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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 Rodriquis Nelson…….....Respondent,

v.

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

REPLY BRIEF OF APPELLANT

December 5, 2022

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SUMMARY

Respondent's entire argument rests on an incorrect premise. Florence Concrete hired Nesbitt Transportation – a federally authorized motor carrier – to transport a slab of concrete from South Carolina to North Carolina. Due to the length of the slab, the load was considered oversize. As a result, Nesbitt Transportation was required to, and did, obtain oversize/overweight (OSOW) permits from the South Carolina and North Carolina Departments of Transportation. Under South Carolina law and under the terms of the OSOW permit, Nesbitt Transportation was not allowed to transport the load at certain hours. Despite the law and the terms of the OSOW permit, Nesbitt Transportation's driver made the unilateral decision to break the law and to transport the load in the dark. It is undisputed that Florence Concrete did not control the time when Nesbitt Transportation moved the load. (R. p. 20, ¶ f). It is also undisputed that Nesbitt Transportation was an independent contractor. (Resp. Br. p. 1).

Despite the independent contractor rule, Respondent argued – and the Circuit Court erroneously found – that Florence Concrete was liable because transportation of the concrete slab was "inherently dangerous." However, Respondent's path to that conclusion is misguided. The first step in evaluating the "inherently dangerous" exception to the independent contractor rule is to identify what the independent contractor was hired to do. Then, the Court must determine if that work had a danger that was inherent to it which could not have been avoided without special precaution. Only then can the Court find that an exception to the independent contractor rule applies.

Respondent jumps to the conclusion and then works backward. Instead of first identifying the task for which Nesbitt Transportation was hired, Respondent begins by identifying the negligent conduct of Nesbitt Transportation – moving the OSOW load "at dark and busy times of

day" – and then argues that such negligent conduct is "inherently dangerous." In other words, Respondent assumes without any explanation that moving the load "at dark and busy times of day" was the task that Nesbitt Transportation was hired to do. It was not. When the Court applies the proper analysis in the proper order, it is indisputable that transporting the load "at dark and busy times of day" was not "inherent" to the task assigned to Nesbitt Transportation.

The Circuit Court held that transportation of an OSOW load is inherently dangerous. Realizing that such a broad ruling is simply unworkable, Respondent argues the Circuit Court's holding was actually much narrower. However, the Circuit Court's holding is unambiguously broad: finding the inherently dangerous exception to the independent contractor rule "applies because hauling an oversize load is work that is inherently or intrinsically dangerous unless proper precautions are taken." (R. p. 6) (cleaned up). The rule is indefensible. Adoption of an exception here flies in the face of the obvious restraint South Carolina courts have applied in evaluating exceptions to the independent contractor rule, which has been established in South Carolina for more than 150 years.

Respondent's other arguments amount to red herrings and groundless claims that Florence Concrete has either admitted issues that are plainly disputed on the face of the parties' Consent Order or that the Circuit Court made its determinative decision in footnotes rather than in the body of its Order. These last-ditch efforts to avoid application of the independent contractor rule in this case fail.

Respondent also argues that the Court should adopt a new cause of action for negligent hiring of an independent contractor. As an initial matter, that cause of action does not exist under South Carolina law, and it should not be adopted in the heavily regulated area of federally authorized motor carriers. However, even if the Court were to adopt Restatement (Second) of Torts

§ 411, the stipulated facts here show that Florence Concrete hired a licensed and fully authorized motor carrier that had successfully transported loads for Florence Concrete for nearly thirty years without a single motor vehicle accident. Put simply, even if such a cause of action existed, it would not apply here.

I. Transportation of the OSOW load itself is not inherently dangerous, and Florence Concrete did not hire Nesbitt Transportation to transport the load at night – the only dangerous activity that Respondent identifies.

Respondent's argument as to why transportation of the OSOW load here was "inherently dangerous" lacks substance and rests on a false premise. Struggling to identify exactly what was inherently dangerous about the task assigned to Nesbit Transportation, Respondent starts with the negligent activity and then works backward. The problem with this approach is that Respondent focuses on an activity that was <u>not</u> part of what Florence Concrete hired Nesbit Transportation to do. Specifically, Respondent argues that an "oversize load driven on public roadways (<u>at dark and busy times of day</u>) is inherently dangerous." (Resp. Br. p. 17) (emphasis added). Respondent's entire argument is built upon the premise that Florence Concrete hired Nesbitt Transportation to transport the load "at dark and busy times of day." That premise is false. Upon removing the false premise – the parenthetical "at dark and busy times of day" – then the flaw in Respondent's argument is apparent.

Florence Concrete hired Nesbitt Transportation to transport an OSOW load from South Carolina to North Carolina. (R. p. 19, ¶ 8(a)). It is stipulated that Florence Concrete did <u>not</u> hire Nesbitt Transportation to transport the load in the dark: "***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." (R. p. 20, ¶ f) (emphasis added). In fact, Florence Concrete did not control any means or methods of Florence Concrete's work. (R. p. 20, ¶¶ 8(e) & (f)). Thus, it is undisputed that Florence Concrete

did not hire Nesbitt Transportation to transport the load at night. The risk that Respondent – and the Circuit Court – focused on is not "inherent" to the job for which Nesbitt Transportation was hired. This failed premise that serves as the foundation for Respondent's claim leaves Respondent's entire argument in rubble.

The expectation was that Nesbitt Transportation – as a federally licensed and authorized motor carrier with SCDOT and NCDOT OSOW permits – would transport the load in accordance with State law, federal regulations, and the terms of the OSOW permits. In its plainest sense, Nesbitt Transportation was an independent contractor. It is undisputed that Florence Concrete did not hire Nesbit Transportation to transport the load "at dark and busy times of day." To the contrary, Florence Concrete hired an independent contractor to transport the load, and there were no directions from Florence Concrete that Nesbit Transportation should move the load at night or at any particular time of day.

