RECEIVED
Dec 05 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 Rodriquis Nelson…………………………………………………...Respondent,

v.

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

FINAL BRIEF OF APPELLANT

December 5, 2022

s/ Anthony W. Livoti
Anthony W. Livoti (SCB 13971)
Wesley B. Sawyer, Esquire (SCB 100229)
Cordes B. Kennedy (SCB 102287)
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
Phone: (803) 782-4100
awlivoti@murphygrantland.com
wsawyer@murphygrantland.com
ckennedy@murphygrantland.com

-and-

John R. Owen, Esquire (*pro hac vice*)
James R. Jebo, Esquire (*pro hac vice*)
Harman Claytor Corrigan & Wellman

P.O. Box 70280
Richmond, VA 23255
Phone: (804) 747-5200
jowen@hccw.com;
jjebo@hccw.com;

Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities……………………………………………………………………………iii

Statement of Issues on Appeal……………………………………………………………1

Statement of the Case……………………………………………………………………...1

Statement of the Facts……………………………………………………………………..5

I. Nesbitt Transportation is a federally authorized motor carrier that contracted to transport an OSOW load……………………………………………………………5

II. Nesbitt Transportation obtained the proper OSOW permits from the South Carolina and North Carolina Departments of Transportation………………………………..6

III. Nesbitt Transportation's driver, Mr. Rouse, picked up the load from an unmanned lot and chose to transport the load outside of the times permitted by the permit and South Carolina law……………………………………………………………………...6

IV. Florence Concrete is a concrete fabricator that has been sued for the negligent conduct of Nesbitt Transportation……………………………………………………7

Standard of Review………………………………………………………………………..9

Argument…………………………………………………………………………………..9

I. The lower court failed to apply the well-established independent contractor rule to Florence Concrete…………………………………………………………………12

A. This case falls squarely within the typical independent contractor rule, and Respondent does not contest the fact that Nesbitt Transportation is an independent contractor……………………………………………………12

B. South Carolina has recognized very few exceptions to the independent contractor rule, none of which apply to this transportation case……………………………………………………...………………14

II. The inherently dangerous exception does not apply because (1) the activity was routine and not inherently dangerous; (2) Mr. Rouse's collateral negligence does not satisfy the exception; (3) Mr. Rouse's negligence did not "inhere" to the activity at hand; and (4) Florence Concrete did not have antecedent knowledge of the danger created by Mr. Rouse's negligence…………………………………………………………...17

A. The activity in this case – transporting oversized freight – is not inherently dangerous……………………………………………………………………18

B. The mere fact that conduct is regulated does not mean it is inherently dangerous……………………………………………………………………….25

C. The inherently dangerous exception cannot apply when the independent contractor's collateral negligence creates the danger, and the risk here – operating a tractor-trailer outside of legally permissible times – is not inherent in the task of transporting the OSOW load…………………………………..27

D. The inherently dangerous exception cannot apply because Florence Concrete did not have "antecedent knowledge" of Mr. Rouse's negligent conduct…...31

Conclusion……………………………………………………………………………….37

TABLE OF AUTHORITIES

CASES

Alexander v. Seaboard Air Line R. Co., 221 S.C. 477, 71 S.E.2d 299 (1952)………16–17, 21, 23

Allison v. Ideal Laundry & Cleaners, 215 S.C. 344, 55 S.E.2d 281 (1949)……..17-18, 21, 31–34

Beavers v. Victorian, 38 F. Supp. 3d 1260 (W.D. Okla. 2014)…………………………………….24

Bellamy v. Hardee, 242 S.C. 71, 129 S.E.2d 905 (1963)………………………………………..14

Boroughs v. Joiner, 337 So.2d 340 (Ala. 1976)……………………………………………..16, 23

Bowles v. Weld Tire & Wheel, Inc., 41 S.W.3d 18 (Mo. Ct. App. 2001)………………………..30

Carson v. Vance, 326 S.C. 543, 485 S.E.2d 126 (Ct. App. 1997)……………………………….14

Cherry v. Myers Timber Co., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013)…………………..12

Commee v. Nucor Corp., 173 F. App'x 209 (4th Cir. 2006)……………………………………..27

Conlin v. City Council of Charleston, 49 S.C.L. (15 Rich.) 201 (1868)………………………...12

Davis v. Summerfield, 133 N.C. 325, 45 S.E. 654 (1903)…………………………………...15, 32

Dennis by Evans v. Timmons, 313 S.C. 338, 437 S.E.2d 138 (Ct. App. 1993)………………….31

Dishmond v. United States, No. CV 114-083, 2014 WL 12570955 (S.D. Ga. Nov. 21, 2014)….23

Dolan v. City of Camden, 233 S.C. 1, 103 S.E.2d 328 (1958)…………………………………..15

Dowe v. Birmingham Steel Corp., 963 N.E.2d 344 (Ill. App. 2011)…………………………….23

Ek v. Herrington, 939 F.2d 839 (9th Cir. 1991)……………………………………………..19, 24

Evans v. Elliott, 220 N.C. 253, 17 S.E.2d 125 (1941)…………………………………………...18

Evergreen Int'l, S.A. v. Marinex Const. Co., 477 F. Supp. 2d 690 (D.S.C. 2007)……………….30

Fike v. Peace, 964 So.2d 651 (Ala. 2007)…………………………………………….16, 22–23

Gary v. Askew, 417 S.C. 232, 789 S.E.2d 94 (Ct. App. 2016)…………………………………..25

Googe v. Speaks, 194 S.C. 206, 9 S.E.2d 439 (1940)……………………………………………16

Inland Steel v. Pequignot, 608 N.E.2d 1378 (Ind. Ct. App. 1993)……………………………24

Jenkins v. E.L. Long Motor Lines, 233 S.C. 87, 103 S.E.2d 523 (1958)……………………...14

Kime v. Hobbs, 252 Neb. 407, 562 N.W.2d 705 (1997)…………………………………………24

Kinsey v. Spann, 139 N.C. App. 370, 533 S.E.2d 487 (2000)…………………………………..18

Leonard v. Abbott, 357 S.W.2d 778 (Tex. Civ. App. 1962)……………………………………..16

Mavrikidis v. Petullo, 153 N.J. 117, 707 A.2d 977 (1998)……………………………19, 24, 29

Momeier v. Koebig, 220 S.C. 124, 66 S.E.2d 465 (1951)………………………………………..15

Nedrow v. Pruitt, 336 S.C. 668, 521 S.E.2d 755 (Ct. App. 1999)……………………………….14

Norris v. Bryant, 217 S.C. 389, 60 S.E.2d 844 (1950)………………16, 21-22, 24-25, 28, 30, 36

Pendergrass v. Lovelace, 57 N.M. 661, 262 P.2d 231 (1953)…………………………………...16

Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005)…………….12

Ruh v. Metal Recycling, 436 F. Supp. 3d 844 (D.S.C. 2020)………………………………..18, 22

S.A. Gerrard Co. v. Fricker, 42 Ariz. 503, 27 P.2d 678 (1933)…………………………………16

S.C. Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986)…..13, 26

S.C. Nat. Gas Co. v. Phillips, 289 F.2d 143 (4th Cir. 1961)…………………………10, 19, 30, 31

Simmons v. Tuomey Regional Med. Ctr., 421 S.C. 32, 533 S.E.2d 312 (2000)………………….15

Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991)……………...12-13, 36

Taghivand v. Rite Aid Corp., 411 S.C. 240, 768 S.E.2d 385 (2015)……………………………26

Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689 (Iowa 2009)……………………….13

Victoria Elec. Co-op., Inc v. Williams 100 S.W.3d 323 (Tex. App. 2002)……………………...24

Walker v. Martin, 887 N.E.2d 125 (Ind. Ct. App. 2008)……………………………..24, 32, 34-35

Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 705 S.E.2d 432 (2011)……………………………...9

Williams v. Tennessee River Pulp & Paper Co., 442 So.2d 20 (Ala. 1983)……………………..24

Young v. Morrisey, 285 S.C. 236, 329 S.E.2d 426 (1992)……………………………….15, 18, 25

STATUTES/REGULATIONS

S.C. Code Ann. § 40-59-20(7)(b)…………………………………………………………..25

S.C. Code Ann. § 40-59-220……………………………………………………………..25

S.C. Code Ann. § 56-4-4090……………………………………………………………..20

S.C. Code Ann. § 56-5-4030(B)………………………………………………………..19, 20

S.C. Code Ann. § 57-3-130(A)…………………………………………………………..26

49 C.F.R. § 390.5…………………………………………………………………………8

OTHER AUTHORITIES

34 A.L.R.4th 914………………………………………………………………………...28

41 Am. Jur. 2d Independent Contractors § 50…………………………………………...27, 28, 32

Appropriations Bill, 1994 South Carolina Laws Act 497 (H.B. 4820)…………………………..26

Advances in State DOT Superload Permit Processes and Practices, Farrar, Matt, PE (Chair) et. al, (available at https://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP20-68A_12-01.pdf, last accessed July 19, 2022)……………………………………………………………………..20

Black's Law Dictionary (11th ed. 2019)………………………………………………10, 29, 32

Freight Facts and Figures 2017, USDOT Bureau of Transportation Statistics, (available at https://www.bts.dot.gov/sites/bts.dot.gov/files/docs/FFF_2017_Full_June2018revision.pdf, last accessed July 19, 2022)…………………………………………………………………..2, 20

Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431 (1996)………………………..15, 18, 26

National Academies of Sciences, Engineering, and Medicine 2016. *Multi-State, Multimodal, Oversize/Overweight Transportation*. Washington, DC: The National Academies Press, (available at https://doi.org/10.17226/23607, last accessed July 19, 2022)……………………...20

Restatement (Second) of Torts § 413 (1965)…………………………………………………….35

Restatement (Second) of Torts § 426 (1965)…………………………………………………….29

Restatement (Second) of Torts § 427 (1965)……………………………………………15, 19, 28

STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in holding that the transportation of oversize or overweight (OSOW) loads by a federally authorized motor carrier is so inherently dangerous that anyone who hires the independent contractor motor carrier is directly liable for the motor carrier's subsequent negligence?

