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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Appeal No.: 2022-000328

Mark Shaffer, as Personal Representative of the Estate of Susan Shaffer,..... Appellant,

v.

DEH Disaster Recovery, LLC, Ceres Environmental Services, Inc.; Beaufort County, A Political Subdivision of the State of South Carolina; Ryan Colter Stoltz; Matt T. Dotson; Tim Tod Dotson; Brandi Dotson; Spencer A. Olson Trucking, LLC; Buyers Products, Co.; and TruckPro, LLC, ...Defendants,

Of which Ceres Environmental Services, Inc. and Beaufort County, A Political Subdivision of the State of South Carolina are the.....Appellants-Respondents,

And Spencer A. Olson Trucking, LLC, DEH Disaster Recovery, LLC, and Ryan Colter Stoltz are the.....Respondents.

BRIEF OF RESPONDENTS DEH DISASTER RECOVERY, LLC, AND RYAN COLTER STOLTZ

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STATEMENT OF THE CASE

This case has a fairly complicated procedural history. Appellant Mark Shaffer, as Personal Representative of the Estate of Susan Shaffer, Deceased ("Appellant"), Plaintiff below, filed a Complaint in Beaufort County Court of Common Pleas on August 24, 2017, against Respondents DEH Disaster Relief, LLC ("DEH")[1] and Ryan Colter Stoltz ("Stoltz"), among others including Beaufort County, Ceres Environmental Services, Inc. ("Ceres"), and Spencer A. Olson Trucking LLC ("Olson"). (R. pp. 46-56). Plaintiff alleges that, on or about May 3, 2017, the deceased, Susan Shaffer, was driving a vehicle along Highway 21 in Beaufort County. Plaintiff alleges that Stoltz was driving a vehicle owned by DEH "with a trailer improperly attached thereto allowing the heavy trailer to detach from the truck and go into the left hand lane striking the vehicle of Susan Shaffer and causing her death." (Compl. ¶ 9, R. pp. 48-49).

Ceres filed an Answer, including Cross-Claims against Olson, DEH and Stoltz, among others. In its Cross-Claims, Ceres sought contractual and/or equitable indemnity from Olson, DEH and Stoltz. (Ceres Answer & Cross-Claims, filed Sept 25, 2017, R. pp. 122-130).

DEH and Stoltz (referred to herein as "Respondents") filed an Answer, (R. pp. 57-63), and then an Amended Answer. (R. pp. 73-99). Respondents admitted that DEH "was hired by Spencer A. Olson Trucking, LLC, which was hired by Ceres Environmental Services, Inc., which in turn was hired by Beaufort County, to perform a scope of work in Beaufort County, South Carolina." Respondents also admitted that, on May 3, 2017, "Stoltz was driving a vehicle with a trailer both owned by DEH Disaster Recovery, LLC on Sea Island Parkway that were involved in a fatal accident with Susan Shaffer." Respondents otherwise denied Plaintiff's claims and raised

[1] DEH was incorrectly named in the initial Complaint. However, its name later was corrected.

a number of affirmative defenses. (Amd Answer ¶¶ 4-6, R. pp. 74-75). Respondents also filed an answer to Ceres' Cross-Claims, denying the substance of Ceres' Cross-Claims and raising a number of affirmative defenses. (Answer to Cross-Claims, R. pp. 64-72).

On April 9, 2018, Plaintiff filed an Amended Complaint, (R. pp. 100-121), and on February 7, 2019, a Second Amended Complaint, adding additional Defendants. In his Second Amended Complaint, (R. pp. 131-156), Plaintiff asserted that Beaufort County had contracted with Ceres "for the removal of storm debris in Beaufort County," and that "Ceres was the prime contractor for [the] storm debris removal and debris management." Plaintiff also alleged that, "Defendant DEH was hired by the Defendant Olson, which in turn was hired by the Defendant Ceres, which in turn was hired by the Defendant Beaufort County, to perform the above-referenced debris removal and debris management services in Beaufort County, South Carolina." Stoltz was employed by DEH as a driver. (2d Amd Compl ¶¶ 17, 19-21, R. pp. 135-136). As was the case in his prior Complaints, Plaintiff set out allegations of negligence separately for each Defendant. (2d Amd Compl ¶ 36, R. pp. 138-146). DEH and Stoltz answered Plaintiff's Second Amended Complaint on February 21, 2019, again denying the negligence allegations and raising affirmative defenses.

Beaufort County and Ceres filed a joint Answer to Plaintiff's Second Amended Complaint, again raising cross-claims against, among others, Olson, DEH and Stoltz for contractual and/or equitable indemnity. (R. pp. 185-195). Respondents filed an Answer to Beaufort County and Ceres' cross-claims, denying they are entitled to indemnification, and raising affirmative defenses. (R. pp. 176-184).

Meanwhile, Olson, DEH and Stoltz engaged in settlement negotiations with Plaintiff. These parties reached an agreement to settle Plaintiff's claims against Olson, DEH and Stoltz for

"One Million One Hundred and Fifty Thousand and NO/100 ($1,150,000.00) Dollars in exchange for a full Release and Dismissal of all claims against the Settling Defendants, with One Million One Hundred and NO/100 ($1,100,000.00) Dollars being allocated to the wrongful death claim and Fifty Thousand and NO/100 ($50,000.00) Dollars being allocated to the survival claim." (Verified Petition ¶ 4, R. pp. 253-264). On December 28, 2020, the circuit court approved the Settlement. In its Order, the circuit court recited that the Settling Defendants "shall pay" $1,150,000.00 to Plaintiff, explaining that that payment was "a full and final compromise and settlement for all claims against the Settling Defendants in exchange for the Settlement Agreement and Release agreed to by the Plaintiff and the Settling Defendants." (Order Granting Petition for Approval of Settlement of Wrongful Death, filed Dec. 28, 2020, R. pp. 33-36).

Subsequently, on March 5, 2021, Plaintiff filed a Third Amended Complaint. (R. pp. 199-217). Olson, DEH and Stoltz are not named in the Third Amended Complaint. However, the Third Amended Complaint retains Plaintiff's independent claims against both Beaufort County and Ceres. With respect to Ceres, Plaintiff alleges, among other things, that Ceres was negligent in failing to inspect the truck, the trailer and pintle hook that were involved in the collision; in failing to require proper inspections; in "failing to hire a competent safety director"; in "failing to ensure that all equipment utilized by its subcontractors satisfied all local, state and federal safety requirements"; and, in "failing to require, request or examine inspection logs for all commercial motor vehicles being used." With respect to Beaufort County, Plaintiff alleges, among other things, that it was negligent "[i]n hiring the Defendant Ceres when it knew or should have known that the Defendant Ceres was unqualified; "[i]n allowing, permitting, condoning, or approving a Truck" with "a Trailer which was in a defective and unreasonably dangerous condition to be utilized in the performance of the Ceres contract"; in failing to inspect or require proper

inspections of the Truck, the Trailer, the pintle hook and safety chains; "[i]n failing to properly oversee and monitor the performance of its Contract with Ceres"; in "failing to ensure that all equipment utilized in the performance of the Contract was in compliance with local, state and federal safety requirements"; "[i]n failing to have a safety officer appointed to ascertain and ensure that the contractors and subcontractors complied with safety rules and regulations"; and, "[i]n failing to require routine safety maintenance and inspections of the equipment being utilized by its contractor and subcontractors." (3d Amd Compl. ¶ 29, R. pp. 205-208).

Beaufort County and Ceres filed a timely Answer to the Third Amended Complaint and, although they were no longer named Defendants, included cross-claims against Olson, DEH and Stoltz, purporting to add them back to the caption. (R. pp. 218-235). In their purported cross-claims, Beaufort County and Ceres asserted that Plaintiff had "improperly removed" Defendants Olson, DEH and Stoltz[2] since Beaufort County and Ceres "previously asserted Cross Claims against these three Defendants, and those Cross Claims were not dismissed or otherwise resolved." Beaufort County and Ceres again alleged that they were entitled to contractual and/or equitable indemnity from Olson, DEH and Stoltz. (Answer to 3d Amd Compl ¶¶ 52, 67, R. pp. 228, 231).