The task for which Nesbit Transportation was hired – to simply transport the load – is not inherently dangerous. Rather the danger was created by Nesbit Transportation's decision to perform the task negligently and in violation of the law. The Fourth Circuit rejected Respondent's flawed approach in *South Carolina Natural Gas Co. v. Phillips*, 289 F.2d 143 (4th Cir. 1961), and the Fourth Circuit's reasoning in that case applies equally here.

In *Phillips*, a subcontractor operating a 30-ton Euclid pan earth mover over high-pressure gas transmission lines punctured a gas line. *Id.* at 145. The escaping gas ignited when the steel pan scraped the ruptured pipe or when the gas met the hot manifold of the 300-horespower engine, causing a fire that lasted for a day and a half. *Id.* The resulting fire burned through overhead high voltage lines and destroyed a twin-pole electric line tower. *Id.* The plaintiff sued the general contractor. *Id.*

The general contractor in *Phillips* hired the subcontractor for the basic grading, grubbing and landscaping in connection with a housing development. The subcontract required the subcontractor to supply earth fill for the pads for the houses. However, the subcontractor was able to obtain the fill from wherever it chose, so long as the fill was of sufficient kind and quality for its intended use. *Id.* at 146. In other words, the general contractor did not control how the subcontractor obtained the fill or where it obtained the fill.

The plaintiff in *Phillips* argued that the inherently dangerous work was "the operation of heavy and powerful earth moving equipment immediately above and across a high-pressure gas transmission line, particularly portions of the pipeline had been partially uncovered by the operator and could have been seen by him."[1] *Id.* at 147. The Fourth Circuit rejected that argument, holding that the focus must be on the task for which the independent contractor was hired, not the improperly dangerous way in which the independent contractor chose to perform the task: "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." *Id.* The unnecessary risks created by the way the independent contractor chose to perform the work was "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 (emphasis added). Focusing on the task that the subcontractor was hired to do – procurement of borrow – the Fourth Circuit found that the

[1] Respondent argues back and forth about the distinction between the "ultrahazardous" exception to the independent contractor rule and the "inherently dangerous" exception. However, the logical flaw in Respondent's argument applies equally regardless of the theory of law. The Court's first step must be to identify the work assigned to Nesbitt Transportation. The question is whether that work falls within an exception to the independent contractor rule. Here, it does not.

activity "is done routinely and commonly without harm to others, and of itself creates no extraordinary risk of harm." *Id.* at 147.

The Fourth Circuit's reasoning in *Phillips* applies here, and Respondent fails to provide any convincing distinction. There was absolutely nothing about the work assigned to Nesbitt Transportation – moving an OSOW load from South Carolina to North Carolina – that required Nesbitt Transportation to move the load "at dark and busy times of day." Respondent makes the same mistake as the plaintiff in *Phillips* by focusing on the particularized, "immediate activity which in fact caused the harm" instead of the activity the independent contractor was hired to do. *Id.* at 147. However, the Court's role is to focus on the task assigned to Nesbitt Transportation, not the negligent way that Nesbitt Transportation unilaterally chose to perform the task. When the Court applies the proper inquiry, it is plain that the task of transporting an OSOW load from South Carolina to North Carolina was not inherently dangerous.

II. Respondent's last-ditch arguments about non-existent rulings by the Circuit Court and non-existent admissions are unavailing.

Perhaps realizing the shaky footing of his arguments on the inherently dangerous exception, Respondent turns to what looks like a game of "gotcha." Respondent claims Florence Concrete failed to appeal a non-existent ruling located in a footnote in the Circuit Court's Order. Then, Respondent argues repeatedly that Florence Concrete somehow stipulated to its own liability in a stipulation that was negotiated by the parties for the very purpose of submitting disputed liability to the Circuit Court. Those arguments fall flat.

A. The Circuit Court's footnote comment plainly is not a dispositive holding by the Circuit Court, and Respondent is barred from arguing to the contrary.

Respondent argues that, in a footnote, the Circuit Court rendered a binding ruling that is unappealed. The footnote plainly is not intended to be a dispositive ruling by the Circuit Court, as it is placed in a footnote before the Court analyzes and addresses the breach question under the

inherent danger exception to the independent contractor rule. (R. p. 15, n. 4). In the footnote, the Circuit Court notes that the failure of Nesbitt Transportation to sign the permit is a breach of a "minimal duty," but it never purports to find that such a ministerial activity was outcome-determinative in this case.[2] The comment in the footnote is never referenced in the body of the Circuit Court's Order.

Not only is the Circuit Court's comment in the footnote not a ruling on the questions presented to the Court, but Respondent is prohibited from arguing otherwise here. Respondent stipulated that the permit was issued: "After review of the information, the oversize permits were issued." (R. p. 19, ¶ 8(c)). Respondent also stipulated that "no other facts are necessary for the Court to answer the stipulated issues . . .." (R. p. 21, ¶ 8(k)). Thus, Respondent cannot credibly argue that the Circuit Court's footnote – that contradicts a stipulated fact and goes outside of the facts agreed to in the stipulation – was a dispositive ruling from the Circuit Court.[3]

B. Respondent's repeated claims that Florence Concrete "admitted" to an inherent danger is simply incorrect, and any such purported admission is insufficient to survive even a directed verdict motion under binding South Carolina precedent.

Respondent repeats *ad nauseum* its claim that Florence Concrete has "admitted" that "being on the road with an oversize shipment at a time that is not allowable creates an inherent

[2] Also, the permit would be signed by the permit holder, which means it should have been signed by Nesbitt Transportation when it picked up the load from the unmanned lot. Signing the permit was not a duty owed by Florence Concrete.

