was open and he fell down to the floor of the
2 church and died.

3 And his wife sued and said -- they disputed whether he
4 was an independent contractor or not, but then said, you
5 know, he had waived -- you negligently selected him. And in
6 the very last sentence of that opinion, the Court says if the
7 independent -- if the man who was replacing the bell was an
8 independent contractor, the material inquiries were what was
9 made his duty as to the closing of the trap doors and if he
10 was guilty of no negligence, did the defendants neglect a
11 duty incumbent upon them?

12 So clearly going back as far as 1868 our Supreme Court
13 has said just because somebody is an independent contractor
14 doesn't mean that a person who contracted to do work can be
15 liable for their own negligence and their own duty that they
16 owed. That's been the law forever. So I don't think that
17 any of these negligent hiring cases are applicable to what
18 we're talking about.

19 The causal link issue that came up -- I mean first of
20 all, proximate cause is not before you. It's just duty and
21 breach. So even if you were to get to that, I don't think
22 that it's proper for them to be arguing about that at this
23 stage.

24 They talked about, you know, the fact that they can
25 legally contract with Nesbitt Transportation, even though

1 they had this conditional safety rating. The fact that it's
2 legal to make a contract doesn't mean that it's not negligent
3 to do it. Those are two different -- two completely
4 different things. Okay?

5 It might be -- they might legally be able to do what you
6 would like for them to do. That doesn't mean that you
7 exercised reasonable care in entering in -- supposedly
8 entering into a contract with them to do it.

9 I mean let's remember they've been doing this together
10 since 1992, and they have no written contract to haul their
11 oversize loads that are regulated by the General Assembly and
12 DOT. They have no policies and procedures between the two of
13 them. It's just, hey, you've been doing it for a long time
14 and just, you know, keep on doing it without ever looking
15 into any of their safety here.

16 Have I forgotten anything? Just a minute, Your Honor.
17 I'm sorry. I want to make sure I get everything covered I
18 wanted to talk about.

19 Your Honor asked about how do they get their safety
20 rating back, and I think it's in the regulations, which I
21 don't think anybody is prohibited from citing to you by the
22 consent order. But it's -- I don't understand all of it, but
23 as I understand, there's a corrective action plan that you
24 can go through to try to get that safety rating back.

25 I just want to close with -- and I've said this

1 repeatedly, but it bears repeating just how you make the
2 facts of this case are because really for three overarching
3 reasons. Because it's an oversized load. Okay? So it's not
4 anybody hauling anything. It's a load that the General
5 Assembly has declared to be dangerous unless certain things
6 are followed that DOT determined by issuing these permits and
7 that Florence Concrete knew about for years because they had
8 done these types of loads in their work and they had the
9 permit and they've said it's inherently dangerous to be on
10 the road when it's not allowed to be on the road. Okay? So
11 oversize load extremely important.

12 It's really -- I mean I think it's really inherently
13 dangerous as a matter of law that it was on the road at this
14 time. I don't really see how you could find the opposite
15 based on the law of an oversize load and the admission that
16 they've made.

17 We're also talking about their own negligence. It's not
18 a case where, you know, you're talking about somebody's
19 brakes. One of the cases, I think maybe the *Fike* case out of
20 Alabama, there was -- you know, the brakes were faulty or
21 anything like that. We're talking about what Florence
22 Concrete did, not them being vicariously liable for what the
23 independent contractor did.

24 And the third thing is the duty. I mean I know that
25 they say we're fighting duty the whole entire time. That

1 question is an acknowledgment that they have a duty at a
2 minimum to contract with somebody who has the proper permits,
3 who is insured, and who has the legal authority to do it.

4 They haven't come in and said we could hire anybody that
5 we want to hire, we can do anything we want to do because we
6 owe you no duty. I mean that duty arises out of the safety
7 issues and the dangers having to do with an oversize load.
8 That's why they've said the person had to be insured and we
9 had to get a permit and they had to have operating authority.
10 They couldn't deny any of those things.