DEH and Stoltz filed an Answer to Beaufort County and Ceres' alleged cross-claims, (R. pp. 236-243), pointing out that, "should Ceres and Beaufort County elect to pursue claims for indemnity against DEH and Stoltz, of which the ability to do so is denied, then such claims should be asserted as Third-Party Claims as DEH and Stoltz are not Defendants in Plaintiff's Third Amended Complaint." Respondents asserted that "no contract exists nor did one ever exist with Ceres and/or Beaufort County" and denied that those parties were entitled to equitable indemnity.

[2] Beaufort County and Ceres correctly noted that, at this point in time, Stoltz had passed away from an unrelated cause. (*See* Answer to 3d Amd Compl ¶ 55, R. p. 228).

They also asserted that the circuit court lacked jurisdiction over Stoltz, who at this time was deceased and his Estate had not been opened. (Answer to Alleged Cross-Claims ¶¶ 3, 14-18, R. pp. 237-239).

DEH and Stoltz moved for summary judgment, arguing that "[t]here is no contract between" them and Beaufort County and/or Ceres, which defeats the cross-claim for contractual indemnity. With respect to the equitable indemnity cross-claim, Respondents argued that there is no special relationship between the parties that would support such a claim, relying on *Rock Hill Tel. Co. Inc. v. Globe Commc'n, Inc.*, 363 S.C. 385, 611 S.E.2d 235 (2005). DEH and Stoltz also pointed out that, because there were no claims against them in the Third Amended Complaint, neither Ceres nor Beaufort County was "defending themselves … based upon any action or inaction" on the part of DEH or Stoltz. (Motion for Summary Judgment, R. pp. 290-292) (Memorandum in Support, R. pp. 310-313). Olson also moved for summary judgment. (Olson Motion for Summary Judgment, R. pp. 295-296) (Olson Memorandum in Support, R. pp. 297-304).

Beaufort County and Ceres filed a consolidated response to all of the motions for summary judgment pending against them. Beaufort County and Ceres argued, among other things, that they had a sufficient contractual relationship and/or special relationship with DEH and Stoltz to support their contractual and/or equitable indemnity claims. (Ceres and Beaufort County's Opposition, filed Oct. 27, 2021, R. pp. 314-342).

DEH, Stoltz and Olson's summary judgment motions, along with other motions, were heard by the Honorable Robert J. Bonds on October 28, 2021. (R. pp. 3257-3388). In Form 4 Orders filed December 2, 2021, the circuit court granted both DEH and Stoltz's, as well as

Olson's motions for summary judgment against Beaufort County and Ceres. (Form 4 Orders, R. pp. 37-42).

Beaufort County and Ceres moved for reconsideration of the Form 4 Orders granting relief to DEH and Stoltz, (Motion for Reconsideration, R. pp. 343-375), which motion was heard by Judge Bonds on February 11, 2022. (R. pp. 3428-3496). At one point during the hearing, Judge Bonds asked Beaufort County and Ceres' counsel why, since Olson, DEH and Stoltz were no longer Defendants in the pending action, they did not simply file a separate complaint against them. Beaufort County and Ceres' counsel's only response was that, although they had won their summary judgment motion against Plaintiff in an order issued after summary judgment had been granted to Olson, DEH and Stoltz, if that ruling was overturned on appeal, they would be back defending this matter at the circuit court. (R. p. 3482, line 9 – p. 3488, line 25).[3]

On February 24, 2022, Judge Bonds filed two Form 4 Orders, denying Beaufort County and Ceres' Motions for Reconsideration, indicating that a formal order was forthcoming. (Form 4 Orders, filed Feb. 24, 2022, R. pp. 20-25). On March 10, 2022, the Circuit Court issued a detailed written Order granting DEH and Stoltz summary judgment and denying Beaufort County and Ceres' Motion for Reconsideration. (Order Granting DEH Disaster Recovery, LLC and Ryan Colter Stoltz's Motion for Summary Judgment as to Claims by Ceres Environmental Services,

[3] As noted, Beaufort County and Ceres moved for summary judgment as to all of Plaintiff's claims against them in the Third Amended Complaint, (Ceres and Beaufort County's Motion for Summary Judgment, filed Sept. 24, 2021, R. pp. 305-309; Ceres and Beaufort County's Memorandum in Support, filed Jan. 5, 2022, R. pp. 376-483), which Plaintiff opposed. (Exhibits in Opposition, filed Jan. 6, 2022, R. pp. 484-485). Beaufort County and Ceres' Motion for Summary Judgment was heard by the Honorable Bentley Price on January 6, 2022, after which he granted summary judgment to Beaufort County and Ceres. (Order Granting summary Judgment to Beaufort County and Ceres, filed Feb. 11, 2022, R. pp. 26-32). Plaintiff moved to reconsider, which the circuit court denied on March 1, 2022. (R. pp. 17-19).

Inc. and Beaufort County, filed March 10, 2022, R. pp. 1-7). The Circuit Court likewise affirmed the grant of summary judgment to Olson. (R. pp. 8-16).

Beaufort County and Ceres timely appealed the orders granting summary judgment to Olson, DEH and Stoltz. Plaintiff timely appealed the grant of summary judgment to Beaufort County and Ceres. The appeals were consolidated and are pending under Appeal No. 2022-000328.[4] (R. pp. 3497-3498).

BACKGROUND FACTS

Following Hurricane Matthew, Beaufort County engaged Ceres to perform cleanup of the storm debris. The contract between Beaufort County and Ceres, made in September 2015, provides that it "shall consist of all the terms, conditions, specifications and provisions contained herein and all the terms, conditions, specifications and provisions contained in RFP #030415 dated February 2, 2015, and all Addendums. The Contractor's Proposal submitted on March 6, 2015, is incorporated by reference into this Contract Agreement in its entirety." (Primary Contract for Storm Debris Removal & Debris Management Site Operation & Disposal series for County of Beaufort, R. pp. 3499-3567). Section 7.0 of the Supplemental Provisions of RFP #030415 provides, in pertinent part, that "[t]he Contractor [Ceres] shall also be responsible for periodically inspecting all Contractor vehicles (including subcontractors) to ensure that vehicles meet state and federal DOT regulations." (RFP #030415, Supplemental Provisions, R. p. 3536).

Ceres, in turn, had entered into a Master Subcontract Agreement with Olson, (R. pp. 3568-3589), that covered the "Disaster Season 2013-2015," but which all parties agree was "updated for this Hurricane Matthew Debris Removal Project on March 23, 2017." (Ceres and Beaufort County Opposition, R. p. 315). Section 1.4 of the Master Subcontract provides, in pertinent part,

[4] Beaufort County and Ceres' Statement of the Case contains argumentative and "contested matters" in violation of Rule 208(b)(1)(C), SCACR, which should be disregarded.

that "[t]his Subcontract does not create, nor does any course of conduct between the Contractor and Subcontractor pursuant to this Subcontract create, any contractual relationship between any parties other than the Contractor and Subcontractor. The Subcontractor is in all respects an independent contractor …. The Subcontractor agrees not to enter into any other contract relating to the Project without the Contractor's prior written consent." (Master Subcontract ¶ 1.4, R. p. 3569). The Master Subcontract also provides that "Subcontractor shall not subcontract, assign or transfer the performance of this Subcontract or any part thereof without the written consent of Contractor," although it also provides that "Subcontractor agrees to flow down or make applicable all the obligations of this Subcontract to any entity with whom Subcontractor assigns, transfers or subcontracts any work." (Master Subcontract ¶ 4.12, R. p. 3574). Pricing under the Master Subcontract was set out in a "Pricing Schedule (Exhibit A)." (Master Subcontract ¶ 5.3, R. p. 3577). Attached to the Master Subcontract was an Exhibit A-1, which set forth the various agreed pricing based on the amount of debris and distance traveled. (Exh. A-1, R. pp. 3588-3589).