2. Did the lower court err in holding that an independent contractor's unilateral decision to operate an OSOW load before daylight, in violation of an OSOW permit and South Carolina law, is a risk that is inherent in the movement of an OSOW?

3. Did the lower court err in holding that Florence Concrete had notice of an inherent risk when there is no evidence that Nesbitt Transportation previously operated OSOW loads outside of legally permissible times?

STATEMENT OF THE CASE

This case arises out of a motor vehicle accident that occurred in the early morning hours of January 4, 2019. At the time of the collision, Calvin Rouse – an employee of Nesbitt Transportation, Inc. – was transporting a 72-foot cement slab from South Carolina to North Carolina for use in bridge construction. Because of the length of the slab, the load was considered oversized. Nesbitt Transportation, as the federally authorized motor carrier, obtained oversize/overweight load (OSOW) permits from South Carolina and North Carolina so that it could transport the load. Although the permit included restrictions requiring the load to be transported during daytime hours, Nesbitt's driver made the unilateral decision to operate the tractor-trailer outside of the times allowed by the permit. Respondent Thomas Nelson was injured when his vehicle collided with the load.

Appellant Florence Concrete is the defendant in this lawsuit. Florence Concrete manufactures concrete products, including the concrete slab that Nesbitt was transporting at the time of the loss. Florence Concrete did not own the tractor-trailer involved in the incident, it did not employ Mr. Rouse, and Respondent concedes that Nesbitt Transportation was an independent contractor. Florence Concrete, a manufacturer of concrete products, hired Nesbitt Transportation, a federally authorized motor carrier in the business of transporting items on the highways, to transport the load. Nesbitt Transportation negligently transported the load. Respondent filed suit, and Nesbitt Transportation and Mr. Rouse settled the claims against them. Respondent then pursued Florence Concrete on the theory that transportation of an OSOW load is "inherently dangerous," such that Florence Concrete is directly liable despite the independent contractor rule.

The Circuit Court adopted Respondent's argument and held a shipper can be liable for an independent contractor's operation of an OSOW load outside of permitted hours because transport of an OSOW load is inherently dangerous. The ramifications of such a holding are breathtaking. Millions of OSOW permits are issued ever year nationwide.[1] If the Circuit Court's decision is affirmed, then every person who hires a federally authorized motor carrier to transport an OSOW load is personally liable for any resulting negligence of the federally authorized motor carrier. For example, a purchaser of a mobile home that hires a federally authorized motor carrier to transport the mobile home to his land would now be personally liable for the tractor-trailer driver's negligence. The number of industries and individuals that would be impacted by such a drastic change to the independent contractor rule is incalculable.

---

[1] *Freight Facts and Figures 2017*, USDOT Bureau of Transportation Statistics, p. 3-24, table 3-14 (noting that over 5,000,000 OSOW permits were issued annually in 2013, 2014, and 2015) (available at https://www.bts.dot.gov/sites/bts.dot.gov/files/docs/FFF_2017_Full_June2018 revision.pdf, last accessed July 19, 2022).

The Circuit Court misapplied the independent contractor rule and its exception for inherently dangerous activities. The stipulated facts in this case reveal that the accident could have been avoided if Nesbitt Transportation's driver had operated the tractor trailer during the times allowed in the permit. If conduct can be carried out safely by following simple safety precautions – such as obeying the terms of a permit and the law – then the conduct is not inherently dangerous. The Circuit Court erred in holding otherwise and should be reversed.

This declaratory judgment action began as a traditional personal injury suit. On September 9, 2019, Respondent filed his first Summons and Complaint naming various iterations of Nesbitt Transportation and its driver, Calvin Rouse. (R. pp. 42-55). Respondent added Florence Concrete as an additional defendant via an Amended Complaint on October 21, 2019. (R. pp. 58-75). Later, the defendants were reduced to Nesbitt Transportation, Inc.; Calvin A. Rouse; and Florence Concrete Products, Inc.

On or about March 17, 2021, Respondent settled his claims against Nesbitt Transportation and its driver, Mr. Rouse, and entered a Stipulation of Dismissal as to those defendants only. (R. p. 84). After settling with Nesbitt Transportation and Mr. Rouse, Respondent and Florence Concrete entered into a settlement agreement where the parties would submit two issues of law to the court based on stipulated facts contained in a Consent Order filed on December 9, 2021. (R. pp. 18-23). The issues would be submitted in the form of a new amended pleading seeking declaratory relief.

Pursuant to that agreement, on January 4, 2022, Respondent filed an Amended Complaint for Declaratory Judgment, naming only Florence Concrete as a defendant. (R. pp. 30-36). The Declaratory Complaint asked the lower court to consider the following two legal issues:

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?

(R. p. 31, ¶ 6). Florence Concrete timely filed an Answer and Counterclaim to Plaintiff's Declaratory Complaint. (R. pp. 37-41). The parties filed cross-motions for summary judgment based on the stipulated facts, requesting the lower court to decide the two issues of law stated above. (R. pp. 99-92 & 124-126). The parties' duties and obligations under the settlement agreement are dependent on the answers to these issues.

On March 10, 2022, the Honorable Michael Nettles held a hearing on the cross-motions. Respondent did not dispute that Nesbitt Transportation and Mr. Rouse were independent contractors at the time of the accident, thus bringing this case within the well-established rule that an employer is not liable for the negligence of an independent contractor. (R. p. 8). Rather, Respondent argued that the transportation of an OSOW load is "inherently dangerous," triggering the narrow and rarely used exception to the independent contractor rule. (R. p. 99).

On April 29, 2022, the Circuit Court granted Respondent's motion, holding that transportation of an OSOW load was inherently dangerous. (R. p. 8). In reaching its decision, the Circuit Court relied on the following: (1) South Carolina requires a motor carrier to obtain a permit before transporting an OSOW load; (2) the OSOW permit prohibits movement of the OSOW load outside of certain times; (3) Nesbitt Transportation moved the load at a prohibited time; and (4) Florence Concrete's shipping manager testified that operating an OSOW load at a time that is not allowable creates an inherent risk and danger to the public.

As a result of the Circuit Court's holding, Florence Concrete is liable for Nesbitt's conduct even though Respondent concedes that Nesbitt was an independent contractor. In essence, the Circuit Court found Florence Concrete owed a duty to ensure that Nesbitt Transportation – the federally authorized motor carrier – operated the load in accordance with the law applicable to motor carriers and in accordance with the terms of a permit that was issued to Nesbitt Transportation. The Circuit Court's holding makes Florence Concrete responsible for controlling the acts of a commercial motor carrier even though it is undisputed that: (1) Nesbitt Transportation and was an independent contractor; (2) Florence Concrete did not control the means or methods of Nesbitt Transportation's operations; (3) the OSOW permit was issued to Nesbitt Transportation; and (4) Florence Concrete was not aware Mr. Rouse had chosen to transport the load outside of permitted hours.

On May 27, 2022, Florence Concrete timely filed this appeal.

STATEMENT OF THE FACTS

I. Nesbitt Transportation is a federally authorized motor carrier that contracted to transport an OSOW load.

The facts of this case have been fully stipulated pursuant to a Consent Order entered by the lower court on December 9, 2021. Nesbitt Transportation is a federally authorized motor carrier, carrying a USDOT number and operating authority from the Federal Motor Carrier Safety Administration (FMCSA). (R. p. 21, ¶ 8(k)). The USDOT sets standards and requirements for a company to obtain a USDOT number and to operate commercial motor vehicles. Nesbitt Transportation contracted to transport a 72-foot long by 2-foot-wide cement slab from South Carolina to North Carolina to be used in a bridge construction project. (R. p. 19, ¶ 8(a)). Due to the length of the slab, the load was oversized and required OSOW permits from the South Carolina and North Carolina DOTs. (R. p. 19, ¶ 8(a)).

II. Nesbitt Transportation obtained the proper OSOW permits from the South Carolina and North Carolina Departments of Transportation.

Pursuant to the requirements for a motor carrier to transport OSOW loads, Nesbitt Transportation obtained oversize permits, including OSOW permit number RB4441R2489 from the South Carolina Department of Transportation and OSOW permit number 90103500341 from the North Carolina Department of Transportation. (R. p. 19, ¶ 8(c)). To obtain the permits, Nesbitt Transportation had to provide true and accurate information regarding its USDOT operating authority number, insurance information, and vehicle information. (R. p. 19, ¶ 8(c)). After reviewing this information, the SCDOT and NCDOT each issued their respective OSOW permits to Nesbitt Transportation. (R. p. 19, ¶ 8(c)). Pursuant to South Carolina law, the South Carolina OSOW permit prohibited Nesbitt Transportation from transporting the load during certain times, particularly outside of daylight hours.

III. Nesbitt Transportation's driver, Mr. Rouse, picked up the load from an unmanned lot and chose to transport the load outside of the times permitted by the permit and South Carolina law.

On January 3, 2019, Nesbitt Transportation's driver, Mr. Rouse, picked up the load from an unmanned lot located at 865 Industrial Road in Sumter, South Carolina. The load had the permit attached, which contained, among other things, the restriction as to what times the load could be transported. Even though it was later than the time stated on the permit, Mr. Rouse made the decision to take the load at or about 5:00 p.m. (R. p. 20, ¶ 8(d)).