11 So that is some minimum duty, and that's really where
12 we're starting. We're not starting with is there a duty at
13 all. We're starting with is there a duty beyond what they
14 say they already did in this case. Did they do enough or
15 should they have done something more?

16 And yes, they should have done something more because it
17 was an inherently dangerous load unless proper precautions
18 were taken, and the proper precautions were very simple.
19 Again, a unique fact in this case. All you had to do was say
20 you can't leave the lot until it's legal for you to be on the
21 road.

22 So for all of those reasons, we ask the Court to find
23 that there is a duty for both of those reasons, for the
24 inherent danger exception and also under negligent selection.

25 And I think it's pretty glaring their memo says nothing

1 about breach. I mean in the very beginning they say there
2 was no breach, at the very end they say that. There's no
3 analysis about it whatsoever. I mean I think they pretty
4 much know if you find there's a duty, they breached that duty
5 in this case. I won't repeat it. I mean I'll rely on what
6 we put in our memos, but it's very clear that they breached
7 both of those duties and they've chosen to just rely on the
8 fact that, you know, they hope you'll find that there was no
9 duty whatsoever.

10 Do you have any other questions for me, Your Honor?

11 THE COURT: I don't -- I don't think so. I believe I'm
12 going to have to contemplate it.

13 Mr. Livoti?

14 MR. LIVOTI: Just very -- just very briefly, Your Honor.
15 I don't want to belabor any more of these points.

16 Your Honor, the plaintiffs have argued that the most
17 important inquiry is when the load left, and we have made it
18 very clear that if the load left at the time before 3 o'clock
19 on January 3rd, that would have complied with their -- with
20 their formulation of this in terms of what we did or did not
21 do.

22 Your Honor, if the load left two days before and Rouse
23 still engages in the conduct he did on the day of the
24 accident, would we be responsible for that? If it left three
25 days before at times that were appropriate for him being on

1 the road, would we be responsible for that? It's the -- it's
2 the intervening act of negligence of Mr. Rouse that is the
3 key inquiry here, Your Honor.

4 They talked about that there's been a determination that
5 this is inherently dangerous activity. Your Honor, I'm not
6 aware of anything in our General Assembly statutes or the
7 transportation statutes that specifically says hauling of
8 oversize loads is inherently dangerous, intrinsically
9 dangerous. There's no language of that that I'm aware of in
10 the statute. So that is really why they're saying it is
11 inherently dangerous.

12 Your Honor, I think the Courts have addressed this in
13 the transportation context and, of course, we acknowledge
14 that *Norris* is not an oversize load, but the *Fike* case out of
15 Alabama, in fact, is and the Court there found that the
16 transporting of loads that are in excess or oversize is not
17 inherently dangerous in and of itself.

18 And I think that's all I've got.

19 THE COURT: All right.

20 MR. LIVOTI: Thank you, Your Honor. Oh, one thing I did
21 want to mention. It's just this whole idea about the fact
22 that it's very highly regulated and it requires a permit.
23 This is an activity that can be done safely if the parties
24 comply with it, and that's something that Rouse did not do,
25 that's something that Nesbitt did not do, and they are the

1 ones who should be responsible for that.

2 THE COURT: Anything from anybody? Does that pretty
3 much cover it?

4 MR. NANCE: I think it's covered, Your Honor.

5 THE COURT: All right.

6 MR. NANCE: The only thing that I would briefly mention,
7 thank you for, first of all, entertaining these arguments
8 today, Judge. We appreciate you setting this up. Thank you
9 to the defense for, you know, all arguing the same thing.

10 I would simply say, Your Honor, if they had done
11 anything, anything prior to this load leaving their lot,
12 there is no way this accident could have occurred because he
13 could not have legally been on the road until 9 o'clock the
14 next morning. That is the fact that I don't want to just
15 glaze over here. It could not have happened. The accident
16 could not have happened had they done what they should have.