The Master Subcontract contains a contractual indemnification provision which provides the "Subcontractor agrees, to the fullest extent permitted by law, to indemnify, defend and hold harmless Contractor, the Owner and the Project architect and the employees, agents and representatives of each … from and against all liabilities, costs, losses, expenses," including fees and expenses, regardless of whether the liability was "caused by or resulting from the Subcontractor's or any of Subcontractor's … subcontractors … or any one directly or indirectly employed by any of them ..." It also provides that "[t]he indemnity obligation granted herein in favor of the Indemnitees shall include the sole and/or concurrent fault and negligence of any Indemnitee whether collectively or singularly." (Master Subcontract ¶ 4.16, R. p. 3575). In

addition, Olson, the Subcontractor, agreed to provide various insurances, including Commercial General Liability, listing Ceres as an additional insured. (Master Subcontract Art. 11, R. pp. 3581-3582).

Olson, in turn, subcontracted with DEH to provide equipment and personnel to "complete and deliver the timely removal, processing and lawful disposal of all eligible storm generated debris," for "the consideration of $5.50 per cubic yard of eligible debris collected, the Subcontractor [DEH] attests and agrees with the Contractor [Olson] as follows: (***See Attachment A for Prices***)." The sub-subcontractor contract ("Sub-Subcontract") provides that, "This Agreement made this 21 day day of March 2017, by and between Spencer A. Olson Trucking, LLC hereinafter referred to as 'Contractor' and DEH hereinafter referred to as 'Subcontractor' is to define the specific responsibilities of the parties in the execution of the project known as Waterways, in Beaufort, SC." The job involved "[l]load[ing] and haul[ing] all eligible storm debris from within the legal boundaries of Beaufort Cty, SC … as assigned to a disposal site(s) as specified." (R. pp. 3592-3603). The Sub-Subcontract includes the pricing and payment schedule, Exhibit A-1, but does not incorporate or otherwise reference the Master Subcontract between Ceres and Olson. In fact, Dodd Hartley, owner of DEH, (R. p. 759, lines 1-3), testified that he had no personal knowledge of Ceres' role in this project. Instead, all of his dealings were with Olson. (R. p. 883, lines 4-14).

On May 3, 2017, Stoltz, who was employed by DEH, was driving a truck with an attached trailer back from dumping a load of storm debris. The parties agree that the pintle hook that held the trailer to the truck became unbolted, and that the safety chains failed, allowing the trailer to come free and cross into on-coming traffic. The trailer collided with a vehicle driven by Susan Shaffer, fatally injuring her.

During litigation, Plaintiff, Olson, DEH and Stoltz entered into a Settlement Agreement which resolved all of Plaintiff's claims against the Olson, DEH and Stoltz. Beaufort County and Ceres appear to take umbrage in the fact that they were not "invited to participate in any settlement negotiations," which it complains were "secret" and unknown to Ceres. (Ceres' Br. pp. 7, 10, 24). The Settlement Agreement was approved by the circuit court with no finding of fault or negligence on the part of any of the settling Defendants. (Dec. 28, 2020 Order, R. pp. 33-36).

At the October 28, 2021 hearing on Olson, DEH and Stoltz's Motions for Summary Judgment, counsel for Beaufort County and Ceres acknowledged that "from the standpoint of DEH, there was not a direct contract between Ceres and DEH[.]" (R. p. 3276, lines 13-14).

At the January 7, 2022 hearing on Beaufort County and Ceres' Motion for Summary Judgment against Plaintiff, Counsel for Beaufort County and Ceres attempted to distance those parties from DEH and Stoltz, asserting that "the chain of command went Beaufort County hired Ceres, Ceres hired Spencer Olson, and then Spencer Olson hired DEH as our sub-sub, DEH was the one that owned the truck and had the driver that was actually involved in the accident. So the three that actually settled with the Plaintiff were basically levels down below Ceres. And so it was our sub, our sub-sub, and its employee." (R. p. 3401, line 23 – p. 3402, line 5). He later confirmed that, "Ceres was an independent contractor of Beaufort County, but then Olson was an even more remote independent, and DEH was even more remote and certainly Stoltz, the driver, was—was four or five levels down from the County." (R. p. 3410, lines 4-8).

Counsel for Spenser Olson disputed Beaufort County and Ceres' claim that they had incurred "hundreds of thousands [of] dollars in fees and expenses," explaining, without objection, that his client had paid and indemnified Ceres "up until the time the Plaintiff amended his

complaint." (R. p. 3492, lines 8-17; *see also* p. 3482, line 25 – p. 3483, line 6 (Beaufort County and Ceres's counsel acknowledging that Olson's insurer "did accept the tender of defense from—from Ceres. And so they actually did start defending us. Then when they got out of the summary judgment, we're—we're done …")).

Michael Napier, a trucking industry expert hired by the Dotson Defendants, was deposed in this case on August 26, 2021. Mr. Napier testified that Beaufort County was "acting as what we would know in the industry as a shipping contractor with Ceres, and that they failed to reasonably determine whether or not Ceres was properly authorized to perform the transportation services outlined as I understood in the contract." In other words, Beaufort County failed to do the simple search that would have "revealed that Ceres' principle place of business registered with FMCSA [Federal Motor Carrier Safety Act] was Minnesota, not Lakewood, Florida," and that Ceres is what is "known as a reincarnated company or a chameleon company, which serves to sometimes hide poor safety performance or safety history and other things that would be problematic with regards to protection of the public good …" (R. p. 2983, line 23 – p. 2985, line 8; *see also* p. 3058, lines 10-19; Napier Dep. Exh. 2, R. p. 3170). Mr. Napier confirmed that the process to determine whether or not Ceres was qualified and/or had the authority to fulfill its contract with Beaufort County was "very easy" and "done all over the United States by brokers and shippers alike." (R. p. 2963, line 14 – p. 2964, line 8).

Mr. Napier testified that Ceres was not "under the addresses that we know, were capable of providing the transportation services that they were providing at the time" of the accident. (R. p. 2959, lines 1-5). He explained that, "when they got the notice to proceed even, and even after the contract was executed, nobody has done the kind of due diligence that would allow for the shipper, in this case the contractor or the contracting entity, the County, did not assure that Ceres

had the proper authority or was vetted to do the hauling in which they were contracted to do. And there's nothing that showed that Ceres had any kind of broker authority that allowed for Ceres to use what's been used in this case subcontract or to broker other loads out to another motor carrier. So, they hire, they've entered into a contract with Ceres and had they done the reasonable due diligence that a shipper does with a motor carrier that's going to haul loads, they would have known that Ceres did not have the kind of authority necessary to do what they were contracting with." (R. p. 2963, line 5 – p. 2964, line 1).

Mr. Napier confirmed that "Ceres operating as a so-called chameleon carrier" was a violation of commercial motor vehicle safety standards. (R. p. 2991, line 23 – p. 2992, line 2; *see also* p. 3139, lines 14-17; Napier Dep. Exh. 2, footnote 26, R. pp. 3196-3199). Both Beaufort County and Ceres failed to perform "their reasonable due diligence" resulting in the hiring of Olson, who, without proper authority, double-brokered the work to DEH. (R. p. 2994, lines 1-16; *see also* p. 2995, lines 4-7 ("And, so from the top down, from Beaufort all the way through the entire transaction, the rules for safety and due diligence and things were just, just seemingly ignored"); p. 3058, lines 10-19 (agreeing it was his opinion that Beaufort County and Ceres "failed to act in a prudent and reasonable manner by independently performing the commercial motor vehicle industry's reasonable due diligence necessary for reasonable contracting with motor carriers in accordance with the commercial motor vehicles safety standards," and also stating "that each one of them failed to do to the other")). Mr. Napier testified that Ceres had no authority to, and in fact, was "prohibited" from brokering the work to Olson, who then "double brokered" it to DEH. (R. p. 3124, line 1 – p. 3126, line 6; p. 2967, line 3 – p. 2969, line 6).