Mr. Rouse drove the load to a commercial lot near his home without incident and parked for the night. (R. p. 20, ¶ 8(e)). He then went home for the evening. On the morning of January 4, 2019, Mr. Rouse decided to get an early start. (R. p. 20, ¶ 8(f)). Despite the plain terms on the permit stating the load could not be operated outside of daylight hours, Mr. Rouse took the tractor-

trailer from the commercial lot before sunrise. (R. p. 20, ¶ 8(f)). At approximately 6:30 a.m., Respondent was driving to work when he struck the load and was injured. (R. p. 20, ¶ 8(f)).

Respondent sued Nesbitt Transportation and Mr. Rouse, both of whom were dismissed after they settled. (R. p. 84).

IV. Florence Concrete is a concrete fabricator that has been sued for the negligent conduct of Nesbitt Transportation.

Respondent also sued Florence Concrete. Florence Concrete is a concrete fabricator, and it fabricated the cement slab carried by the trailer at the time of the accident. (R. p. 19, ¶ 8(a)). Florence Concrete's only involvement with the load was hiring Nesbitt Transportation to transport the load, pre-loading the slab onto the trailer, and attaching the permits that were issued to Nesbitt Transportation. (R. p. 19, ¶ 8(b)). There is no allegation that the slab was improperly loaded onto the Nesbitt Transportation trailer. The load was pre-loaded and placed in the unmanned lot, so Florence Concrete was not aware of when Nesbitt Transportation's driver picked up the trailer. (R. p. 19, ¶ 8(b)).

Florence Concrete contracted with Nesbitt Transportation – a federally authorized motor carrier – to transport the concrete slab. It is undisputed that Nesbitt Transportation was an independent contractor – i.e., Florence Concrete did not control the means or methods of Nesbitt Transportation's job. (R. pp. 8 & p. 20, ¶ 8(f)). As noted above, the OSOW permits were applied for and issued to Nesbitt Transportation, not Florence Concrete. (R. p. 19, ¶ 8(c) & pp. 24-27). The permits list Nesbitt Transportation as the responsible motor carrier and include Nesbitt Transportation's USDOT number and the license plate number for the truck and trailer owned by Nesbitt Transportation. (R. pp. 24-27).

Florence Concrete had a long history of hiring Nesbitt Transportation to transport its products, dating back to 1992 – approximately 27 years. (R. p. 21, ¶ 8(k)). Nesbitt Transportation

hauled the "vast majority" of Florence Concrete's loads and had done so without any prior motor vehicle accidents and only minor property damage incidents. (R. p. 21, ¶ 8(k)). It is undisputed that Nesbitt Transportation had the proper licensing, insurance, and operating authority to carry the load in question. No restrictions were in place against Nesbitt. (R. p. 21, ¶ 8(k)). Florence Concrete knew that Nesbitt Transportation was insured, authorized to carry the load by state and federal authorities, and properly permitted.[2] (R. p. 19, ¶ 8(c)).

Importantly, Florence Concrete did not know any of the following:

1) "Florence Concrete was not aware of the time that Mr. Rouse left its [unmanned] lot with the oversized load nor was it aware that the oversized load left the lot at a time that violated the oversized permit" (R. p. 20, ¶ 8(e)).

2) "Florence Concrete did not provide instructions to Nesbitt Transportation or Mr. Rouse on when to move the load" (R. p. 20, ¶ 8(f)); and

3) Mr. Rouse chose to leave early on the morning of the accident, without Florence Concrete's knowledge (R. p. 20, ¶ 8(f)).

At all times relevant to this lawsuit, Nesbitt Transportation and its driver Mr. Rouse were the "motor carrier" responsible for transporting the load. Florence Concrete, on the other hand, was just a concrete fabricator and "shipper" of its products.[3]

---

[2] Respondent contended that Nesbitt Transportation had a "conditional safety rating" from the FMCSA. (R. p. 20, ¶ 8(h)). However, it is undisputed that Florence Concrete was not aware of that rating. It is also undisputed that there were no regulatory restrictions on Nesbitt Transportation to operate the load in question. (R. p. 21, ¶ 8(i)). Moreover, this information is not relevant to the "inherently dangerous" question, and the Circuit Court declined to rule on the issue of duties in connection with hiring an independent contractor. Therefore, this information is irrelevant to the issues before this Court on appeal.

[3] The terms "shipper" and "motor carrier" have separate meanings under the FMCSA Regulations, and the distinction is important. 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.

STANDARD OF REVIEW

When the parties file cross-motions for summary judgment, the issue becomes a question of law for the Court to decide *de novo*. *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). Thus, the appellate court may evaluate the issues "with no particular deference to the trial court." *Id.* (citations omitted).

ARGUMENT

For over 150 years, South Carolina courts have applied the well-established rule that a company is not liable for the acts of an independent contractor. This State's courts have closely guarded this rule, recognizing only a handful of exceptions. In short, the "inherently dangerous" exception to the independent contractor rule is a narrow one. However, the Circuit Court's treatment of the "inherently dangerous" exception is so broad that the exception risks swallowing the rule in its entirety. Each state issues tens of thousands – and in many states, hundreds of thousands – of OSOW permits every year. By simply obeying state and federal traffic laws and the terms of the issued permits, federally authorized motor carriers can and do transport these loads without incident.

Despite the incredible regularity of transporting OSOW loads, the Circuit Court's Order creates a new and strikingly broad exception to the independent contractor rule: anyone hiring a federally authorized motor carrier to transport an OSOW load is now liable for that motor carrier's tortious conduct. The Circuit Court's reasoning fails to identify how the transportation of an OSOW load in accordance with the terms of the SCDOT permit is inherently dangerous. In fact, had Nesbitt Transportation merely complied with the terms of the SCDOT permit, the accident would not have happened. An activity is not inherently dangerous if it can be done safely by merely

following the law. Thus, the inherently dangerous exception does not apply, and this Court should reverse.

The lower court misapplied the inherently dangerous exception in several ways. First, the transportation activity at issue is not inherently dangerous. No South Carolina appellate court, or any court cited by Respondent, has applied the exception in a transportation context. The load (measuring 72ft. long) poses no inherent danger because it is an inanimate and largely inert object. It is not like explosives, toxic chemicals and pesticides, or other volatile objects – the sort of items South Carolina has deemed to be inherently dangerous or ultrahazardous. In fact, this load did not even require pilot cars or other similar measures. Nesbitt Transportation merely had to stay on certain roads and drive at appropriate hours. These are far from the type of extraordinary precautionary measures that would support application of the inherently dangerous exception to the independent contractor rule.

Second, the danger created by Mr. Rouse's negligence was not inherent to the transportation work itself. For the exception to apply, the danger must "inhere" to the work.[4] The danger must arise out of the **normal** operation of the activity, which is not satisfied here. The hours in which Mr. Rouse was allowed to operate the load are clearly defined by South Carolina statute and the SCDOT permit assigned to Nesbitt Transportation, so it cannot be said that Mr. Rouse's decision to violate the permit and break the law was just "part of the job" or otherwise "inherent"

[4] The word "inhere" means "to exist as a permanent, inseparable, or essential attribute or quality of a thing; to be intrinsic to something." Black's Law Dictionary (11th ed. 2019); *see also S.C. Nat. Gas Co. v. Phillips*, 289 F.2d 143, 147–48 (4th Cir. 1961) (analogizing that the operation of a 30-ton piece of earth-moving equipment near playing children might be reckless and said to have created a risk of harm to children, but that is not a danger that is inherent in the work of earth-moving).

in the work. Mr. Rouse's negligence created a new danger separate and apart from the normal transportation of the OSOW load.

Third, the lower court failed to correctly apply the "antecedent knowledge" element of the exception. It is undisputed Florence Concrete was unaware that Mr. Rouse chose to transport the load outside of the permitted hours. To the contrary, Florence Concrete and Nesbitt Transportation shared a 27-year business relationship. During that time, Nesbitt transported "the vast majority" of Florence Concrete's loads, and those loads were transported without any prior motor vehicle accidents and only minor property damage incidents. Prior to the accident, Florence Concrete knew Nesbitt was insured, had the proper permits, and had the necessary operating authority from the DOT and FMCSA. There is no evidence that Mr. Rouse had a history of operating loads outside of permitted times or, more importantly, that Florence Concrete knew about it.

Florence Concrete had no duty to control the conduct of its independent contractor. The duty to control is one of a master over an agent. By definition, an employer of an independent contractor does not control the conduct of the contractor; it does not control the means or methods of the activity. If the transportation of an OSOW load creates an exception to this rule, then every customer shipping <u>any</u> oversize or overweight load will be forced to accompany the federally authorized motor carrier during the entirety of the trip to make sure the motor carrier complies with all laws and regulations. Not only will most customers not have the knowledge necessary to accomplish such a task, but the rule would have incalculable ramifications on the shipping industry. Therefore, the Circuit Court should be reversed, and summary judgment should be entered in favor of Florence Concrete.

I. The lower court failed to apply the well-established independent contractor rule to Florence Concrete.

A. This case falls squarely within the typical independent contractor rule, and Respondent does not contest the fact that Nesbitt Transportation is an independent contractor.