17 THE COURT: All right.

18 MR. NANCE: Thank you.

19 THE COURT: I'm going to ask if y'all will prepare
20 proposed orders, and I want to take an opportunity -- y'all
21 have done a very fine job of these briefs and I want to --
22 after having heard y'all's very, very good arguments, I want
23 to read the cases after that and kind of think on it. These
24 are very important matters and I want to give it the proper
25 consideration.

1 And another just sort of minor thing that has nothing to
2 do with the case, I've always thought that oversize should be
3 oversized instead of -- if you -- has anybody ever else ever
4 thought of that?

5 MS. BARNES: I thought the same thing when I was writing
6 -- when I was writing the memo, but it all says oversize
7 load.

8 THE COURT: I know.

9 MS. BARNES: So that's -- yeah.

10 THE COURT: I've always -- my entire life I've ridden
11 down the road and I've always thought they misspelled the
12 sign. It should be oversized, but --

13 MR. LIVOTI: Your Honor, after hearing arguments, I know
14 we all agreed to brief the issues and submit the briefs at
15 the same time and then raise any issues here in the arguments
16 in reply. Does the Court want any reply briefs or is the
17 Court satisfied with --

18 THE COURT: I think y'all have covered it and done a
19 very fine job.

20 MR. LIVOTI: Okay.

21 THE COURT: And a very difficult question, but y'all
22 have laid it out.

23 MR. LIVOTI: Your Honor, the one thing I do want to
24 confirm with -- because this is a question that I had with
25 Mr. Nance before we had proceeded with submitting the briefs

1 that we did on the 28th of February was we kind of operated
2 in our thinking that this was just going to be a non-jury
3 matter that the Court was going to hear, basically a bench
4 trial on the stipulated facts and the answering the question
5 of law. Mr. Nance obviously filed a motion for summary
6 judgment. We filed a cross motion for summary judgment.

7 Just from a standard standpoint, do you -- does the --
8 does the Court want us to submit an order using the cross
9 motion for summary judgment standard or does the Court want
10 us to submit an order just on the nonjury?

11 THE COURT: I think it would probably be better -- I'll
12 hear from y'all as well, but I think probably summary
13 judgment.

14 MR. LIVOTI: I believe either way I think as a practical
15 matter it's the same analysis.

16 THE COURT: Right.

17 MR. LIVOTI: Because it's a question of law.

18 MS. BARNES: Yeah. I mean I know when you two raised
19 that issue and actually called me about it, I mean it's a
20 matter of law either way. I don't think -- you know, I mean
21 the only possible difference you could argue for appellate
22 purposes would be somehow in summary judgment if -- you know,
23 if you were the non-moving party something was taken in your
24 favor, but I don't think that applies here because it's a
25 matter of law. So it's going to be *de novo* either way. So

1 whatever you want.

2 THE COURT: Let's do it summary judgment. I think that
3 would be --

4 MR. LIVOTI: Cross-motions for summary judgment?

5 THE COURT: Yes.

6 MR. LIVOTI: Yes, sir. We'll incorporate that as the
7 standard.

8 THE COURT: Very good. All right. Thank y'all.

9 MS. BARNES: Do you have a deadline for when you want
10 the proposed orders?

11 THE COURT: Well, what do you think about that? There's
12 no real hurry on it because it is an important matter and I
13 want y'all to have adequate time to prepare. What do you
14 think?

15 MR. LIVOTI: I think 30 days would be --

16 MS. BARNES: Yeah. That would be great.

17 THE COURT: I think that would be fine and, if you have
18 any problems with that, let me know.

19 MS. BARNES: Okay.

20 MR. LIVOTI: Okay.

21 THE COURT: All right. Very good.

22 MS. BARNES: Thank you so much.

23 MR. LIVOTI: Thank you, Your Honor.

24 MR. NANCE: Thank you, Your Honor.

25 (WHEREUPON, the proceedings ended at 12:09 p.m.)

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Nov 15 2022

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge
Civil Action No. 2021-CP-21-02042

Appellate Case No. 2022-000729

Thomas Rodriquez Nelson.....Respondent,

v.

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

CERTIFICATE OF COUNSEL

I hereby certify, pursuant to Rule 210(g), SCACR, that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

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