Jim Minor served as Beaufort County's solid waste manager at the time of the incident. (R. p. 2381, lines 3-10). Mr. Minor testified that neither Beaufort County nor Ceres inspected or

took steps to ensure all trucks or other equipment were in compliance with all applicable local, state, and federal rule and regulations. (R. p. 2407 line 20 – p. 2409, line 1; p. 2430, lines 5-23; p. 2433, lines 1-15).

The failures by Beaufort County and/or Ceres to inspect or require inspection of the equipment used in the project contributed to Plaintiff's injuries. David Eby, who performed a metallurgic analysis of the safety chains, (R. p. 2481, lines 7-15), testified that the chains were too small for the working load of the trailer, and they were improperly attached to the trailer by welding, which reduced their strength. (R. p. 2473, line 7 – p. 2474, line 16). Mr. Eby testified that both of these conditions were readily observable. (R. p. 2474, lines 4-10; p. 2603, line 16 – p. 2604, line 16). Moreover, Mr. Napier testified that the safety chains were not crossed, which would have prevented the tow bar from dropping to the ground, which also was a readily observable condition. (R. p. 3017, line 21 – p. 3019, line 2). Had either Beaufort County or Ceres performed or required inspections of the equipment, they would have discovered these issues and, consequently, the accident would never have occurred.

Mr. Napier tied Ceres' operation as a "chameleon carrier" and its other failures to the cause of Plaintiff's injuries:

Q: Did any of that have anything to do with the failure of this pintle hitch?

A: Absolutely.

…

Q: Okay. Well, tell me about it?

A: All of it did. I mean, it ultimately led to using an unqualified driver and unqualified carrier, who shouldn't have been there doing what they did, who didn't do any of the things. None of that would have happened if you didn't use an unqualified Ceres, who hired an unqualified Olson, who hired an unqualified DEH …

(R. p. 3131, line 6 – p. 3132, line 5). In other words, the accident "would not happened but for those failures." (R. p. 3132, lines 15-16).[5]

STANDARD OF REVIEW

On appeal, this Court applies the same standard in reviewing an order granting summary judgment as was applied in the lower court. *E.g.*, *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). That is, under Rule 56(c), summary judgment should be granted when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In making this determination, the Court must view "the evidence and all inferences which can be reasonably drawn therefrom … in the light most favorable to the nonmoving party." *Bayle v. South Carolina Dept. of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 735, 738 (Ct. App. 2001). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617 n.4, 698 S.E.2d 879, 882 n.4. (Ct. App. 2010). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Singleton v. Sherer*, 311 S.C. 185, 197-198, 659 S.E.2d 196, 203 (Ct. App. 2008).

[5] While Respondents do not take a position on whether the circuit court properly granted summary judgment to Beaufort County and Ceres, Respondents raise evidence of Beaufort County and Ceres' independent negligence that caused or contributed to Plaintiff's injuries in support of their argument that Beaufort County and Ceres are not entitled to equitable indemnity. However, Respondents take issue with a number of statements in Plaintiff's Brief and by various witnesses, ascribing fault to DEH and/or Stoltz. In particular, Respondents note that nothing in either the Verified Petition seeking approval of the Settlement Agreement or the Order approving that Settlement Agreement indicate that DEH and/or Stoltz admitted to or was found to be negligent or at fault in connection with Plaintiff's injuries. As such, neither DEH nor Stoltz has been or will be found guilty of negligence. DEH and Stoltz pose this objection to any assertion of their negligence in Plaintiff's Brief in order to preserve their position that any alleged negligence on their part has not and never will be proven, in the unlikely event this Court overturns the grant of summary judgment in their behalf against Beaufort County and Ceres.

With regard to equitable indemnity, which is an action in equity, the reviewing court "may find facts in accordance with its view of the preponderance of the evidence. [citation omitted] However, this broad scope of review does not require the appellate court to disregard the findings made below." *Fountain v. Fred's, Inc.*, 429 S.C. 533, 544-545, 839 S.E.2d 475, 481 (Ct. App. 2020) ("*Fountain I*"), *rev'd on other grounds*, 436 S.C. 40, 871 S.E.2d 166 (2022) ("*Fountain II*"). For example, in *Walterboro Cmty. Hosp., Inc. v. Meacher*, 392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2010), this Court denied a demand for equitable indemnification, even after reviewing the evidence and finding facts "in accordance with its view of the preponderance of the evidence," because the party seeking indemnification could not show it was without fault. 392 S.C. at 486-489, 709 S.E.2d at 75-76. The same is true here.

ARGUMENTS

I. The Circuit Court properly granted summary judgment to DEH and Stoltz on Beaufort County and Ceres' indemnity claims.

Beaufort County and Ceres's Brief is premised on an illusory assertion that they have presented an issue of material fact that is in dispute, *i.e.*, "whether the acts or omissions of Olson, DEH, and Stoltz caused or contributed to the death of Plaintiff Susan Shaffer, and led to the Plaintiff's claims against Ceres." (Ceres' Br. p. 2). Even assuming, solely for the sake of argument and for purposes of summary judgment, that DEH and Stoltz contributed to Plaintiff's injuries, Beaufort County and Ceres still are not entitled to either contractual or equitable indemnity from DEH and/or Stoltz. This is because there was no contractual relationship between Ceres (much less Beaufort County) and Respondents to support contractual indemnity, and no special relationship between them and Respondents to support equitable indemnity. Even if Beaufort County and Ceres could identify a special relationship, which they cannot and which their own counsel has repudiated, they cannot demonstrate that they are without fault in

contributing to Plaintiff's injuries. It is well-established in South Carolina that "there can be no indemnity among mere joint tortfeasors." *Scott v. Fruehauf Corp.*, 302 S.C. 364, 370, 396 S.E.2d 354, 357-358 (1990), *citing Atlantic Coast Line Ry. v. Whetsone*, 243 S.C. 61, 132 S.E.2d 172 (1963). Indeed much of their argument relies on the erroneous premise that, if Olson, DEH and Stoltz caused or contributed to Plaintiffs' injuries, that alone proves that Beaufort County and Ceres are absolved of any liability, rendering the claims against them in the Third Amended Complaint meaningless. However, it is black letter law in South Carolina that "[a]n injured person can sue any one or all of several joint tort-feasors whose negligent acts or omissions unite to produce his injury," *Atlantic Coast Line*, 243 S.C. at 67, 132 S.E.2d at 174, and that "[t]he release of one tortfeasor does not constitute a release of others who contributed to the plaintiff's injuries unless the parties intended such a release or the plaintiff received full satisfaction." *Scott*, 302 S.C. at 368, 396 S.E.2d at 356.[6]

Beaufort County and Ceres' arguments, in large part, are based on dire predictions that, in the end, amount to nothing. They complain that the Settling Parties and/or, alternately, the circuit court "eliminated Ceres' legal right to indemnity without any cause, justification, or legal support from statutory or case law." (Ceres' Br. pp. 6, 7). Likewise, their predictions of doom and gloom if summary judgment is upheld in this case, (Ceres' Br. pp. 2 (suggesting "the entire concept of