South Carolina's independent contractor rule is clear: "a [principal] is not vicariously liable for the negligent acts of an independent contractor." *See, e.g.*, *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005). Over 150 years ago, South Carolina announced this rule, stating: "[T]he owner of property, fixed or movable, for whose benefit a work about such property is to be accomplished, is not held answerable for the negligence of an independent contractor to whom he has committed the work, to be done without his control in its progress." *Conlin v. City Council of Charleston*, 49 S.C.L. (15 Rich.) 201, 211 (1868). Stated another way, a principal, like Florence Concrete, who commits a task to an independent contractor, like Nesbitt Transportation, and who does not control the means or methods used by the independent contractor in the performance of its work, is not liable for the independent contractor's negligence. *See Cherry v. Myers Timber Co.*, 404 S.C. 596, 601, 745 S.E.2d 405, 407 (Ct. App. 2013) (holding that a timber company was not liable for the negligence of a logging company hired to harvest the timber because the logger was an independent contractor and the timber company did not control the logger's work).

The independent contractor rule is based on the traditional principle that liability is based on fault. From early common law to now, tort liability has been grounded on the notion that fault should be assigned to the wrongdoer. *Snow v. City of Columbia*, 305 S.C. 544, 548, 409 S.E.2d 797, 799 (Ct. App. 1991). This idea is called the "fault principle," and it is a "foundational principle of tort liability today." *Id.* at 548–49, 409 S.E.2d at 800 ("There is no tenet more fundamental in our law than liability follows the tortious wrongdoer."). The independent contractor rule

recognizes that an employer who does not control the contractor's activities is not at fault for that contractor's negligence.[5]

Secondly, and equally important, the independent contractor rule encourages individuals and companies (like Florence Concrete) to defer to more knowledgeable persons whose work (like motor carrier transportation) falls outside of the employer's expertise, thereby creating necessary efficiencies in the workplace. The Supreme Court of Iowa poignantly summarized the importance of the rule:

> The limited nature of the duty owed by employers of independent contractors takes into account the realities of the relationship between employers and their contractors. One of these realities is that employers often have limited, if any, control over the work performed by their contractors. Employers typically hire contractors to perform services beyond the employers' knowledge, expertise, and ability… The policy of the law therefore justifies the rule placing the primary responsibility on the [independent] contractor for assuring proper precautions will be taken to manage risks arising in the course of the performance of the work... **If liability were not limited in this fashion, inefficiencies would result as employers would be required to develop the knowledge and expertise in their contractors' fields so as to be prepared to understand even the ordinary risks involved in the work and assure that the precautions necessary to manage those risks are taken**. As one court has noted, 'if the law imposed on the principal liability for failure to supervise or monitor the contractor's activities, the result is added cost for minimal benefit.'"

Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689, 698 (Iowa 2009) (citing *PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943, 953 (Ind. 2005)) (emphasis added). In other words, the employer can hire the independent contractor – who often has specialized knowledge in how to perform the

[5] The fault principle, which has served as the foundation of American tort law for centuries, can be contrasted with the "insurance principle," the idea that a person is an insurer against harm regardless of fault. The insurance principle is strongly disfavored rule in South Carolina. *See id*. at 550, 409 S.E.2d at 800 ("This idea, which we shall call the insurance principle, is a departure from fault-based liability. Generally, the common law does not make a person an insurer against all harm that may result from his conduct."); *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 187, 348 S.E.2d 617, 626 (Ct. App. 1986) ("The concept of fault lies at the core of common law tort liability. Only the strongest of reasons should compel the law to depart from the fault principle.").

work – without the expense of learning how to do the work himself or paying to oversee the work performed by the independent contractor.

The facts of this case fall within the well-established independent contractor context. Florence Concrete is a fabricator of concrete products. In contrast, Nesbitt Transportation was a federally authorized motor carrier with a USDOT number and proper operating authority. As such, Nesbitt Transportation was required to comply with a litany of state and federal regulations for motor carriers. Likewise, Nesbitt Transportation – as the permit holder – was required to comply with the terms of the SCDOT permit that Nesbitt Transportation applied for and obtained. Therefore, Nesbitt Transportation was in the best shoes to safely and legally transport the load. Recognizing this irrefutable reality, Respondent concedes that Nesbitt Transportation is an independent contractor. (R. p. 18, ¶ 7).

B. South Carolina has recognized very few exceptions to the independent contractor rule, none of which apply to this transportation case.

In over 150-years of applying the independent contractor rule, South Carolina courts have recognized only a few exceptions. Typically, the exceptions arise out of two classes of nondelegable duties: (1) the defendant attempts to delegate a statutory duty; or (2) the defendant provides a public service and attempts to delegate that distinctly public duty. Specifically, South Carolina has recognized an exception to the rule in the following cases:

1) An employer's duty to provide a reasonably safe place to work and suitable tools. *Bellamy v. Hardee*, 242 S.C. 71, 129 S.E.2d 905 (1963);

2) A landlord's duty to maintain a tenant's property in a fit and habitable condition. *Nedrow v. Pruitt*, 336 S.C. 668, 521 S.E.2d 755 (Ct. App. 1999) (statutory);

3) A commercial motor carrier's duty to properly secure cargo. *Jenkins v. E.L. Long Motor Lines*, 233 S.C. 87, 103 S.E.2d 523 (1958) (statutory);

4) A bail bondsman's duty to supervise the work of his employees. *Carson v. Vance*, 326 S.C. 543, 485 S.E.2d 126 (Ct. App. 1997) (statutory);

5) A municipality's duty to maintain safe streets. *Dolan v. City of Camden*, 233 S.C. 1, 103 S.E.2d 328 (1958) (public service);

6) A private hospital's duty with respect to providing emergency room services. *Simmons v. Tuomey Regional Med. Ctr.*, 421 S.C. 32, 533 S.E.2d 312 (2000) (public service).

None of these exceptions are present in the instant case, nor has Respondent argued that any such exception applies.

The common law also recognizes the "inherently dangerous" exception, which "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." Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431, 453 n.117 (1996).[6] Typically, South Carolina case law references the "inherently dangerous" exception as a precursor to noting that the exception does not apply. *See, e.g.*, *Young v. Morrisey*, 285 S.C. 236, 242, 329 S.E.2d 426, 429 (1992), *superseded by statute on unrelated ground* (holding electrical work is "of very common occurrence" and declining to apply inherently dangerous exception to electrical work); *Momeier v. Koebig*, 220 S.C. 124, 129, 66 S.E.2d 465,

[6] There is a distinction between the inherently dangerous exception and the other nondelegable duty exceptions recognized in South Carolina. *Id.* (stating that "Professor Prosser 'treats inherently dangerous activities as an exception to the independent contractor rule separate from nondelegable duty.'" (citing W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 71, at 513 (5th ed. 1984)). The main difference between a nondelegable duty exception and the inherently dangerous exception is that for the latter, an independent contractor's negligence is **not** imputed onto the principal. *Compare Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) (a nondelegable duty case where the Court stated that: "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."); *with Davis v. Summerfield*, 133 N.C. 325, 45 S.E. 654, 655 (1903) (holding that the inherently dangerous exception does not apply when the injury results from the independent contractor's collateral negligence); *and* Restatement (Second) of Torts § 427 (1965) (The inherently dangerous exception "has no application where the negligence of the contractor creates a new risk, not inherent in the work itself or in the ordinary or prescribed way of doing it, and not reasonably to be contemplated by the employer.").

467 (1951) (noting that while blasting operations may be inherently dangerous, pile driving is not); *Norris v. Bryant*, 217 S.C. 389, 400, 60 S.E.2d 844, 848 (1950) (holding that even though a logging truck is a dangerous instrumentality if negligently operated on the highway, the operation of the truck is not so inherently dangerous as to make an owner liable for the negligence of an independent contractor); *Googe v. Speaks*, 194 S.C. 206, 9 S.E.2d 439, 443 (1940) (holding it is "manifest" that use of a gasoline tank on a truck was not inherently dangerous).

Only once has a South Carolina appellate court applied the inherently dangerous exception, and in that case, the independent contractor was spreading toxic chemicals from an airplane on a narrow strip of a railroad company's right of way and, unsurprisingly, the aerial chemicals blew onto neighboring property. *Alexander v. Seaboard Air Line R. Co.*, 221 S.C. 477, 480, 71 S.E.2d 299, 300 (1952). The poisonous chemical was known as "2-4-D chemical dust" and had "unusual carrying powers" that caused it to "vaporize in the air" and "travel for miles" once released. *Id.* at 487, 71 S.E.2d at 303. South Carolina is one of numerous states that have recognized that aerial spraying of such chemicals is inherently dangerous due to the natural tendency for the chemicals to be carried by wind onto neighboring properties.[7]

When comparing *Alexander* to the facts of this case, it is hard to imagine how releasing toxic, wide-spreading chemicals from an airplane onto a narrow right of way is in any way similar to transporting an inanimate, inert, non-toxic concrete block on the roadway. This is likely why courts that have addressed this question in other jurisdictions hold that transportation of an OSOW load is <u>not</u> inherently dangerous. *See Fike v. Peace*, 964 So.2d 651 (Ala. 2007) ("When considering

[7] *See, e.g., S.A. Gerrard Co. v. Fricker*, 42 Ariz. 503, 27 P.2d 678 (1933); *Pendergrass v. Lovelace*, 57 N.M. 661, 262 P.2d 231 (1953); *Leonard v. Abbott*, 357 S.W.2d 778 (Tex. Civ. App. 1962), *rev'd on other grounds*, 366 S.W.2d 925 (Tex. 1963); *Boroughs v. Joiner*, 337 So.2d 340 (Ala. 1976).

other activities previously recognized in this State as inherently dangerous—the aerial spraying of pesticides and insecticides . . .—we must conclude that the shipping of an oversized load does not rise to the same level.").