[3] Respondent also argues the OSOW permits are issued "in the public interest of for safety on the highways." (Resp. Br. p. 21). Respondent fails to tell the Court that it is citing from the statute dealing with issuing open-ended or annual OSOW permits, not trip-specific permits like the one at issue in this case. Interestingly, the trip-specific permit statute is located at South Carolina Code § 57-3-130 and it does not discuss public safety. However, the question of whether public safety is a concern in issuing the permit is wholly irrelevant as it does not answer the question of whether the task of transporting an OSOW load is inherently dangerous.

risk and danger to the public."[4] (Resp. Br. pp. 4, 8, 10, 15, 16, 24). Respondent variously argues that Florence Concrete has "admitted" this fact or "stipulated" to this fact. A plain reading of the Stipulation proves this is simply not true. Moreover, even if it were true, Florence Concrete did not hire Nesbitt Transportation to move the shipment at a time that was not allowable. The Supreme Court's holding in *Allison v. Ideal Laundry & Cleaners*, 215 S.C. 344, 55 S.E.2d 281 (1949), shows that such an admission would not even be enough to get Respondent past a directed verdict motion.

The stipulation includes numerous facts that are stipulated by the parties:

a. The load was a 72-foot by 24-inch cement slab . . .

b. The cement slab was pre-loaded on a Nesbitt Transportation extended trailer and placed in Florence Concrete's facility . . .. Florence Concrete does not monitor or secure the trailer lot. . . .

c. The South Carolina and North Carolina DOTs are 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 . . ..

(R. p. 19, ¶¶ 8(a)-(c)). When the parties stipulated to a fact, it was stated as a fact in the Consent Order. "The load <u>was</u> . . ."; "The cement slab <u>was</u> . . ."; "Nesbit Transportation <u>submitted</u> . . .."

In contrast, the language regarding Lance Roberson's testimony is presented in an entirely different manner: "Florence Concrete's Shipping Manager, Lance Roberson, <u>testified</u> 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. 19, ¶ 8(c)) (emphasis added). Florence Concrete only stipulated to the

[4] Respondent also argues that Florence Concrete stipulated to proximate cause. (Resp. Br. p. 1). There is no such statement in the stipulation. The stipulation does state "Plaintiff sustained injuries as a result of the accident and is a quadriplegic." (R. p. 20, ¶ 8(g)). This would be an admission that the injuries were proximately caused by the accident, but it certainly cannot be said to be an admission that something done by Florence Concrete caused the accident.

fact that its shipping manager gave certain testimony. It is plain from reading these paragraphs together that Florence Concrete did not stipulate to the truth of Roberson's testimony.

However, the argument as to Lance Roberson's testimony is yet another red herring – albeit one on which Respondent spends considerable effort to distract the Court from the weakness of its legal arguments. Roberson's admission is practically identical in its nature to the admission made by the defendant in *Allison*. The Supreme Court in that case found such an admission would not even get the plaintiff past a directed verdict.

Roberson admitted that moving the OSOW shipment "at a time that is not allowable" creates an inherent risk and danger to the public.[5] The *Allison* case involved a propane explosion at a laundry, which the Supreme Court described as "one of the most catastrophic occurrences in the State of South Carolina, certainly within the memory of this generation."[6] 215 S.C. at 348, 55 S.E.2d at 281. Shortly before the explosion, the laundry had hired an independent contractor to install a propane gas system, including a 6,500-gallon propane tank. *Id.* The explosion occurred because the system was not properly installed.

At trial, the laundry owner admitted in response to a question of whether "propane gas was a terribly dangerous thing if not properly controlled and handled" that propane "like any gas . . . would be dangerous unless it was properly installed." *Id.* at 354, 55 S.E.2d at 284. The Supreme

[5] The Fourth Circuit's discussion in *Phillips* is worth reiterating here. Plaintiff focuses on the "immediate activity which in fact has caused the harm" rather than the activity for which Nesbitt Transportation was hired. 289 F.2d at 147. The question is not whether moving a load at an unlawful time is inherently dangerous. The question before the Court is whether transporting an OSOW load from South Carolina to North Carolina is inherently dangerous. Transporting the load in the dark was not inherent in the work.

[6] According to news sources, the explosion killed four people and injured one hundred people. The blast was felt sixty miles away, and houses for a half a block were, in some instances, demolished. https://www.greenvilleonline.com/story/news/2019/07/11/ideal-laundry-greenville-sc-explosion-4-die-150-injured/1657364001/.

Court held that this admission was "unworthy of the weight necessary to ascribe to it, in order to create liability upon the laundry for the negligence of the independent contractor." *Id.* As a result, the Supreme Court affirmed a directed verdict in favor of the laundry. *Id.* at 356, 55 S.E.2d at 281.

Like Respondent here, the plaintiff in *Allison* tried to focus on the wrongful conduct – negligent installation of a propane system – rather than the task for which the independent contractor was hired – installation of the propane system. An admission by the laundry that performing the act negligently was dangerous did not even allow the case to go to the jury. Likewise, here, the mere acknowledgment that moving the OSOW load at an illegal hour would be dangerous is not evidence that the task of moving an OSOW load is itself inherently dangerous. Rather, it merely shows that moving an OSOW load dangerously is dangerous. Thus, like the admission by the laundry owner in *Allison*, Roberson's admission – to the extent it is treated as an admission by Florence Concrete – fails to establish the "inherently dangerous" exception to the independent contractor rule.

