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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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Case No. 09-CP-10-6574

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NESHEN MITCHELL, individually and as the next friend of her minor child, HAKEEM T. M.,..... Petitioners,

vs.

JUAN P. MARRUFFO d/b/a LIBERTY EXPRESS, ADRIAN MORALEZ, RET PARTNERSHIP, WILLIAM T. MCQUEENEY, CARL E. ROBERTS, KARL R. HENDERSON, and STEVEN PARHAM, ..... Defendants,

OF WHOM RET PARTNERSHIP, WILLIAM T. MCQUEENEY, CARL E. ROBERTS, KARL R. HENDERSON, and STEVEN PARHAM, are the ..... Respondents.

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# PETITIONERS' REPLY

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## ARGUMENT

Petitioners' cause of action against Respondents is for negligence, which arises out of the well-founded principle of tort law that all persons have a duty to act reasonably so as to avoid harm to third parties. Snow v. City of Columbia, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). The duty of landowners to exercise due care in the use of their property arises out of this very basic rule of law. Id.; Bober v. New Mexico State Fair, 808 P.2d 614, 618 (N. Mex. 1991). Whether the duty is espoused in the more narrow context of premises liability, or even nuisance law, the duty remains the same. The law of South Carolina is clear: where a landowner retains possession and control of his property, he will be liable to third parties injured as a result of the dangerous use of that property. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001); Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (citing Dunbar v. Charleston & W.C. Ry. Co., 211 S.C. 209, 44 S.E.2d 314 (1947)); Peden v. Furman University, 155 S.C. 1, 151 S.E. 907 (1930); Cook v. Lowe's Home Centers, Inc., 2006 WL 3098773 (D.S.C. Oct. 30, 2006) (citing Benjamin v. Wal-Mart Stores, Inc., 413 F. Supp. 2d 652 (2006)); Restatement (Second) of Torts § 364 (1965). Because the courts below failed to apply this rule of law in the case at hand, their decisions are in conflict with these prior holdings of the South Carolina Supreme Court.

The critical facts in this case, which are admitted to by the Respondents, are that: (1) the Respondents retained ownership, possession, and control of the property known as 5858 Savannah Highway; (2) the property was being used for a dangerous activity, namely, backing across both lanes of the heavily traveled highway adjacent to the property to load and unload large tractor trailers onto the property; (3) the Respondents

knew how their property was being used and knew that such activity constituted a danger to the traveling public; and (4) the Respondents failed to remedy the danger. (R. pp. 25, 228-28, 233, 235-36, 238-40, 246-47, 252) These facts alone are sufficient to impose a duty of reasonable care on Respondents.

Respondents' arguments are based on facts that are irrelevant to the duty of care owed by them. The crux of the Respondents' argument derives from the mistaken notion that landowners have no duty to ensure the safety of others on public highways against the negligence of third parties that is beyond the control of the landowner. However, the facts of this case are distinguishable in that these Respondents had control over *both* the third party and the dangerous use of the Respondents' property. As Respondents correctly point out and as the case law supports, a landowner's duty of care ends *only* after he parts with possession of the property. (Return of Respondents, p. 7, n.1 (citing Dunbar, 211 S.C. 209, 44 S.E.2d 314))

The cases relied on by the Respondents to avoid liability are inapposite to this litigation. In Naumann v. Windsor Gypsum, 749 S.W.2d 189, 190 (Tex. Ct. App. 1988), the plaintiff was injured by a truck driver, an independent contractor, who had completely left the defendant's property and traveled 264 feet down the highway before colliding with another vehicle. There, the court likened the defendant to a mere bystander which, because it had no control over the driver and did not create the danger, had no affirmative duty to act. Id. at 192. The facts in Naumann stand in great contrast to the evidence established in this case, which is that the Respondents had control over the subject property and the dangerous condition created by its improper use. Accordingly, Naumann provides no reasonable basis to excuse the Respondents from their legal duty

as a landowner. In addition, the wreck at issue here occurred right in front of the Respondents' property. In fact, two of the tractor truck wheels were already on the curb between Respondents' property line and the highway at the time the collision took place. (R. p. 253)