The scarcity of exceptions to the independent contractor rule illustrates the degree to which South Carolina's courts have protected the rule. But despite that continued protection, the Circuit Court applied the rarely used inherently dangerous exception in a manner that has not been recognized in this or any other state. While South Carolina has historically treated exceptions to the independent contractor rule with great skepticism and scrutiny, the Circuit Court's standard was exactly the opposite – the Circuit Court broadly held that the exception applies to the transportation of OSOW loads. The Circuit Court's holding stands for the proposition that Florence Concrete and any shipper like it are vicariously liable for an independent contractor's negligence, even when the work could have easily been performed safely by simply following South Carolina law. This is not – and cannot be – the rule in this State.

II. The inherently dangerous exception does not apply because (1) the activity was routine and not inherently dangerous; (2) Mr. Rouse's collateral negligence does not satisfy the exception; (3) Mr. Rouse's negligence did not "inhere" to the activity at hand; and (4) Florence Concrete did not have antecedent knowledge of the danger created by Mr. Rouse's negligence.

In the last century, South Carolina's appellate courts have applied the inherently dangerous exception only once. *See Alexander*, *supra* (applying the exception to the aerial spraying of chemicals). The exception applies 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). Unlike dropping chemicals from an airplane, the transportation of OSOW loads is commonplace and can easily be performed without extraordinary efforts to prevent harm. Simply

put, the work is far from "inherently dangerous," and Nesbitt Transportation's negligence cannot be imputed to Florence Concrete.

South Carolina has not formally adopted a set of elements to follow when considering the exception, perhaps because it is so rarely applied. But other states, like North Carolina, apply the following: (1) the activity must be inherently dangerous; (2) the principal must have had antecedent knowledge of the danger inherent to the work;[8] (3) the principal failed to take necessary precautions to control the attendant risk; and (4) the risk proximately caused the injury to the third-party. *Kinsey v. Spann*, 139 N.C. App. 370, 375, 533 S.E.2d 487, 492 (2000). Each element must be satisfied for the exception to apply, but here, none of them are satisfied.

A. The activity in this case – transporting oversized freight – is not inherently dangerous.

To trigger the exception, the inherent danger must be a "peculiar," "special," or "substantial" risk that is inherent in the nature of the work itself. *See e.g.*, McWilliams & Russell, supra, at 453 n.117 (the exception includes "work which, in nature, will create some peculiar risk of injury to others unless special precautions are taken."); *Ruh v. Metal Recycling*, 436 F. Supp. 3d 844, 851 (D.S.C. 2020) (using the phrase "special risk"); *Evans v. Elliott*, 220 N.C. 253, 17 S.E.2d 125, 128 (1941) (holding that work is inherently dangerous if a "recognizable and substantial danger [is] inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor").

The exception "applies where the work is **not of common occurrence** and involves the risk of serious harm to others or their property during the course of the performance…." *Young v.*

[8] Like North Carolina, South Carolina also has an "antecedent knowledge" requirement, which is discussed more fully below in Section III(D) of Appellant's Brief. *See Allison*, 215 S.C. at 351, 55 S.E.2d at 283 ("Liability of the employer in such cases depends upon his antecedent knowledge of the danger inherent in the work or a finding that the average, reasonably prudent man or corporation should, in the exercise of due diligence, have known.").

Morrisey, 285 S.C. 236, 242, 329 S.E.2d 426, 429 (1985) (holding that electrical work is of very common occurrence and is not inherently dangerous) (abrogated by statute); *S.C. Nat. Gas Co. v. Phillips*, 289 F.2d 143, 147 (4th Cir. 1961) (holding that moving earth with heavy machinery is not inherently dangerous because it is "routinely and commonly" performed without harm to others). The danger must inhere to the activity "**<u>at all times</u>**," so as to require special precautions to avoid injury. *Mavrikidis v. Petullo*, 153 N.J. 117, 151, 707 A.2d 977, 994 (1998) (emphasis added).

The type of peculiar, special, or substantial risk required by the exception is different from ordinary risks caused by an independent contractor's negligence. *Id*. at 144, 707 A.2d at 990; *Ek v. Herrington*, 939 F.2d 839, 843 (9th Cir. 1991) (holding that Restatement §§ 413, 416, and 427, which discuss a principal's nondelegable duty for inherently dangerous work, do not apply to "ordinary dangers that are not special to the work at hand, and against which any careful [independent] contractor would take precautions"). "Poor driving, faulty brakes, and overloading are ordinary risks associated with motor vehicles and the transport of materials, and as such, are the responsibility of the [independent] contractor." *Mavrikidis v. Petullo*, 153 N.J. at 145, 707 A.2d at 991. An independent contractor's negligence does not make an activity inherently dangerous. *See* Restatement (Second) of Torts § 427 (1965) (stating that the exception "has no application where the negligence of the contractor creates a new risk, not inherent in the work itself or in the ordinary or prescribed way of doing it").

The transportation of an OSOW load does not bear any unusual risk that is inherent to the task. As an initial matter, countless products are technically oversized when transported. By definition, loads wider than 8.5 feet are considered "oversize." S.C. Code § 56-5-4030(B). Unsurprisingly, this means countless products and materials cannot be transported without an

OSOW permit. Some products that are longer than the concrete slab at issue in this case are technically not oversize. For example, a pole, log, pipe, or other material placed on a trailer may be up to 80 feet before a permit is required.[9] S.C. Code § 56-4-4090.

Due to the common nature of transporting OSOW loads, states individually issue tens or hundreds of thousands of OSOW permits every year. For example, one survey of eighteen states revealed that in 2012, those states issued a range of 25,000 permits on the low end (Maine) up to 741,000 permits on the high end (Texas) in a single year.[10] In total, millions of permits are issued annually.[11]

The Circuit Court's order fails to point to anything unusual about the transportation of an OSOW load that makes it inherently dangerous. In this case, some loads of the same length could be transported without a permit. Therefore, it is difficult to discern how the mere fact that the load was long made it inherently dangerous. Likewise, the mere fact that a load requires a permit – such as a load that is 8 feet 7 inches wide – cannot render the transportation automatically inherently dangerous. Such a rule directly contradicts the principle that exceptions to the independent contractor rule are to be rare and applied with scrutiny.

---

[9] Notably, these loads that do not require OSOW permits are still restricted as to the hours that they can be on the roadway. S.C. Code § 56-5-4090(B).

[10] *Advances in State DOT Superload Permit Processes and Practices*, Farrar, Matt, PE (Chair) et. al, p. 28, fig. 2.2 (available at https://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP20-68A_12-01.pdf, last accessed July 19, 2022).

[11] *See* National Academies of Sciences, Engineering, and Medicine 2016. *Multi-State, Multimodal, Oversize/Overweight Transportation*. Washington, DC: The National Academies Press p. 20, fig. 2-7 (noting that over 3,000,000 OSOW permits were issued annually from 2006 through 2012) (available at https://doi.org/10.17226/23607, last accessed July 19, 2022); *Freight Facts and Figures 2017*, supra (noting that over 5,000,000 OSOW permits were issued annually in 2013, 2014, and 2015).

In *Alexander v. Seaboard*, the only South Carolina case to apply the exception, the Supreme Court held that spraying a toxic chemical known as "2-4-D" from a crop-dusting airplane was an inherently dangerous activity because the highly toxic chemical had "unusual carrying powers…as it vaporizes in the air and may travel for miles." 221 S.C. at 487, 71 S.E.2d at 303 (citing *Burns v. Vaughn*, 216 Ark. 128, 128, 224 S.W.2d 365, 365 (1949)). The inherent dangers in *Alexander* are obvious.

In contrast, every day, tractor-trailer rigs carrying heavy or oversized loads traverse South Carolina's roadways without incident. Not once has a South Carolina court – or any court cited by the Circuit Court or Respondent – deemed such an activity to be inherently dangerous. To the contrary, courts examining this issue and the similar question of whether the operation of a commercial motor vehicle is inherently dangerous have held such activities are **not** inherently dangerous.[12]

Just two years after *Allison,* the South Carolina Supreme Court held that the inherently dangerous exception did not apply to the operation of a logging truck. *Norris v. Bryant*, 217 S.C. 389, 60 S.E.2d 844 (1950). In *Norris*, the plaintiff's leg was sheared off due to the negligent operation of a logging truck hauling logs. The plaintiff argued that the defendant principal was responsible for its independent contractor's negligence because the activity – hauling heavy timber – was inherently dangerous under *Allison*. The Supreme Court disagreed, holding:

> [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

[12] The difference between the operation of a commercial motor vehicle and the transportation of an OSOW load is one of degree. As noted above, that difference can often be a simple matter of one or two inches. Likewise, the distinction between a non-commercial vehicle and a commercial vehicle is simply a matter of degree. Once a vehicle reaches certain weight or other thresholds, it often requires a commercial motor vehicle authorization. Therefore, the mere fact that an OSOW load is larger than some other load is not, in and of itself, sufficient to make its transportation inherently 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 an independent contractor.

Id. at 400, 60 S.E.2d at 848.