III. Saying something is "inherent" in the work does not make it so.

Ultimately, the fatal flaw in both the Circuit Court's Order and Respondent's argument is the failure to identify a danger that was inherent to the work assigned to Nesbitt Transportation. Specifically, it is stipulated that Florence Concrete hired Nesbitt Transportation to transport the OSOW load from Florence Concrete's facility in South Carolina to a construction site in North Carolina. (R. p. 19, ¶ 8(a)). Respondent must identify a risk that is inherent in that task and that is sufficiently out of the normal realm of dangers such that it justifies an exception to the independent contractor rule. Both the Circuit Court and Respondent state, without any analysis or explanation why, that transporting the load at dark was a danger "inherent" in the work. However, merely saying something is inherent in the work does not make it so.

Respondent cites Ballentine's Law Dictionary and defines "inherently dangerous" as a danger that is "an inseparable quality or part of" the activity or "intrinsic" to it. Assuming this is a proper definition, the question then remains whether the activity identified by Respondent and the Circuit Court – transporting "an oversize load . . . on public roadways (at dark and busy times of day)" – is "an inseparable quality or part of" the activity that Florence Concrete hired Nesbitt Transportation to do. Respondent glosses over this critical step of the analysis – likely because it is fatal to Respondent's case.

Nesbitt Transportation easily could have, and should have, transported the load during the hours lawfully permitted by the South Carolina Code and the OSOW permit. Had it done so, then it would not have transported the load "at dark and busy times of day." This is the very danger that Respondent claims should have been avoided: "if it is driven at less congested and brighter times of day, the danger is reduced." (Resp. Br. p. 17). Because Nesbitt Transportation could have easily moved the load during lawful hours, it cannot be said that moving the load at unlawful times was "inseparable" or "intrinsic" to the job. Rather, it was an easily separable act, and Nesbitt Transportation was simply negligent in failing to obey the law.

IV. Florence Concrete does not owe a duty to prevent Nesbitt Transportation from moving the load from its property after hours unless the Court first finds that the task Florence Concrete hired Nesbitt Transportation to do was inherently dangerous.

Respondent makes a bootstrapping argument that Florence Concrete is not being held vicariously liable, but it is being held liable for its own conduct in failing to stop an independent contractor from being negligent. That argument assumes without any explanation that Florence Concrete had a duty to control the conduct of an independent contractor. If Respondent's argument were correct, then the Supreme Court would have reached a different decision in *Norris v. Bryant*, 217 S.C. 389, 60 S.E.2d 844 (1950). In that case, the plaintiff could have argued the employer of the independent contractor had a duty to prevent the independent contractor from driving

negligently. It did not. Instead, the Supreme Court held that the negligent performance of the task by an independent contractor did not make the action inherently dangerous – thus, not creating a duty owed by the employer. *Id.* at 400, 60 S.E.2d at 848.

Under the "inherently dangerous" exception to the independent contractor rule, the employer only owes a duty if the conduct assigned to the independent contractor is inherently dangerous. Thus, claiming that Florence Concrete owed a duty to stop Nesbitt Transportation from being negligent, once again, puts the cart before the horse. It assumes that transporting the OSOW load was inherently dangerous – if it was not, then Florence Concrete owed no duty. Thus, Respondent's circular argument that Florence Concrete is being held liable for its own negligence in failing to prevent an independent contractor from acting negligently is both logically and legally flawed.

V. Asking the Court to answer whether there is a duty is not an admission that there is a duty.

The parties submitted the following question to the Circuit Court:

> 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 a 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?

(R. pp. 18-19, ¶ 7). The question is whether Florence Concrete, "owe[d] a duty of care to Plaintiff to take measures beyond verbally contracting for the shipment of the load, ..." Following the comma in the word "load," the remainder of the question presents surrounding facts.

Respondent admits that the Consent Order was "negotiated in a hard-fought settlement." It is also plain that the question presented to the Court was designed to ask whether a duty was owed:

"Did Florence Concrete Products . . . owe a duty of care to Plaintiff to take measures beyond verbally contracting for the shipment of the load, . . ." Yet, Respondent makes the confounding argument that by asking the Circuit Court whether a duty was owed, Florence Concrete admitted that it owed a duty. This argument is nonsensical. More importantly, the question of a legal duty is a legal question. *See Chastain v. Hiltabidle*, 381 S.C. 508, 519, 673 S.E.2d 826, 832 (2009) ("The determination of whether a duty exists in regard to the wrong alleged is a question of law for the court."). Therefore, the question must be answered in accordance with the law, not based on the statements of the parties. Appellant's opening brief argues thoroughly that no such duty exists, and Respondent's contention that the argument is somehow not preserved is groundless.

VI. Respondent's arguments as to *Alexander* and *Duane* are misplaced because *Alexander* involved an activity that numerous jurisdictions have identified as inherently dangerous, and *Duane* did not even apply the "inherently dangerous" exception.

Respondent continues to focus on two cases, *Alexander* and *Duane*.[7] The first case serves only as an example of conduct that truly is "inherently dangerous," in contrast to the activity at issue in this case. The second case does not even apply the "inherently dangerous" except and is wholly irrelevant.