[6] In the instant case, the fact that Plaintiff continues to pursue his independent claims against both Beaufort County and Ceres in the Third Amended Complaint is evidence that he did not intend to release those parties through the Settlement Agreement reached with Olson, DEH and Stoltz. Beaufort County and Ceres have not asserted or raised any argument that Plaintiff has received full satisfaction—either before the circuit court or in their opening Brief—and cannot do so now. *E.g.*, *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989) (an appellate court will not consider a claim or argument not raised to the lower tribunal); *Emerson Elec. Co. v. South Carolina Dept. of Rev.*, 395 S.C. 481, 489 n.6, 719 S.E.2d 650, 654 n.6 (2011) (declining to consider argument raised for the first time in a reply brief); *Simmons v. SC Strong*, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 634 n.2 (Ct. App. 2013) (argument not preserved for appellate review where it was raised for the first time in a reply brief).

indemnity in South Carolina would be eviscerated"), p. 8 (upholding summary judgement "undermines the entire body of South Carolina law regarding indemnity" and "could easily lead to nefarious dealings"), p. 10 (purported efforts by the Settling Parties "to eliminate the indemnity cause of action in South Carolina … would have devastating consequences to future litigants"; and, "[t]he Lower Court's Summary Judgment Orders are an attack on the fundamental principles of indemnity")), are both legally and factually incorrect. What Beaufort County and Ceres avoid mentioning is that they could have brought a third-party claim against the Settling Defendants, or could have sued them separately for indemnification. (*See* R. p. 3482, line 9 – p. 3488, line 25). Upholding summary judgment in favor of Respondents does not undermine the "concept of indemnity" in any way but, instead, would be fully in line with South Carolina precedent.

Indeed, Beaufort County and Ceres have lost no "legal rights without [their] knowledge or consent" or without "consideration or bargained for exchange supporting the release of indemnity rights." (Ceres' Br. p. 8). Parties settle their claims all the time. It is common practice that, when a plaintiff settles with a defendant or a group of defendants, those defendants are released and no longer parties to the ongoing action. That is what occurred here. Beaufort County and Ceres' Cross-Claims simply are no longer viable because the parties against whom they are asserting those claims are no longer named Defendants. Patently, a plaintiff has the right to name the defendant or defendants he or she chooses to sue. *E.g.*, *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 345, 698 S.E.2d 559, 560 (2010) ("It is well-settled that a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue"). Beaufort County and Ceres easily could have pled DEH and Stoltz in as third-party defendants in order to pursue their indemnity claims but, for strategic reasons known only to them, have chosen not to do so. DEH and Stoltz do not deny that Beaufort County and Ceres are entitled to pursue their indemnity claims in some forum (while

maintaining their position that they are not under any duty to indemnify those parties); however, Beaufort County and Ceres cannot dictate which Defendants remain in the case and which do not. That decision is made by the Plaintiff. *Chester*, 388 S.C. at 345, 698 S.E.2d at 560.

A. Indemnity in general.

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party," and "may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." *Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990). "Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties." *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018). In contrast, "courts have allowed equitable indemnity in cases of imputed fault," *i.e.*, where a master is held vicariously liable for the torts of his servant, or, alternatively "where some special relationship exists between the first and second parties." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999). However, equitable indemnity is only allowed where the moving party can demonstrate that "no personal negligence of his own has joined in causing the injury." *Id.*

B. The Circuit Court properly granted summary judgment to DEH and Stoltz on Beaufort County and Ceres' contractual indemnity claim.

As an initial matter, Counsel for Beaufort County and Ceres has conceded that there is no contract between either of them and DEH, let alone DEH's employee Stoltz. (R. p. 3276, lines 13-14). Instead, Beaufort County and Ceres craft a creative, but strained and legally unsupportable argument that, by agreeing that Olson "will direct the services and equipment of" DEH "according to the specifications of the Client," and by attaching the pricing addendum to its

contract with Olson, DEH somehow contractually agreed to indemnify Ceres. The Olson/DEH Sub-Subcontract does not incorporate by reference any of the terms of the Master Subcontract between Ceres and Olson beyond the pricing addendum. That addendum does not reference or contemplate in any way an indemnification obligation to Ceres.

While it is not necessary to use any particular "magic words" in order to incorporate the terms of a separate writing, "the contract 'must explicitly, or at least precisely, identify the written material being incorporated *and* must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history).'" *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 394 S.C. 300, 307-308, 715 S.E.2d 655, 659 (Ct. App. 2011) (emphasis added), *aff'd in part and rev'd in part on other grounds*, 407 S.C. 407, 756 S.E.2d 148 (2014), *citing Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1346 (Fed. Cir. 2008). While Beaufort County and Ceres might be able to show the Sub-Subcontract identifies the Master Subcontract sufficiently, which is doubtful and not conceded, they can point to no language in the Sub-Subcontract that "clearly communicate[s] that the purpose of the reference is to incorporate" the Master Subcontract in general, and the indemnification clause in particular.

Instead, the Sub-Subcontract specifies that "[t]his Agreement made this 21 day of March 2017, by and between Spencer A. Olson Trucking, LLC hereinafter referred to as 'Contractor' and DEH hereinafter referred to as 'Subcontractor' is to define the specific responsibilities of the parties in the execution of the project know as Waterways, in Beaufort, SC." In other words, the Sub-Subcontract defines "the specific responsibilities of the parties" without reference to any

other contract or agreement. (R. p. 3592). Had the parties intended to incorporate the terms of Ceres' Master Subcontract, they would have stated so. They did not.

Moreover, the Sub-Subcontract between Olson and DEH does not identify the Master Contract in any meaningful way. The fact that the pricing addendum has in the caption that it is the "Subcontract Pricing Addendum Disaster Debris Removal and Disposal, Beaufort County, SC Job 3498, Addendum to Ceres Master Subcontract Agreement," (R. pp. 3602-3603), simply provides the agreed pricing but is insufficient to incorporate by reference all the terms of Ceres' Master Subcontract Agreement. At most, the Sub-Subcontract incorporated the Schedule A pricing, but nothing more.

By way of contrast, the Primary Contract between Beaufort County and Ceres contains language clearly incorporating RFP #030415 and Ceres' Proposal, stating that the Primary Contract "*shall consist of* all the terms, conditions, specifications and provisions contained herein *and all the terms, conditions, specifications and provisions contained in RFP #030415* dated February 2, 2015, and all Addendums. The *Contractor's Proposal* submitted on March 6, 2015, *is incorporated by reference into this Contract Agreement in its entirety*." (Primary Contract, R. p. 3560) (emphasis added). No such language—or even remotely similar language—appears anywhere in the Sub-Subcontract.

Beaufort County and Ceres rely heavily on Paragraph II of the Sub-Subcontract, which provides that "Contractor and its agents will direct the services and equipment of the Subcontractor according to the specifications of the Client, and/or government authority." (R. p. 3592). This is an obligation directed to Olson, the Contractor, and does not begin to suffice as an incorporation by reference. It does not refer to the Master Subcontract by name or in any meaningful way. It requires *Olson* to "direct the services and equipment of [DEH] according to

the specifications of the Client …" To the extent that Paragraph II even remotely could be construed as incorporating any part of the Master Subcontract, which is denied, it refers solely to the "specifications" for performing "the services" and the "equipment" to be used. It cannot reasonably be construed as a wholesale incorporation by reference of all of the terms—particularly a broad indemnification provision—included in the Master Subcontract. There simply is no language or evidence indicating that was the intent of the parties. *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 89, 232 S.E2d 20, 25 (1977).

Neither Paragraph II nor any other provision of the Sub-Subcontract between Spencer Olson and DEH contains any language incorporating by reference any of the provisions of the Master Agreement between Olson and Ceres, beyond the agreed upon pricing for hauls. Contrary to Beaufort County and Ceres' assertions otherwise, the Sub-Subcontract between Olson and DEH includes the "Subcontract Pricing Addendum" to the Master Agreement but none of the operational terms generally and not the indemnification provision specifically. In other words, while the pricing for the Spencer Olson/DEH Sub-Subcontract is taken from an attachment to the Ceres/Spencer Olson Master Contract, there is no language of incorporation in the Sub-Subcontract that references any portion of the Master Agreement, other than pricing.