The Supreme Court's reasoning in *Norris* applies with equal force here. The OSOW load at issue was only dangerous because Mr. Rouse made the unilateral and negligent decision to operate a load before daylight when the load was intended to only be transported during daylight hours. Obviously, operation of such a load when it is dark– i.e., "a truck negligently operated on the highway" – is dangerous. However, that danger is not inherent to the transportation of an OSOW load. In other words, while the negligent operation of any truck makes the truck a dangerous instrumentality, the operation of the truck is not "inherently dangerous." It is the driver's negligence that creates the danger, not the inherent risks associated with the task.[13]

In addition, courts across the country agree that the operation of large commercial vehicles and the transportation of heavy or oversized loads are not inherently dangerous. Perhaps the most analogous case is *Fike v. Peace*, where the Alabama Supreme Court held that transporting oversized brick-kilns was not an inherently dangerous activity. 964 So. 2d 651 (Ala. 2007). In that case, General Shale was a company in the business of manufacturing brick. *Id*. at 653. The cargo in question was large steel kiln cars used to manufacture brick, and due to the size of the kiln cars, they were deemed to be an "oversized load." *Id.* General Shale, like Florence Concrete, was not a motor carrier, so it contracted with DG Trucking, a motor carrier and independent contractor, to transport the loads. *Id*.

---

[13] More recently, in *Ruh v. Metal Recycling Services, LLC*, the United States District Court for the District of South Carolina held that transporting almost 80,000 pounds of scrap metal did not present any "special risk" for which the exception would apply. 436 F. Supp. 3d 844, 851 (D.S.C. 2020). That case is on appeal on other grounds.

General Shale and DG Trucking shared a fifteen-year-long business relationship prior to the accident in *Fike*, and in that time, "[t]here was no evidence that General Shale has ever had any problems with DG Trucking and its methods, safety history, or observation of legal requirements for a commercial motor carrier." *Id*. Like the cement slab here, the OSOW load in *Fike* required an OSOW permit. *Id.* at 659.

A fatal accident occurred when DG Trucking's driver wedged his oversized load between two lanes of traffic. *Id.* After, an inspection of the tractor-trailer revealed several regulatory violations. *Id.* The plaintiff filed suit against General Shale in federal court, which certified to the Alabama Supreme Court a question that is almost identical to the stipulated issue in the instant case: "[D]oes the mere contracting for the hauling of an oversize load make the shipper vicariously liable for the negligence of the independent contractor trucking company?" *Id.* at 652. The Alabama Supreme Court answered in the negative, stating: "When considering the other activities previously recognized in this State as inherently dangerous – the aerial spraying of pesticides and insecticides,[[14]] the use of a highly caustic chemical, and the use of dynamite as an explosive – we must conclude that the shipping of an oversized load does not rise to the same level…." *Id.* at 660–61.

A legion of other courts have also held that transporting large and/or oversized loads is not an inherently dangerous activity. *See Dowe v. Birmingham Steel Corp.*, 963 N.E.2d 344, 354 (Ill. App. 2011) (holding that transporting an oversized load consisting of 60ft long steel reinforcing bars was not inherently dangerous because there was not a "peculiar risk" with the activity); *Dishmond v. United States*, No. CV 114-083, 2014 WL 12570955, at *3 (S.D. Ga. Nov. 21, 2014)

[14] South Carolina and Alabama are alike in that both states have held that the aerial spraying of pesticides is an inherently dangerous activity. *See Alexander*, *supra*; *Boroughs*, *supra*.

(holding that the operation of "a large commercial truck on a dangerous highway" is not unique or inherently dangerous); *Beavers v. Victorian*, 38 F. Supp. 3d 1260, 1269 (W.D. Okla. 2014) (transporting a heavy load weighing approximately 76,000 pounds up steep mountain roads was not an inherently dangerous activity); *Walker v. Martin*, 887 N.E.2d 125, 135 (Ind. Ct. App. 2008) (transporting a heavy load of fifty-six timber logs was not inherently dangerous); *Victoria Elec. Co-op., Inc v. Williams* 100 S.W.3d 323, 331 (Tex. App. 2002) (transportation of utility poles was not inherently dangerous or peculiarly risky); *Mavrikidis v. Petullo*, 153 N.J. 117, 146, 707 A.2d 977, 991 (1998) (hauling an overloaded truck carrying 11-tons of asphalt between 300- and 310-degrees Fahrenheit was not an inherently dangerous activity); *Kime v. Hobbs*, 252 Neb. 407, 418, 562 N.W.2d 705, 713 (1997) (transportation of a tractor-trailer loaded with livestock was not inherently dangerous); *Inland Steel v. Pequignot*, 608 N.E.2d 1378, 1385 (Ind. Ct. App. 1993) (holding that the transportation of 48,000 pounds of steel was not an inherently dangerous activity); *Ek v. Herrington*, 939 F.2d 839, 843–44 (9th Cir.1991) (declining to apply the inherently dangerous exception to a logging truck transporting several tons of logs up steep mountain roads) (applying Idaho law); *Williams v. Tennessee River Pulp & Paper Co.,* 442 So.2d 20, 23 (Ala. 1983) (transportation of a logging truck hauling pulp timber was not inherently dangerous). These cases are consistent with the South Carolina Supreme Court's holding in *Norris*.

In sum, the transportation of a concrete slab is not an inherently dangerous activity that triggers an exception to the independent contractor rule. The mere fact that a load is large (in this case, long) does not trigger the inherently dangerous exception. OSOW loads are routinely transported on highways in South Carolina and across the county without incident. There was nothing about the task at hand that was inherently dangerous. Rather, the independent contractor's unilateral choice to break South Carolina law is what rendered the activity dangerous – no different

from the independent negligence of the trucker in *Norris* or a driver who chooses to operate a vehicle at night without headlights. Therefore, the standard independent contractor rule applies.

B. The mere fact that conduct is regulated does not mean it is inherently dangerous.

The Circuit Court held transporting an oversized concrete slab is inherently dangerous because the SCDOT has regulated the activity. (R. p. 8). This holding has no principled line of demarcation. Driving a common car is regulated, requiring a licensed driver, a valid registration, and insurance. Driving a commercial motor vehicle is regulated, requiring a USDOT number, pre-trip inspections, a driver with a proper commercial license, and numerous other measures. The mere fact that this load required a permit does not prove that it was inherently dangerous.

Notably, South Carolina has held that other regulated conduct is not "inherently dangerous." For example, electrical contractors must be licensed with the state. *See* S.C. Code § 40-59-20(7)(b); S.C. Code § 40-59-220. Yet, electrical work is not "inherently dangerous." *Young v. Morrisey*, 285 S.C. 236, 242, 329 S.E.2d 426, 429 (1985). Likewise, the fact that permits are required does not make conduct inherently dangerous. Permits are required for all sorts of conduct, including constructing buildings; however, a landowner is not liable for a general contractor's negligent conduct that injures a third party under any "inherent danger" rule.

No court in this state – or any other state cited by the Circuit Court or Respondent – has held that a regulated activity is *ipso facto* inherently dangerous. The mere fact that the conduct is regulated or requires a permit is far from the sort of strict standard that would justify an exception to the independent contractor rule. This Court has held that exceptions to the independent contractor rule are "difficult to define" and "primarily grounded in public policy considerations," *Gary v. Askew*, 417 S.C. 232, 249, 789 S.E.2d 94, 103 (Ct. App. 2016), the creation of which requires an "exercise in restraint" and should be developed only after "the utmost circumspection."

Taghivand v. Rite Aid Corp., 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015); *see also* McWilliams & Russell, *supra*, at 453 (stating that in our fault-based system, exceptions to the independent contractor rule are "strong medicine, assigned only on the basis of potent policy"). The conclusion that transporting OSOW loads is inherently dangerous merely because it is regulated or requires a permit fails to exercise the restraint and circumspection required before recognizing an exception to the independent contractor rule.

Imagine the consequences of the lower court's incredibly expansive interpretation. Many daily activities are regulated in some capacity – e.g., driving a car, practicing law and medicine, preparing and selling food in a restaurant or grocery store, supervising children at a daycare. This list could go on forever. But if a regulated activity is *ipso facto* "inherently dangerous," then the independent contractor rule would be abrogated on a massive scale and, in its place, a widespread application of the insurance principle would take over (i.e., liability in the absence of fault), which is strongly disfavored in this state. "**Only the strongest of reasons should compel the law to depart from the fault principle**."[15] *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 187, 348 S.E.2d 617, 626 (Ct. App. 1986) (emphasis added).

[15] It is equally telling that prior to July 1, 1994, the Department of Revenue, not SCDOT, was responsible for issuing OSOW permits to motor carriers – for a fee. *See* Appropriations Bill, 1994 South Carolina Laws Act 497 (H.B. 4820). If the transportation of oversized loads was so inherently dangerous that it affected the health and safety of the public, it seems unlikely that the Department of Revenue would be tasked with oversight.

It makes sense that at one time the Department of Revenue would have controlled revenue collection and related permitting. Now, the fees generated from the sale of permits go to the state highway fund, so it stands to reason that SCDOT is allowed to control its own purse strings. § 57-3-130(A). And even then, the SCDOT's spending authority is not necessarily tailored towards promoting the health-and-safety of the public. Instead, the statute provides that spending may be directed toward defraying costs of issuing additional permits and "other highway purposes," a broad category. *Id*. All of this lends support to the proposition that this activity is not inherently dangerous.

Ultimately, no South Carolina appellate court has held that an activity is inherently dangerous simply because it is regulated or requires a permit. Such a rule is impossibly broad and would effectively swallow the independent contractor rule whole. Therefore, the Circuit Court's reliance on the existence of the OSOW permit is unsupported.

C. The inherently dangerous exception cannot apply when the independent contractor's collateral negligence creates the danger, and the risk here – operating a tractor-trailer outside of legally permissible times – is not inherent in the task of transporting the OSOW load.