The *Alexander* case, except for establishing the rule for the inherently dangerous exception, serves only as a contrast to the facts of this case. The conduct in that case was the spraying of a "very dangerous" chemical that "would in all probability greatly damage growing cotton if it floated thereon." 221 S.C. at 487, 71 S.E.2d at 303. The Supreme Court held "[t]his is not a case where the [owner] did not know, or could not have ascertained upon inquiry that this [chemical] spray was very injurious and damaging to plants . . . as it vaporizes in the air and may travel for

[7] *Alexander v. Seaboard Air Line R. Co.*, 221 S.C. 477, 71 S.E.2d 299 (1952); *Duane v. Presley Construction Co., Inc.*, 270 S.C. 682, 244 S.E.2d 509 (1978).

miles." *Id.* The Supreme Court found that spraying this toxic chemical on a narrow strip of a railroad's right of way was an inherently dangerous activity due to its high likelihood of floating over onto adjoining land. *Id.* As discussed at length in Florence Concrete's principal brief, Courts across the country have recognized that spraying of chemicals is inherently dangerous, and the Supreme Court in *Alexander* looked to some of those other jurisdictions in reaching its decision. *Id.* In stark contrast, Respondent has not identified a single jurisdiction that holds the movement of OSOW loads is inherently dangerous. The cement slab was inert and had no special dangerous propensities.

Respondent's reliance on *Duane* is even more unavailing. The *Duane* decision does not involve the "inherently dangerous" exception at all. In *Duane*, a developer-landowner of a "bowl-shaped" subdivision with a stream flowing through it down to a pond on the plaintiff's property hired a contractor to clear and improve the land, which then caused water concentration and siltation on the plaintiff's property. 270 S.C. at 683, 244 S.E.2d at 509. The Supreme Court reversed the developer-landowner's summary judgment ruling, finding the lower court failed to address whether the developer-landowner was negligent in "ordering the improvements." *Id.* at 683, 244 S.E.2d at 510. Notably, the Supreme Court never referenced any "inherently dangerous" activity. Instead, it simply held the lower court was required to evaluate whether the developer-landowner was independently negligent in ordering the work based an affirmative duty applicable only to landowners. *Id.* In doing so, the Supreme Court cited to an American Jurisprudence article on duties of adjoining landowners. *Id.* at 684, 244 S.E.2d at 510 (quoting 1 Am. Jur. 2d, Adjoining Landowners, s. 27, p. 709); *see also Ruh v. Metal Recycling Services, LLC*, No. 20-1440, 2022 WL 203744, at *3 (4th Cir. Jan. 24, 2022) (recognizing that *Duane* involved an exception to nonliability based on a landowner's breach of an affirmative duty not to alter land in a way that

causes foreseeable injury to an adjoining property"). The case has nothing to do with the "inherently dangerous" exception. Applied here, the question would be whether Florence Concrete was independently negligent in ordering its concrete slab to be transported to North Carolina. The answer is obviously "no."

In sum, Respondent fails to apply the proper legal analysis to the independent contractor rule's "inherently dangerous" exception. The Court must begin by identifying the task for which Nesbitt Transportation was hired – transporting an OSOW load from South Carolina to North Carolina. Then, the Court must determine if there was an abnormal danger that was "inherent" – inseparable from or intrinsic to – the work. Here, there was no "inherent' danger. Millions of OSOW loads are transported every year without incident. Rather, Respondent focuses on an admittedly dangerous activity – moving an OSOW load in the dark. However, Florence Concrete did not hire Nesbitt Transportation to move the load in the dark, and it was not "intrinsic to" or "inseparable from" the work. The work could easily have been done without moving the load in the dark. In fact, the law and the OSOW permit required Nesbitt Transportation to move the load during daylight hours. In accordance with the well-established independent contractor rule, Nesbitt Transportation – and only Nesbitt Transportation – is responsible for its negligent decision to violate the law.

VII. Florence Concrete cannot be liable to Respondent under a claim for the negligent hiring/selection of an independent contractor because South Carolina has never recognized such a cause of action and, even if it were to do so, the facts of this case do not show a breach.

Respondent's final argument is that Florence Concrete owed him a duty in the selection and hiring of an independent contractor and that Florence Concrete breached that duty. (Resp. Initial Brief p. 26 – 31). Notably, Respondent argues that this is an additional sustaining ground. As an initial matter, the question of breach is one that should properly be left to the trial court in

the first instance. However, even if this Court considers Respondent's argument now, Respondent's argument must fail because South Carolina does not recognize a claim for negligent hiring of an independent contractor. Moreover, even if South Carolina were to recognize such a cause of action, the facts of this case – where Florence Concrete hired a federally licensed and authorized motor carrier, who obtained the proper OSOW permits, and who had transported loads for Florence Concrete for thirty years without incident – simply do not support such a claim.

A. South Carolina does not recognize liability for the negligent hiring/selection of an independent contractor, and the adoption of Restatement § 411 would drastically alter South Carolina's legal landscape and negatively impact industries across the board.

First, South Carolina does not recognize liability for the negligent hiring/selection of an independent contractor, despite Respondent's contention to the contrary. Instead, the rule is that employers can be subject to liability for the negligent hiring/selection of *employees*, and in this case, it is undisputed that Florence Concrete does not share an employer-employee relationship with Nesbitt Transportation or Mr. Rouse. *See, e.g.*, *James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008). In fact, in 2022, the Fourth Circuit Court of Appeals held that there was "no controlling South Carolina authority" regarding a cause of action for the negligent hiring/selection of an independent contractor. *Ruh v. Metal Recycling Serv.*, No. 20-1440, 2022 WL 203744, at *1 (4th Cir. Jan. 24, 2022). As a result, the Fourth Circuit certified the question to the South Carolina Supreme Court, which it accepted.[8] That issue is currently pending before the Supreme Court and oral arguments were held on September 13, 2022.

Respondent argues that this Court should apply Restatement § 411, which purports to create liability for the negligent selection of an independent contractor. However, South Carolina

[8] Specifically, the Fourth Circuit asked whether South Carolina would recognize Restatement (Second) of Torts § 411, which is advanced by Respondent here.

adheres to the traditional or common law rule that an employer is not liable for the torts of an independent contractor committed in the performance of the contracted-for work. *Cherry v. Myers Timber Co.*, 404 S.C. 596, 601, 745 S.E.2d 405, 407 (Ct. App. 2013). The impetus for this rule is that the employer lacks the necessary control over the manner and method of the work performed by the independent contractor. *Conlin v. City Council of Charleston*, 49 S.C.L. 201, 211 (S.C. Ct. App. 1868) ("Therefore, the 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*.") (emphasis added). In the absence of control, there can be no culpability for the employer and, therefore, no basis for liability when the hired independent contractor acts negligently in performing the work.