Not only is there no language in the Sub-Subcontract incorporating or adopting the terms of the Master Subcontract, Section 1.4 of the Master Subcontract provides, in pertinent part, that "[t]his Subcontract *does not create*, nor does any course of conduct between the Contractor and Subcontractor pursuant to this Subcontract create, *any contractual relationship between any parties other than the Contractor and Subcontractor*." (Master Subcontract ¶ 1.4, R. p. 3569) (emphasis added). This language reveals Ceres' intent in the Master Subcontract to enter into a contractual relationship only with Olson, but no other party.

Beaufort County and Ceres then assert, incorrectly, that the Waiver and Release for Payment, signed by DEH, constitutes an acknowledgement of "its contractual arrangement with Ceres." (Ceres' Br. p. 17). The Waiver and Release identifies DEH as the "2nd Tier Subcontractor" which gave up all claims and rights it might have "against Spencer A. Olson Trucking, LLC ('Subcontractor[']) and Ceres Environmental Services, Inc. ('Contractor'), Liberty Mutual Insurance Company ('Surety'), and DEH Disaster Recover, LLC or 'Owner')," as relates to "labor and/or material supplied by the Subcontractor under its written agreement ("Subcontract") with Contractor performed pursuant to Contractor's agreement with the Owner, Ceres' Job # 3498 and all modifications) (collectively 'the Contract') relating to *Beaufort Cty. SC* (the 'Project Scope')." (R. p. 3590). As an initial matter, the identification of DEH as both the 2nd Tier Subcontractor *and* as the "Owner" of the project, which it clearly was not, renders this Release internally inconsistent and of questionable probative value.

In addition, the fact that Olson, identified as the "Subcontractor," agreed to release "the Released Parties" from certain claims does not establish or evidence a contract between DEH and Ceres. In fact, the Master Subcontract contains its own Release provision, in Para. 15.6, in which Olson, as Subcontractor, released "Contractor [Ceres] from liability, and releases all claims against Contractor, for lost profits or incidental, underabsorbed overhead, delay damages, attorneys' fees, consequential or special damages of any kind in connection with or related to the Subcontract Documents or any alleged breach thereof." (Master Subcontract 15(6), R. pp. 3586-3587). The Waiver and Release for Payment provides that Olson, identified as "Subcontractor," released the Released Parties from "any and all claims, demands of every kind or character, causes of action … or claims for original contract work, extra work, extended or additional job costs or overhead, lost profits, impact costs and the like … which the 2nd Tier Subcontractor has

or could have arising from, or under the facts and circumstances arising from the Subcontract against Released Parties of this Project."[7] (R. p. 3590). In other words, Olson was releasing the Released Parties from any claims DEH might have against them for further payment, although it also purports to apply "to claims resulting from anything which has ever happened during the above-referenced performance period of the Subcontract," which latter provision itself may be impermissibly broad. In the end, there simply is no language of incorporation in the Wavier and Release for Payment that suggests the parties were incorporating the Master Subcontract in general and certainly not the indemnification provision specifically.

The fact that the Master Subcontract required Olson to ensure that its subcontractors were "subject to the specific contract terms required by Ceres," does not automatically or magically create a contractual relationship between Beaufort County and Ceres and Respondents. Nor does that directive, requiring action on the part of Olson, but not DEH, evidence any intent between Olson and DEH to incorporate the terms of the Master Subcontract into the Sub-Subcontract. The failure on the part of Olson to conform its sub-subcontract language to that allegedly required in the Master Subcontract falls to Olson and not to DEH. Moreover, there is no evidence—just Beaufort County and Ceres' unsupported allegation—that DEH, let alone Stoltz, ever saw or reviewed the Master Subcontract or were aware of its terms, including the indemnification clause. In fact, Dodd Hartley, owner of DEH, (R. p. 759, lines 1-3), testified that he had no personal knowledge of Ceres' role in this project. Instead, all of his dealings were with Olson. (R. p. 883, lines 4-14). There is absolutely no evidence that DEH intended to bind itself to the terms of the

[7] Respondents note that this Waiver and Release for Payment is dated June 6, 2017, (R. p. 3591), which is over a month after the accident that forms the basis of Plaintiff's claims. The Release was conditioned on payment to "Subcontractor in the amount of" $15,577.65 which appears to the outstanding amount owed to DEH. In other words, it appears that DEH was required to enter into this Waiver and Release for Payment in order to be paid for the remainder of its work on the project.

Master Subcontract, particularly to an agreement to indemnify Ceres and/or Beaufort County, making *Klutts Resort Realty*, where the contract itself contained an internal ambiguity, 268 S.C. at 89, 232 S.E.2d at 25, inapplicable to resolution of this case. While Beaufort County and Ceres assert that "the intention of the parties entering into the contracts is a genuine issue for the trier of fact," (Ceres' Br. p. 19), there is no evidence whatsoever that DEH intended to be contractually bound by the indemnification provision in the Master Subcontract. Where, as is the case here, the evidence is all on one side, the issue becomes one for the court to resolve as a matter of law. *E.g.*, *Logan*, 389 S.C. at 617 n.4, 698 S.E.2d 882 n.4.

Failing to prove any contractual relationship between them and Respondents, Beaufort County and Ceres default to arguing that the applicable summary judgment standard "obligated" the circuit court to rule in their favor. (Ceres' Br. pp. 16, 19). However, summary judgment cannot be successfully opposed by making inferential leaps and relying on speculation. *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010); *see also Small v. Pioneer Mach.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997) ("speculative, theoretical, and hypothetical views" need not be submitted to a jury).

Finally, even if Ceres could establish that DEH and Stoltz had contractually agreed to indemnify it, which Respondents strenuously deny, the indemnity provision in the Ceres Master Subcontract is unenforceable, particularly the language purporting to indemnify Ceres for its own wrongdoing. *See Concord & Cumberland*, 424 S.C. 639, 819 S.E.2d 166. Respondents hereby incorporate the arguments raised by Respondent Olson in its Brief with regard to the unenforceability of the indemnity provision in its contract with Ceres, to the extent not inconsistent with the positions taken herein.

Because there is no contract between Respondents and Beaufort County and Ceres, they are not entitled to contractual indemnity from Respondents.

C. The Circuit Court properly granted summary judgment to DEH and Stoltz on Beaufort County and Ceres' equitable indemnity claim.

1. Beaufort County and Ceres' equitable indemnification claim fails because they cannot demonstrate a special relationship between themselves and DEH and/or Stoltz.

Beaufort County and Ceres' alternative argument—that they are entitled to equitable indemnification from DEH and Stoltz—fails as well. While Beaufort County and Ceres accurately and repeatedly state the general rule that, "a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join," *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983), they incorrectly suggest that all they need to show is that they have incurred liability as the result of actions or inactions on the part of DEH and/or Stoltz. It is well-established in South Carolina that, in order to prevail on their equitable indemnification claim, Beaufort County and Ceres have to demonstrate a special relationship exists between them and Respondents. In other words, "there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing." *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 390 n.3, 611 S.E.2d 235, 237 n.3 (2005); *see also First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994) (the right to equitable indemnity "is created by operation of law 'in cases of imputed fault or where some special relationship exists between the first and second parties'"); *Vermeer*, 336 S.C. at 64, 518 S.E.2d at 307 ("Under South Carolina law, there can be no indemnity among mere joint tortfeasors").