It is important to identify the "danger" that has been alleged in this case. Here, the danger was Mr. Rouse's negligent operation of the tractor-trailer outside of legally permissible times. The danger arose from Mr. Rouse breaking the law and deviating from the standard of care for motor carriers, which is not an "inherent" part of transporting freight. The danger could have been avoided simply by obeying the law and operating the load during the times allowed in the permit. The permitted hours of operation are clearly defined by statute and in the SCDOT permit assigned to Nesbitt Transportation. It cannot be said that Mr. Rouse's deviation from those clear instructions was "part of the job," any more than illegally speeding is "part of driving."

Literally and legally, Mr. Rouse acted outside of what the job required, and it is well-established nationwide that this type of negligence does not make an activity inherently dangerous. *See, e.g.*, *Commee v. Nucor Corp*., 173 F. App'x 209, 215 (4th Cir. 2006) ("[A]ny danger created by the use of the forklift was the result of negligence collateral to the work performed, which, as discussed, does not reflect on the inherent danger of the activity."); 41 Am. Jur. 2d Independent Contractors § 50 ("[I]f the danger is created by a contractor's negligence, or the danger could be reduced or eliminated by taking reasonable precautions, then the task is not inherently dangerous."); 34 A.L.R.4th 914 ("The phrase 'inherently or intrinsically dangerous work' is defined for purposes of this annotation as hazards which inhere in the performance of the work

and result directly from the work to be done, not from the collateral negligence of the contractor."); Restatement (Second) of Torts § 427, cmt d. (1965) (stating that the exception to the independent contractor rule "has no application where the negligence of the contractor creates a new risk, not inherent in the work itself or in the ordinary or prescribed way of doing it, and not reasonably to be contemplated by the employer").

For an activity to be "inherently dangerous," the danger must be one that "inheres in the performance of the work such that in the **ordinary course of events** its performance would probably, and not merely possibly, cause injury if proper precautions were not taken." 41 Am. Jur. 2d Independent Contractors § 50 (emphasis added). "It is the task itself that must be inherently dangerous in order for the inherently dangerous work exception to the independent contractor defense to apply . . .." *Id.*

Operating loads outside of permitted times is not an "inherent" part of Mr. Rouse's work. Florence Concrete hired Nesbitt Transportation to transport the load from South Carolina to North Carolina; it did not hire Nesbitt to do so during nighttime hours. Nothing about the assignment to transport the load required Nesbitt Transportation to move the load outside of the times permitted by the permit and by law. Here, the only step needed to alleviate the risk was to not drive the truck negligently and illegally. If this type of activity "inheres" to the task of transporting an OSOW load, then the negligent operation of the logging truck in *Norris* would have inhered to the work in that case. However, as the Supreme Court recognized in *Norris*, if the injury is caused by the negligent operation of the truck in violation of the standard of care – rather than a risk that is inherent to the task itself – then the risk is not the type of "inherent risk" that falls outside of the standard independent contractor rule.

If breaking the law and deviating from a standard of care is an inherent part of work, then any negligent or illegal conduct of an independent contractor during the work would be imputable to the employer. For example, if a customer ordered Uber Eats and the driver caused an accident while driving at night without headlights – an illegal and dangerous activity – then the customer would be legally liable for the driver's negligent conduct. Such negligence does not inhere to the normal, everyday operation of the activity.

Mr. Rouse deviated from the "ordinary course of events" required to perform his job. *Id.* His deviance was not a "permanent, inseparable, or essential attribute or quality" of the transportation activity. *See* Black's Law Dictionary (11th ed. 2019) (definition of "inhere"). He was not required to operate the load at night. In fact, he was expected to obey the law – i.e., drive during the day. There is no evidence that Florence Concrete knew or should have known that Mr. Rouse was likely to act the way that he did, and Florence Concrete was not required to anticipate Mr. Rouse's rogue act of negligence. *See e.g.*, *Mavrikidis v. Petullo*, 153 N.J. 117, 145, 707 A.2d 977, 990–91 (1998) (holding that the principal was justified in presuming that the independent contractor would operate their vehicles safely and in accordance with the traffic laws); Restatement (Second) of Torts § 426 (1965) ("[The principal] is not required to contemplate or anticipate…negligence in the performance of operative details of the work which ordinarily may be expected to be carried out with proper care.").

The Circuit Court erred by focusing on the wrongful conduct – moving the load in the early morning darkness in violation of the permit – rather than focusing on the task that Nesbitt Transportation was hired to do – transport the load. When considering whether a danger is inherent to the work itself, the court must consider "the general nature of the work," not the highly particularized activity that created the harm. *See, e.g.*, *Bowles v. Weld Tire & Wheel, Inc.*, 41

S.W.3d 18, 24 (Mo. Ct. App. 2001) ("To determine whether an activity is inherently dangerous, the court must begin by ascertaining the nature of the activity and the manner in which it is ordinarily performed."). This Court must distinguish between (1) work that is inherently dangerous and (2) work that may be made dangerous by an independent contractor's negligence. The latter – like the work at issue in this case and the work performed in *Norris* – does not satisfy the exception.

For example, in *S.C. Nat. Gas Co. v. Phillips*, the Fourth Circuit, analyzing South Carolina law, held that operating a 30-ton piece of earth moving machinery over high pressure gas lines was not inherently dangerous. 289 F.2d 143 (4th Cir. 1961). The court explained that "any activity which has caused harm would appear highly dangerous . . . when so particularized that the view is restricted to the immediate activity which in fact has caused the harm," but the focus must be on the general nature of the work itself – not the independent contractor's bad acts. *Id.* at 147. If the focus is improperly placed on the independent contractor's negligence, then the court fails to appreciate whether the danger was inherent in the work itself or merely inherent in the negligent performance of the work.

The Fourth Circuit in *Phillips* analogized that if the 30-ton piece of earth-moving equipment was operated in the vicinity of playing children, then the operator might be charged with recklessness and creating a grave risk of harm, but that is not a risk that is inherent in the work of earth moving. *Id.* at 147–48. Rather, that danger "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.*; *see also Evergreen Int'l, S.A. v. Marinex Const. Co.*, 477 F. Supp. 2d 690, 694 (D.S.C. 2007) (holding that dredging a navigable river may be made dangerous by a negligent actor, but the activity itself does not present any peculiar or ultrahazardous risks for which an

exception would apply).[16] Just like the example of operating an excavator at a time when children are nearby – something an operator may choose to do, but is not required to do, in order to excavate – Nesbitt was not required to transport the load outside of daylight hours to complete the work. Rather, Mr. Rouse – the immediate actor – made the decision to move the load at an improper time. Thus, as the Fourth Circuit held in *Phillips*, the conduct "does not arise out of the nature of the work generally to be done." *Id.* at 147-48.

For 27 years, Nesbitt Transportation hauled loads like this for Florence Concrete without injuring another person, which is evidence that the activity at hand is not inherently dangerous when performed with care. The activity may become dangerous when an independent contractor negligently performs the work, but such negligence does not inhere to the nature of the work itself to satisfy the inherently dangerous exception. The Circuit Court erroneously focused on the negligent act to find an inherent danger instead of focusing on the nature of the work itself. As required by the rule, the focus must be on the work itself, and in this case, transporting a cement slab is not inherently dangerous.

D. The inherently dangerous exception cannot apply because Florence Concrete did not have "antecedent knowledge" of Mr. Rouse's negligent conduct.

In *Allison v. Ideal Laundry*, the Supreme Court held that liability for the inherently dangerous exception "depends upon [the employer's] **<u>antecedent knowledge</u>** 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." 215 S.C. at 351, 55 S.E.2d at 283 (emphasis added).

---

[16] Analogously, this Court explained that a common household screwdriver is not a dangerous object, but when used in a reckless or dangerous manner, it can become a dangerous instrumentality. *Dennis by Evans v. Timmons*, 313 S.C. 338, 341, 437 S.E.2d 138, 140 (Ct. App. 1993). Still, a person's negligent use of a screwdriver does not make a screwdriver inherently dangerous. *Id*.

The word "antecedent" means "earlier; preexisting; previous." Black's Law Dictionary (11th ed. 2019). Therefore, to apply in this case, Florence Concrete must have had knowledge – before the accident occurred – that Mr. Rouse was likely to create a danger by transporting the load outside of permitted times.

Moreover, the Respondent must show that Florence Concrete had knowledge that the danger created by Mr. Rouse would "probably, and not merely possibly" cause injury unless proper precautions were taken. 41 Am. Jur. 2d Independent Contractors § 50 (emphasis added); *see also Davis v. Summerfield*, 133 N.C. 325, 45 S.E. 654, 655 (1903) (holding that the exception applies where "one that might have been anticipated as a direct or probable consequence of the performance of the work contracted");[17] *Walker v. Martin*, 887 N.E.2d 125, 136 (Ind. Ct. App. 2008) ("More than a mere possibility of harm is required; the defendant should have foreseen the probability of such harm.").

Despite Nesbitt's and Florence Concrete's 27-year long business relationship, there is no evidence that Nesbitt or Mr. Rouse had a history of transporting loads outside of permitted times or that Florence Concrete knew or should have known that Mr. Rouse was likely to act negligently, causing this danger. To the contrary, the stipulated facts confirm that Nesbitt Transportation had a 27-year history of transporting loads for Florence Concrete without injury to others and only minor property damage.

Respondent argues that Florence Concrete had antecedent knowledge because 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." (R. p.

[17] In *Allison*'s discussion of the inherently dangerous exception, the Court calls *Davis v. Summerfield* a "well-considered case". 215 S.C. at 350, 55 S.E.2d at 282.

19, ¶ 8(c)). As an initial matter, this admission is wholly unimpressive. It is no different from admitting that operating a car at night without headlights is inherently dangerous. The fact of the matter is that Mr. Rouse violated the law when he chose to transport the load outside of daylight hours. Thus, knowing that violating the law can create a danger is not "antecedent knowledge" that the independent contractor is likely to violate the law.