It makes sense that South Carolina's current law allows for a negligent hiring/selection claim in the *employer-employee* context because, there, the employer controls the manner and method of his employees' work and presumably has an intimate knowledge of the industry – it is hiring the employee to work in its line of business. Moreover, the employer-employee relationship is one that is generally expected to be longer lasting and more intimate than the relationship between an employer and an independent contractor.

In contrast, adopting Restatement § 411 here would create unparalleled inefficiencies in one of South Carolina's largest industries – shipping – by requiring shippers at every level – including individuals, small and local business, etc. – to develop knowledge about the independent contractor's field in order to determine whether that independent contractor is qualified for its field of work – a field that the independent contractor purportedly dedicates its entire business to and the employer does not. The rule would apply regardless of whether the shipper hires the

independent contractor for a single shipment or for multiple shipments. The rule would significantly increase transaction costs.

Applying a negligent hiring/selection claim in the context of motor carriers is even more problematic. Federal motor carriers are a heavily regulated industry, subject to numerous state and federal regulations and rules. There are both state and federal agencies that are dedicated to licensing, inspecting, and policing motor carriers. The myriad rules and regulations are so complex that it is routine in trucking cases that both sides hire expert witnesses to discuss the requirements for motor carriers. An employer of a motor carrier should be able to rely on the fact that those federal and state authorities have deemed that motor carrier authorized.

Lastly, the General Assembly has not recognized a shipper liability cause of action such as the one Respondent proposes that this Court adopt. In fact, the General Assembly has not enacted *any* statutory provision that is contrary to the traditional common law rule of non-liability for the acts of an independent contractor in the shipping context. Thus, there is no statutory basis or support for Respondent's proposed cause of action.

Applying Restatement § 411 to create shipper liability for the hiring of an independent contractor motor carrier would detrimentally impact South Carolina's legal landscape by abrogating the independent contractor rule, thereby creating "a profound change in the law of this State." *Barnwell v. Barber-Coleman Co.*, 301 S.C. 534, 536, 393 S.E.2d 162, 163 (1989). The facts of this case and the nature of the heavily-regulated motor carrier industry simply do not support such a cause of action here.

B. South Carolina has a history of declining to recognize shipper liability causes of action.

South Carolina courts have previously addressed whether to impose liability upon a shipper for the negligence of an independent contractor motor carrier, albeit not under the rubric of Restatement § 411. Therefore, existing precedent supports rejecting the adoption of § 411 in this case as a mechanism for recognizing a shipper liability cause of action under South Carolina law.

In *Norris v. Bryant*, the South Carolina Supreme Court affirmed summary judgment in favor of a lumber company who had contracted with a motor carrier to transport harvested logs to a mill. 217 S.C. 389, 60 S.E.2d 844 (1950). There, the Court noted "hauling contracts" such as the one at issue created an independent contractor relationship, which under the traditional common law rule was insufficient to create liability for the lumber company/shipper. The court specifically rejected the plaintiff's argument that the nature of the hauling work was "inherently or intrinsically dangerous." *Id.* at 400, 60 S.E.2d at 848.

Similarly, in *Cherry v. Myers Timber Co.*, this Court affirmed summary judgment in favor of a timber owner who contracted with a motor carrier to haul harvested timber to the mill. 404 S.C. 596, 745 S.E.2d 405 (2013). The motor carrier was involved in a traffic accident while transporting the logs. Citing the lack of control by the timber owner over the motor carrier's operations, including the operation of the tractor-trailer, this Court held there was no basis for liability against the timber owner. *Id.* at 603, 745 S.E.2d at 409; *accord Fulton v. Westvaco Corp.*, 930 F. Supp. 1115 (D.S.C. 1995) (interpreting the long line of South Carolina timber hauling cases that have refused to hold timber owners liable for motor vehicle accidents involving independent contractor timber haulers).

In the recent case of *Oulla v. Velazques*, this Court rejected the plaintiff's attempts to hold the shipper liable for a motor vehicle accident caused by the independent contractor motor carrier.

427 S.C. 428, 831 S.E.2d 450 (Ct. App. 2019). In so holding, the Court held there was no recognized duty, either statutory or under common law, upon the shipper to act for the protection of the motoring public generally. *Id.* at 439–45, 831 S.E.2d at 456–60. The Court continued to reject Restatement § 324A, which extends liability for those who render services to another to foreseeable third parties. *Id*. at 444–45, 831 S.E.2d at 458 ("Foreseeability itself does not give rise to a duty."). In fact, the Court held that the shipper did not have a duty to the public for the acts of the independent contractor, even though there was a statute governing load securement. *Id*. at 445, 831 S.E.2d at 458 ("We find the mere fact it was foreseeable an unsecured load could be a danger to the Oullas and other drivers is insufficient to impose liability on Super-Sod under the common law.").

While each of these cases were determined under the traditional common law rule and the plaintiff did not raise § 411, they represent a general unwillingness of the South Carolina courts to recognize a "shipper liability" cause of action like Plaintiff asks this Court to now adopt.