Moreover, the case of Estes v. Peels, 2000 WL 1424808 (Tenn. Ct. App. 2000) is also unavailing and fails to yield any sound line of reasoning for this Court to absolve Respondents. In that case, the plaintiff was injured when an employee, leaving her job with the defendant plant, pulled onto the highway into the path of an oncoming car. Id. at *1. That court recognized the general rule that "[a] duty to act with due care arises when a risk is unreasonable." Id. at *3. However, there was no evidence that anything, whether another vehicle or a structure on the property, had obstructed the vision of the defendant driver, and the wrongdoing lay solely on the driver. Id. at *6. Accordingly, the court held that summary judgment was properly granted to the defendant plant. Id. at *7. Again, these facts are contrary to the evidence in this case. Here, it was the very use of the property, that the Respondents controlled, that caused injury to the minor Petitioner. Furthermore, both Naumann and Estes were based primarily on a theory of negligent design. Of course, that claim has not been made here. The subject property was not intended for use by tractor trucks and semi trailers. Such activity was in violation of local zoning ordinances and would knowingly create a danger on the adjacent highway. (R. pp. 235, 239-40, 246-47; Supp. R. p. 1, 41)

Respondents have incorrectly framed the issues on appeal. This collision was not the result of a mere happenstance beyond the control of Respondents. This litigation is not, as Respondents' contend, a "failure to yield" case. (Return of Respondents, p. 8)

The harm to Petitioner Hakeem was caused by a large tractor trailer truck obstructing both lanes of Highway 17 South. "The danger of leaving a vehicle standing on the traveled portion of a highway is well known." Jeffers v. Hardeman, 231 S.C. 578, 583, 99 S.E.2d 402, 404 (1957). Respondents admittedly knew of both the nature and danger of the tenants' use of their property.

Thus, the cognizable claims against these Respondents are based, not on some tenuous reasoning, but on the fact that these landowners allowed an ongoing dangerous use of their property, which they possessed and controlled, without regard to the safety of motorists on the adjacent highway. Tractor trucks were routinely seen by the general public parked on the property and also backing across Savannah Highway onto the Respondents' property to load and unload semitrailers. (R. p. 38, 41, 56) In addition, the very first time Respondents saw the tractor truck and semitrailer on the property they knew that Valdez was a trucking operator. (R. p. 244) Coupled with these facts, the added detail that a party unknown to the Respondents was also using the property to load and unload tractor trailer is evidence that the *jury* should be permitted to consider in determining whether Respondents breached their duty of reasonable care.

The Respondents misconstrue the duty that is owed, and Respondents' slippery slope argument must fail. The Petitioners do not seek to impose a duty on landowners "to defend claims for traffic accidents occurring on a public highway while person are negligently entering or exiting their private property." (Return of Respondents, pp. 11-12) Here, the underlying duty owed by Respondents to Petitioner Hakeem arises from the dangerous use of Respondents' property which they failed to remedy. The facts of this case are not at all analogous to the Respondents' example of holding homeowners

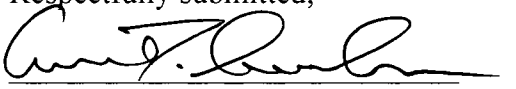
liable for how packages are delivered to their property. However, if that homeowner allowed unknown drivers to park their tractor trailers on his property, or failed to remove them, and the drivers injured a neighborhood child riding his bicycle on the nearby street when entering or exiting the property, the owner of the premises then would and should be called to answer for the harm caused by the dangerous use of his property.

Petitioners are not asking this Court to create a new duty on these Repsondents, but merely to impose the responsibility long recognized by the South Carolina Supreme Court that landowners have to exercise reasonable care in the use of their property to avoid harm to others, including persons on the premises, adjacent landowners, and the traveling public.

## CONCLUSION

For all these reasons, this Court should grant Petitioners' Petition for a Writ of *Certiorari*.

Respectfully submitted,



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**PROOF OF SERVICE**

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I certify that I have served the Petitioners' Reply on Respondents RET Partnership, William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham by regular U.S. Mail, postage prepaid, on June 7, 2013, addressed to their attorneys of record as follows:

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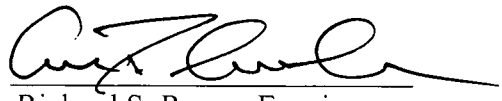
June 7, 2013

By: 

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