The facts of this case are undeniably and meaningfully similar to those in *Rock Hill*, which controls the outcome of this case. There, the utility hired an independent contractor to install an underground cable along a highway. The independent contractor,[8] in turn, hired a subcontractor. After it was sued for damages arising out of an accident involving the subcontractor's work, the utility settled with the plaintiff and then sued the subcontractor for equitable indemnity. The Court rejected the utility's argument that it had a "special relationship" with the subcontractor, holding "the relationship between the utility and the subcontractor is an attenuated one." While a relationship between a general contractor and its subcontractor is sufficient to support a claim for equitable indemnity, *see First Gen. Servs.*, 314 S.C. at 443, 445 S.E.2d at 448, in *Rock Hill*, the subcontractor was found to be "merely a remote or distant independent contractor," that did not have a special relationship with the utility that would support its equitable indemnification claim. 363 S.C. at 390, 611 S.E.2d at 237.

The same is true here. Beaufort County contracted with Ceres, which entered into the Master Subcontract with Olson, an independent contractor, who in turn, sub-subcontracted with DEH, again, a remote independent contractor. Indeed, counsel for Beaufort County and Ceres emphasized the remoteness of any connection between them and DEH in his arguments in favor of their motion for summary judgment against Plaintiff's remaining claims. (R. p. 3410, lines 4-8 ("Ceres was an independent contractor of Beaufort County, but then Olson was an even more remote independent, and DEH was even more remote and certainly Stoltz, the driver, was—was four or five levels down from the County"; *see also* Brief of Appellants-Respondents, p. 9

[8] It is of note that, in their Brief of Appellants-Respondents answering Plaintiff's appeal of the grant of summary judgment in their favor, Beaufort County and Ceres repeatedly refer to Olson as an independent contractor. (Brief of Appellants-Respondents Beaufort County and Ceres, pp. 8-9, 18, 19).

(explaining that Stoltz, "[t]he driver was four levels below Beaufort County in the organization of this hurricane relief project, and was far from the actual County employees …")).

Beaufort County and Ceres do not even seriously attempt to distinguish the facts of *Rock Hill* from the instant case. Frankly, they cannot. Instead, they attempt to misconstrue the finding in *Rock Hill*, suggesting that it was "implicitly" based on a "finding that a duty to equitably indemnify by the remote subcontractor was not foreseeable." (Ceres Br. p. 27). The Supreme Court neither explicitly nor implicitly held that any part of the test to determine whether a special relationship necessary to support a claim for equitable indemnification is foreseeability. Beaufort County and Ceres' flawed argument is nothing more than a transparent attempt to use *Rock Hill* to segue into a discussion of foreseeability—as that is a test they believe they can meet. Contrary to their attempts to rewrite precedent, "the use of foreseeability as an analytical tool" does *not* "dominate[] the jurisprudence of … equitable indemnity, in South Carolina." (Ceres' Br. p. 28). Patently, the independent subcontractor in *Rock Hill* could have foreseen that any negligence on its part might cause the utility to incur defense costs or, in other words, it could have "forsee[n] an equitable indemnity obligation in favor of the telephone company." (Ceres' Br. p. 28). That simply is not the holding of *Rock Hill* which, instead, was that "the subcontractor is merely a remote or distant independent contractor, and therefore does not have a special relationship with the utility as contemplated under our jurisprudence." 363 S.C. at 390, 611 S.E.2d at 237. Although foreseeability is key to determining proximate cause, and relevant (but not solely determinative) in analyzing whether a duty exists, it is not a significant part of the analysis of whether a special relationship exists for purposes of equitable indemnification.

Beaufort County and Ceres also rely on the *Rock Hill* Dissent, suggesting that the more attenuated the connection the greater the need for equitable indemnity. (Ceres Br. pp. 27-28).

With all due respect, Justice Pleicones' Dissent in *Rock Hill* has never been adopted as the analysis of whether a special relationship exists that would support equitable indemnity.

Although Beaufort County and Ceres argue to this Court that their relationship with DEH and Stoltz is sufficiently close to impose equitable indemnity, as noted above, in urging the circuit court to grant their own summary judgment motion against Plaintiff, they took a decidedly different position. Specifically, at the January 7, 2022 hearing on their Motion for Summary Judgment against Plaintiff, counsel for Beaufort County and Ceres[9] asserted that "the chain of command went Beaufort County hired Ceres, Ceres hired Spencer Olson, and then Spencer Olson hired DEH as our sub-sub, DEH was the one that owned the truck and had the driver that was actually involved in the accident. So the three that actually settled with the Plaintiff were basically levels down below Ceres. And so it was our sub, our sub-sub, and its employee." (R. p. 3401, line 23 – p. 3402, line 5). He later argued that, "Ceres was an independent contractor of Beaufort County, but then Olson was an even more remote independent, and DEH was even more remote and certainly Stoltz, the driver, was—was four or five levels down from the County." (R. p. 3410, lines 4-8). Appellant courts routinely reject parties' attempts to argue inconsistent positions on appeal. *See, e.g.*, *King v. Daniel Int'l Corp.*, 278 S.C. 350, 354, 296 S.E.2d 335, 337 (1982) (rejecting appellant's exception on appeal where it was inconsistent with its statement at trial); *see also Vaughan v. Kalyvas*, 288 S.C. 358, 362, 342 S.E.2d 617, 619 (Ct. App. 1986) (declining to allow the appellant to assert a position on appeal that is contrary to the position taken below), and this Court should do so here.

[9] Parties are bound by concessions made by their counsel. *See, e.g., Pope v. Heritage Comm., Inc.*, 395 S.C. 404, 430-431, 717 S.E.2d 765, 779 (Ct. App 2011); *Smith v. Pearson*, 210 S.C. 524, 530-531, 43 S.E.2d 479, 481-482 (1947) (finding party was bound by its counsel's prior statement). In addition, "[a]n issue conceded in a lower court may not be argued on appeal." *TNS Mills, Inc. v. South Carolina Dept. of Rev.*, 331 S.C. 611, 617, 503 S.E.2d 471, 475 (1998).

Beaufort County and Ceres' reliance on *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App.2015), *rev'd on other grounds*, 435 S.C. 176, 866 S.E.2d 577 (2021), is misplaced. What they fail to mention is that, prior to setting out the language quoted in their Brief at p. 21, this Court first explained that, "[w]hehter the right [to equitable indemnification] exists depends on the nature of the relationship between the indemnity plaintiff and the party who caused the third party's damages." 413 S.C. at 625, 776 S.E.2d at 431. Then this Court observed that "[a] general contractor's relationship with its subcontractor in the residential construction context is sufficient to support the general contractor's right of equitable indemnity against the subcontractor." 413 S.C. at 625, 776 S.E.2d at 432. Here, neither Beaufort County nor Ceres can show any such special relationship between themselves and Respondents, whom they have represented to the circuit court were remote independent contractors. (R. p. 3410, lines 4-8).

For these same reasons, Beaufort County and Ceres' reliance on the law of agency is also misplaced. Beaufort County and Ceres focus on the "imputed liability" language in equitable indemnity cases, suggesting that it is a question of fact whether DEH and Stoltz were its "agents." As noted above, Beaufort County and Ceres have conceded that DEH and Stoltz are remote independent contractors and cannot, therefore, be considered agents of a principle. *See*, *Rock Hill*, 363 S.C. at 390, 611 S.E.2d at 238 ("The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor"). DEH's owner testified that he had no personal knowledge of Ceres' role in this project. Instead, all of his dealings were with Olson. (R. p. 883, lines 4-14). It would be an odd principal/agent relationship where the agent knew nothing about the principal.

In addition, regardless of whether Respondents were Ceres' agents or servants, imputed liability arises out of fact patterns where a principal is held vicariously liable for the torts of his agent/servant. *See Jenkins v. So. Ry.*, 130 S.C. 180, 125 S.E. 912 (1924). *Jenkins*, which involved imputed liability between the servant and master, is distinguishable on its face. First, as noted above, this case no longer involves any imputed or vicarious liability claims against Beaufort County or Ceres, and their defense costs associated with the vicarious liability claims have been paid. (*See* R. p. 3492, lines 8-17 (Olson counsel explaining, without objection, that his client had paid and indemnified Ceres "up until the time the Plaintiff amended his complaint"; *see also* p. 3482, line 25 – p. 3483, line 6 (Beaufort County and Ceres's counsel acknowledging that Olson's insurer "did accept the tender of defense from—from Ceres. And so they actually did start defending us. Then when they got out of the summary judgment, we're—we're done …")). Thus, any defense costs incurred for any potential vicarious liability—*i.e.*, imputed liability—have been covered by Olson and its insurer.