For contrast and comparison, the exception to the traditional common law rule recognized in *Simmons v. Tuomey Regional Med. Ctr.* relied on the theory of nondelegable duty and was influenced by public policy considerations. 241 S.C. 32, 533 S.E.2d 312 (2000). In that case, which involved a medical malpractice claim arising out of treatment rendered in a hospital's emergency room, the Court considered whether to adopt the exception provided under Restatement § 429. Section 429 was broadly worded and not limited to the fact pattern before the Court in *Simmons*. However, in adopting § 429, the Court limited its application to the hospital/emergency room setting rather than in all situations generally, and importantly, the Court recognized a limited application of § 429 in the hospital context because ***public policy*** favored doing so. The rule created in *Simmons* was one born out of policy considerations based on the public's reliance upon

hospitals, the public's perception that a hospital and its providers are one-in-the-same, and the commercialization of American medicine. *Id*. at 50, 533 S.E.2d at 322 ("We conclude the Court of Appeals properly outlined and applied the public policy consideration in question. Our decision, like those made by other courts that have considered this issue and held hospitals liable under one or more theories, is grounded primarily in those considerations."). The nondelegable duty was merely the framework by which to accomplish those policy goals.

But *Simmons*, and the public policy considerations considered therein, are completely different from the facts of this case. Whereas the plaintiff in *Simmons* relied on the hospital for care and considered the hospital and its providers to be one-and-the-same, Respondent in this case had no relationship with Florence Concrete or Nesbitt Transportation whatsoever. Unlike in *Simmons*, the Respondent in this case was not relying on the shipping work performed by Florence Concrete or the transportation work performed by Nesbitt Transportation. Therefore, the public policy considerations that justified a limited application of § 429 in *Simmons* are totally absent from the facts in this case. As such, there is no public policy consideration that favors adopting § 411 to create shipper liability.

C. Even if South Carolina were to adopt Restatement § 411, Respondent still could not prevail in this case because the stipulated facts fall far short of establishing negligence under Restatement § 411.

Even if South Carolina were to adopt Restatement § 411, Florence Concrete would not be liable in this case because the stipulated facts are woefully insufficient to establish that Florence Concrete negligently selected Nesbitt Transportation.

Section 411 states "An employer is subject to liability for physical harm to third parties caused by his failure to exercise reasonable care to employ a competent and careful contractor . . .." Restatement (Second) of Torts § 411 (1965) (emphasis added). The Restatement goes on to define the meaning of a "competent and careful contractor" as:

> a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have to do the work which he is employed to do without creating unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary.

Restatement (Second) of Torts § 411, cmt. A.

The stipulated facts in this case show that Nesbitt Transportation: (1) "had been issued a DOT number and operating authority from the FMCSA"; (2) was able to obtain oversize load permits from the South Carolina and North Carolina DOTs; (3) was authorized to operate without restrictions; and (4) "hauled the vast majority of Florence Concrete's loads since 1992 and had done so without any prior motor vehicle accidents." (R. p. 21, ¶ 8(k)). In other words, Nesbitt Transportation was a federally-authorized motor carrier that had nearly thirty years of knowledge and experience. It had proven its skill in transporting these types of loads by transporting the vast majority of Florence Concrete's loads without any prior motor vehicle accidents. Likewise, Respondent makes no contention that Nesbitt Transportation lacked adequate equipment to perform its work.

Put simply, Respondent fails to point to any credible evidence that Florence Concrete did not employ a "competent and careful contractor" as that phrase is defined in the Restatement. Instead, Florence Concrete hired an independent contract that Florence Concrete knew to have thirty years of experience hauling similar loads without any prior motor vehicle accidents.

Respondent has shown a deep-seeded misunderstanding of how liability applies under § 411. Shockingly, Respondent proffers that Florence Concrete should be liable for the negligent selection/hiring of Nesbitt Transportation because Nesbitt's permit was unsigned and, to quote Respondent, "invalid."[9] The Court can easily see that Respondent's injury was not caused by an

[9] As noted above, the parties never stipulated that the permit was unsigned, so this fact offered by Respondent is not properly before the Court. Further, the parties never stipulated that the permit

unsigned permit. To put it plainly, it is ridiculous to suggest that Florence Concrete should be liable for Respondent's quadriplegic injuries simply because Nesbitt Transportation – not Florence Concrete – allegedly failed to sign the permit.

Respondent again tries to misdirect this Court by arguing that Florence Concrete is liable for failing to enter a "written contract" with Nesbitt or by failing to implement written policies or procedures between the companies. Again, this argument ignores the requirements of § 411 – the very cause of action that Respondent asks this Court to adopt. Restatement § 411 does not suggest that it is negligent to verbally contract with an independent contractor. Such a claim is baseless. Neither the rule set forth in § 411 nor the comments suggest in any way that the existence or lack of a contract or written policies or procedures between the employer and the independent contractor are of any moment.

Respondent also argues that Florence Concrete "had no evaluation or qualification process" for choosing a motor carrier to haul its loads, but this assertion is blatantly contrary to the stipulated facts. (Resp. Br. p. 30). The stipulated facts identify many things that Florence Concrete did to confirm that Nesbitt Transportation was safe to carry oversized loads. First and foremost, the Consent Order provides that "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." (R. p. 19, ¶ 8(c)). Next, "Florence Concrete relied on the fact that Nesbitt Transportation had been issued a DOT number and operating authority from the Federal Motor Carrier Safety Administration" and was "authorized to operate without restrictions." (R. p. 21, ¶ 8(i), ¶ 8(k)). If the FMCSA, the SCDOT,

was "invalid," as described by Respondent. To the contrary, the Consent Order expressly refers to the permits as "proper" (R. pp. 18-19, ¶ 7) and that the permits "were issued" (R. p. 19, ¶ 8(c)).

and NCDOT determined that Nesbitt Transportation was fit to carry oversized loads and operate as a motor carrier at the time of this incident, then it is reasonable for Florence Concrete to also believe that Nesbitt was qualified to perform the work. Once more, there are no facts in the record that would suggest Florence Concrete knew or should have known that Nesbitt and/or Mr. Rouse had a history of operating loads outside of permitted times, and based on the evidence in the record, Mr. Rouse's conduct at the time of the accident was the epitome of an unforeseeable event.