Respondent's argument regarding Mr. Roberson's statement cannot prevail because the Supreme Court in *Allison* held that nearly identical testimony failed to satisfy the antecedent knowledge requirement. 215 S.C. at 354, 55 S.E.2d at 284. The *Allison* case arose out of a propane gas explosion at a laundromat. 215 S.C. at 348, 55 S.E.2d at 281–82. There, the laundry hired an independent contractor to replace the laundry's coal-driven boilers with a more efficient propane system. *Id*. at 349, 55 S.E.2d at 282. Shortly after installation, the gas was ignited and an explosion occurred, causing tremendous damage and loss of life. *Id.* at 348, 55 S.E.2d at 281–82. The trial court granted a directed verdict in favor of all the defendants (except the independent contractor), holding that there was no evidence that they had been negligent. *Id*. at 349, 55 S.E.2d at 282. On appeal, the plaintiffs argued that the laundry owed an absolute duty, irrespective of negligence, but the Supreme Court disagreed and affirmed the trial court's directed verdict. *Id*. at 356, 55 S.E.2d at 285.

Importantly, the plaintiffs in *Allison* argued that the laundry's owner had antecedent knowledge of the danger associated with propane gas because he testified at trial that the gas was dangerous unless installed properly, stating:

> Q: Mr. Haynie, of course, you, with your large experience in the business world and traveling, you knew that that propane gas was a terribly dangerous thing if not properly controlled and handled, didn't you?
>
> A: It would be like any gas; it would be dangerous unless it was properly installed, yes, sir.
>
> Q: That is what I am driving at; you knew that, didn't you?

A: Yes, sir.

Id. at 354, 55 S.E.2d at 284. The owner's testimony is strikingly similar to Mr. Roberson's testimony in this case. Moreover, like this case, the owner's testimony was "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." *Id*. After reviewing that testimony, the Supreme Court in *Allison* found the owner's testimony "unworthy of the weight necessary to ascribe to it, in order to create liability upon the laundry for the negligence of its independent contractor." *Id.* at 354, 55 S.E.2d at 284.

Like in *Allison*, Mr. Roberson's testimony does not establish that Florence Concrete knew or should have known that Mr. Rouse's negligence was likely to occur. When read *in toto*, Mr. Roberson's quote is a general statement of fact, like saying "it is inherently dangerous for a person to drink and drive while transporting a concrete slab." While it is true that drinking and driving creates a danger, it would be completely unreasonable to suggest that Mr. Rouse was likely to engage in that illicit activity, especially when there is no evidence to support the assertion. The risk is simply not inherent in the work, and it would be unreasonable to require Florence Concrete to protect against such a speculative and remote danger.[18]

In *Walker v. Martin*, the Indiana Court of Appeals held "the danger that the principal must foresee must be substantially similar to the accident that produced the injury. More than a mere possibility of harm is required; the defendant should have foreseen the probability of such harm."

[18] "It is obvious that an employer of an independent contractor may always anticipate that if the contractor is in any way negligent toward third persons, some harm to such persons may result. Thus one who hires a trucker to transport his goods must, as a reasonable man, always realize that if the truck is driven at an excessive speed, or with defective brakes, some collision or other harm to persons on the highway is likely to occur. **This Section has no reference to such a general anticipation of the possibility that the contractor may in some way be negligent**." Restatement (Second) of Torts § 413 (1965) (emphasis added).

887 N.E.2d 125, 136 (Ind. Ct. App. 2008). There, a company in the business of procuring and selling timber contracted with a motor carrier/independent contractor to haul large loads of timber. *Id*. The carrier was hauling a heavy load of fifty-six logs when he ran a traffic light, killing the plaintiff. *Id.* at 129. Prior to the accident, the logging company and motor carrier had worked together for three-and-a-half years, and at the time of the accident, the carrier was the logging company's primary log hauler. *Id*. There was no evidence prior to the accident that the motor carrier was likely to operate the load in a negligent manner. However, a post-accident investigation revealed that the carrier had violated several regulations. The carrier had improper license plates, defective brakes, and did not have operating authority from the Federal Motor Carrier or Department of Transportation, which plaintiffs argued made the transportation activity inherently dangerous. *Id*. at 135. The Indiana court held that the "evidence did not establish the [logging company] had any knowledge of any alleged mechanical problems with [the carrier's] semi-tractor or trailer, his driving record, or any alleged non-compliance with interstate trucking laws and regulations." *Id*. There was "no showing that [the logging company] could have reasonably foreseen that [the carrier] would negligently disobey a traffic signal and cause an accident." *Id*. at 137. The court recognized that while it is possible that hauling logs may cause injury, "we cannot say that the act in and of itself establishes that the injury will probably occur." *Id*.

Similarly, in this case, there is no evidence that Mr. Rouse was likely to transport the load outside of permitted times. There is no evidence that Mr. Rouse had a prior history of committing similar acts. And there is no evidence that Mr. Rouse's negligent act was a "probable" event likely to cause injury. If persons and businesses like Florence Concrete are required to protect against every possible danger, despite having no knowledge that the danger was likely to occur, then businesses would be unable to meet the demands of such a broad and unreasonable duty. This

Court recognized such a problem in *Snow v. City of Columbia*, stating: "[J]ust as it is impossible to avoid all harm in the conduct of human affairs, it is impossible to insure against all harm. At some point the marginal cost of insuring against risks becomes greater than the marginal benefit of conducting the enterprise that gives rise to those risks." 305 S.C. 544, 551, 409 S.E.2d 797, 801 (Ct. App. 1991).

In sum, transportation of OSOW loads is commonplace, and states issue OSOW permits tens of thousands (or hundreds of thousands) of times a year. OSOW loads like the cement slab in this case can and are transported on roadways daily without incident. Nothing about the task assigned to Nesbitt Transportation was unusually dangerous or the sort of task that falls under the inherently dangerous exception. To the contrary, it was Mr. Rouse's decision to negligently and illegally operate the tractor-trailer at an impermissible time that caused Respondent's injuries. Such conduct – like the negligent operation of the logging truck in *Norris* – does not render the assigned task of transporting the OSOW load inherently dangerous. The danger was avoidable simply by following the law. Finally, there is no evidence that Florence Concrete had antecedent knowledge of Mr. Rouse's probability for negligence. Therefore, the Circuit Court erred in holding that transportation of an OSOW load is inherently dangerous, and the Circuit Court should have enforced the well-established independent contractor rule.

CONCLUSION

Every day, OSOW loads traverse South Carolina's roadways without incident. The task is safe when it is performed as prescribed by law – it is not inherently dangerous. In this case, the accident occurred because Mr. Rouse was negligent and deviated from the ordinary, prescribed way of transporting the load. Mr. Rouse broke the law and breached the standard of care for motor carriers in the process. Mr. Rouse's negligence is not part and parcel with transporting OSOW

loads. He was not required to transport the load outside of permitted times to complete his work, and Florence Concrete did not ask him to operate his load in such a manner. Simply, transporting OSOW loads is not inherently dangerous, it was Mr. Rouse's negligence that made the activity dangerous. Further, there is no evidence that Nesbitt Transportation or Mr. Rouse had a history of committing similar acts, and there is no evidence that Florence Concrete knew or should have known that Mr. Rouse was likely to act negligently.

For these reasons, the Circuit Court erred in holding that the inherently dangerous exception applied here, that Florence Concrete owed a duty to take precautionary measures against Mr. Rouse's negligence, and that Florence Concrete breached a duty to take precautionary measures. The Circuit Court's holding has ramifications that extend far beyond this case to the entire motor transportation industry. The holding obviates the independent contractor rule on a massive scale and adopts a widespread application of the insurance principle (i.e., liability without fault). Therefore, this Court should reverse the Circuit Court's Order and, in doing so, reinstate the sanctity and purpose of the independent contractor rule that has guided South Carolina for well over a century.

Respectfully submitted,

s/ Anthony W. Livoti
Anthony W. Livoti (SCB 13971)
Wesley B. Sawyer, Esquire (SCB 100229)
Cordes B. Kennedy (SCB 102287)
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
Phone: (803) 782-4100
awlivoti@murphygrantland.com
wsawyer@murphygrantland.com
ckennedy@murphygrantland.com

-and-

John R. Owen, Esquire (*pro hac vice*)
James R. Jebo, Esquire (*pro hac vice*)
Harman Claytor Corrigan & Wellman
P.O. Box 70280
Richmond, VA 23255
Phone: (804) 747-5200
jowen@hccw.com;
jjebo@hccw.com;

Attorneys for Appellant

RECEIVED
Dec 05 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 Rodriquis Nelson…...Respondent,

v.

Florence Concrete Products, Inc...Appellant.

CERTIFICATE

I, Anthony W. Livoti, Esquire, attorney for Appellant, certify that the Appellant's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules and the South Carolina Supreme Court Order of August 13, 2007/

s/ Anthony W. Livoti
Anthony W. Livoti (SCB 13971)
Wesley B. Sawyer, Esquire (SCB 100229)
Cordes B. Kennedy (SCB 102287)
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
Phone: (803) 782-4100
awlivoti@murphygrantland.com
wsawyer@murphygrantland.com
ckennedy@murphygrantland.com

-and-
John R. Owen, Esquire (*pro hac vice*)

James R. Jebo, Esquire (*pro hac vice*)
Harman Claytor Corrigan & Wellman
P.O. Box 70280
Richmond, VA 23255
Phone: (804) 747-5200
jowen@hccw.com;
jjebo@hccw.com;

Attorneys for Appellant

December 5, 2022