Moreover, Florence Concrete and Nesbitt Transportation shared a long business relationship spanning nearly three decades prior to this incident, and during that period, Nesbitt hauled most of Florence's loads "without any prior motor vehicle accidents[] and only minor property damage incidents." (R. p. 21, ¶ 8(k)). Florence Concrete had nearly thirty years' worth of actual, real-world experience using Nesbitt Transportation as its motor carrier, and not once was there a prior incident like the one that occurred here where a load was operated outside of permitted times.

Finally, Respondent's most significant attempt to distract this Court arises out of his argument related to the "conditional safety" rating assigned to Nesbitt Transportation in 2015 by the Federal Motor Carrier Safety Administration. But Respondent's argument has two gaping flaws. First, Nesbitt was assigned the conditional safety rating in 2015, *four years prior to this incident*, and there is absolutely no evidence in the record that the safety conditions at issue in 2015 were related to operating a load outside of permitted times or, much less, still present at the time of this incident. A conditional safety rating can be based on any number of factors. 49 C.F.R. § 385.5(a)–(k). Notably, in 2018, of all the FMCSA investigations that resulted in a safety rating,

forty-five percent resulted in a "conditional" federal safety rating.[10] In other words, the mere fact that an entity has a conditional safety rating – of which Florence Concrete was not informed – is simply not sufficient evidence in and of itself to show that Nesbitt Transportation was not a "competent and careful contractor" as that term is defined in § 411. The record in this case is absolutely devoid of facts related to Nesbitt's 2015 rating, and the Court cannot possibly discern what lead to its rating and whether the conditions still existed at the time of this incident.

The next obvious flaw in Respondent's argument is that he ignores the undisputed fact that there are no restrictions placed on a motor carrier that is assigned a conditional safety rating. To quote directly from the Consent Order:

> 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.

(R. p. 21, ¶ 8(i)). Respondent stipulated to these facts yet now attempts to convince this Court that there is a problem with Nesbitt Transportation operating the oversized load based on a safety rating assigned four years prior to the incident

For the Court's context, the FMCSA may 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 in one or more particulars. *Id.* A motor carrier is not incompetent or unfit to act

[10] Federal Motor Carrier Safety Administration, *Safety Investigations by Safety Rating*, https://ai.fmcsa.dot.gov/EnforcementPrograms/Investigations?type=BySafetyRating&time_period_id=2&report_date=0&carrier_type=1&acute_critical=0&safety_rating=F&state=NAT&isPDF=0 (last visited on October 12, 2022) ("This report is a breakdown of investigations that resulted in a safety rating….Investigations that did not result in a safety rating are 'Not Rated.'").

as a motor carrier just because it was assigned a conditional safety rating. *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)). Respondent has not established what violation(s) contributed to Nesbitt Transportation's conditional safety rating in 2015, and Respondent has failed to show that the violation, whatever it may have been, was still present when this incident occurred. Therefore, Respondent has failed to show that the safety rating from 2015 has any bearing on the accident that occurred in this case four years later or that the mere existence of a 2015 conditional safety rating made Florence Concrete's hiring of Nesbitt Transportation negligent under § 411. The rating by itself is simply insufficient to overcome the undisputed, stipulated fact that Nesbitt Transportation was fully licensed and authorized to transport the load and that Florence Concrete had nearly thirty years of experience with Nesbitt Transportation safely transporting similar loads.

Respondent can only prevail by showing that the conditions contributing to Nesbitt's conditional safety rating in 2015 were present at the time of the accident *and* causally related to the accident. The existence of a conditional safety rating does not establish negligence per se. *See 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."). Respondent, alone, has the burden to produce evidence to support his claims, and Respondent cannot rely on speculation, conjecture, and unsupported hypotheticals to carry the day. Relying solely on the mere existence of the conditional safety rating, Respondent asks the Court to improperly speculate and draw unwarranted conclusions. In contrast, Florence Concrete has proven – through stipulated facts – that it was aware that Nesbitt Transportation had successfully transported similar loads for almost thirty years without a prior motor vehicle accident. The stipulated facts preclude any claim under § 411.

CONCLUSION

For the above-stated reasons and those set forth in Florence Concrete's principal brief, the Circuit Court's decision should be reversed and judgment should be entered in Florence Concrete's favor. Transportation of an OSOW load from South Carolina to North Carolina is not inherently dangerous. Respondent's whack-a-mole arguments about a footnote comment from the Circuit Court, alleged admissions, and numerous other claims ultimately highlight the glaring problem with their entire case: the work assigned to Nesbitt Transportation was not inherently dangerous.

Respondent's secondary argument that Florence Concrete is liable under Restatement § 411 for the negligent hiring of an independent contract fares no better. First, South Carolina has never adopted § 411, and the rule is a poor fit in the shipper context because motor carriers are heavily regulated by state and federal authorities, and the average shipper is not in a position to evaluate motor carriers under the myriad federal and state laws and regulations that apply to that line of business. However, even if South Carolina were to adopt Restatement § 411 in this context, the stipulated facts in this case show that Florence Concrete hired an independent contractor that it knew was licensed and authorized to carry the load and that it knew had carried similar loads for

nearly thirty years without a prior motor vehicle accident. Plainly, these stipulated facts fall far short of the negligence standard set forth in § 411.

Respectfully submitted,

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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 Reply 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

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