In addition, in *Jenkins*, it was agreed that the employer took no part in the alleged defamation. Here, in contrast and as is discussed in more detail below, Plaintiff always has alleged separate and independent torts on the part of Beaufort County and of Ceres. Moreover, Plaintiff has presented specific evidence raising a dispute of material fact as to whether Beaufort County and Ceres were negligent in independently contributing to his injuries such that they cannot show they are free from fault.

Moreover, agency is not relevant to the determination of whether a special relationship exists that would support an obligation on the part of DEH and Stoltz to equitably indemnify Beaufort County and/or Ceres. Because they cannot establish that a special relationship exists between themselves and Respondents, it is understandable that Beaufort County and Ceres resort

to creative lawyering, attempting to graft an agency and/or foreseeability analysis into the mix. However creative, their attempt to expand the analysis of what constitutes a special relationship for purposes of equitable indemnification, particularly based on strong and binding precedent under substantially similar facts, *i.e.*, *Rock Hill*, fails. "In order to sustain a claim for equitable indemnity, the existence of some special relationship between the parties must be established." *Toomer v. Norfolk S. Ry.*, 344 S.C. 486, 492, 544 S.E.2d 635, 637 (Ct. App. 2001).

The types of relationships previously found to establish a special relationship for equitable indemnification purposes include: 1) a buyer and seller of property, *McCoy v. Greenwave Enters.*, 408 S.C. 355, 759 S.E.2d 136 (2014); 2) a general contractor and a subcontractor, *Winnsboro*[10]; *First Gen.*; 3) a landowner and its general contractor, *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971); and, 4) a house seller and exterminator, *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990). Significantly, "[p]arties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right to indemnity between them." *Vermeer*, 336 S.C. at 67, 518 S.E.2d at 309.

Beaufort County and Ceres' attempts to mix concepts of foreseeability and agency, (Ceres' Br. pp. 25, 27-29, 31), are no part of and certainly no substitute for demonstrating a special relationship that will support equitable indemnity. *E.g.*, *Toomer*, 344 S.C. at 492, 544 S.E.2d at 637. Because they cannot establish a special relationship exists between them and Respondents, Beaufort County and Ceres' equitable indemnification claim fails.

[10] Beaufort County and Ceres appear to argue that *Winnsboro* was decided on the basis of imputed liability. (Ceres' Br. p. 30). Instead, as noted in *First Gen.*, 314 S.C. at 443, 442, 445 S.E.2d at 448, both that case and *Winnsboro* were decided on the basis that the relationship between a contractor and subcontractor is sufficient to support a claim of equitable indemnity.

2. Beaufort County and Ceres' equitable indemnification claim fails because they cannot prove they are without fault.

Even if, solely for the sake of argument, Beaufort County and Ceres could establish a sufficiently special relationship to maintain an equitable indemnification cause of action, which is denied, their claim still fails. "Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. If the second party is also at fault, he comes to court without equity and has no right to indemnity." *Winnsboro*, 303 S.C. 58-59, 398 S.E.2d at 503; *see also Vermeer*, 336 S.C. at 63, 518 S.E.2d at 307 ("[e]quitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not").

Critically, as is pointed out below and by Plaintiff in his Brief to this Court, neither Beaufort County nor Ceres can show it is without fault of its own. *Winnsboro*, 303 S.C. 58-59, 398 S.E.2d at 503 ("If the second party is also at fault, he comes to court without equity and has no right to indemnity"); *see also Meacher*, 392 S.C. at 486, 709 S.E.2d at 74 ("The most important requirement for equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnify party is the one at fault"); *cf. Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys, Inc.*, 397 S.C. 348, 370, 725 S.E.2d 112, 124 (Ct. App. 2012) (the law imposes on a general contractor a duty to "use due care in supervising a subcontractor").

Beaufort County and Ceres argue repeatedly that "but for" the alleged negligence of DEH and Stoltz, Plaintiff would not have been injured and, consequently, he would not have brought suit against Beaufort County and Ceres. Their arguments depend on convincing this Court that, because the alleged actions and/or failures to act of DEH and Stoltz may have been *a* cause of

Plaintiff's injuries, which is not conceded, that their actions/inactions were the *sole* cause of Plaintiff's injuries.[11]

Here, there is competent, probative and material evidence that Beaufort County and/or Ceres *independently contributed to* Plaintiff's injuries. In *Fountain II*, the Supreme Court first held that "it is a close question whether the evidence in this record is adequate to support a finding of a special relationship," but declined to resolve that issue because the respondents there "manifestly failed to demonstrate their own absence of fault and therefore were not entitled to equitable indemnification." 436 S.C. at 40, 871 S.E.2d at 171-172[12]; *see also Meacher*, 392 S.C. at 487-489, 709 S.E.2d at 75-76 (distinguishing cases where the party seeking equitable indemnification had been adjudged to have not been at fault from cases, like the instant case, where "there was insufficient evidence presented at the indemnification hearing to enable the circuit court make" a finding that the party seeking indemnification was without fault). In *Fountain II*, as is the case here, the Supreme Court explained that the respondents "were sued for their own independent negligence—not vicariously for the negligence of" the developer's general contractor. That is, there, the plaintiff alleged the respondents failed to inspect and maintain the premises in a reasonably safe condition. *Fountain II*, 436 S.C. at 50, 871 S.E.2d at 172. Here, similarly, Beaufort County, and Ceres in particular, failed to "periodically inspect[] all Contractor vehicles (including subcontractors) to ensure that vehicles meet state and federal DOT

[11] Beaufort County and Ceres also appear to mix their potential right to demand indemnification with their potential right to demand contribution from and/or a set-off due to the settlement by other, unrelated defendants. (*See* Ceres' Br. at p. 6 (asserting "[t]he lower Court had no reason to believe that any portion of that settlement was intended to extinguish all of Plaintiff's claims against Ceres").

[12] While this Court found a special relationship did exist between the store owner and the general contractor who had constructed several stores for the same owner and who, in fact, owned one of the owner's store nearby, *Fountain I*, 429 S.C. at 546-547, 839 S.E.2d at 482, the Supreme Court's observation in *Fountain II* leaves the precedential value of this finding in serious doubt.

regulations,`" as was required by Section 7.0 of the Supplemental Provisions of RFP #030415, which was incorporated by reference into the Primary Contract. (RFP #030415, Supplemental Provisions, R. p. 3536) (Primary Contract, R. p. 3560). As was noted in *Meacher*, this Court "can affirm for any reason appearing … in the record." 392 S.C. at 489, 709 S.E.2d at 76.

Relying heavily on Mr. Napier's testimony in their attempt to implicate DEH and Stoltz, (Ceres' Br. pp. 7, 22, 23), Beaufort County and Ceres go so far as to assert that his "testimony … is evidence that it was DEH and Stoltz, and not Ceres [or Beaufort County], who were at fault." (*Id.* p. 23).[13] However, in addition to Olson, DEH and Stoltz, Mr. Napier had highly critical opinions of both Beaufort County and Ceres' contribution to the accident that resulted in Plaintiff's injuries. Mr. Napier testified that Beaufort County was "acting as what we would know in the industry as a shipping contractor with Ceres, and that they failed to reasonably determine whether or not Ceres was properly authorized to perform the transportation services outlined as I understood in the contract." In other words, Beaufort County failed to do the simple search that would have "revealed that Ceres' principle place of business registered with FMCSA [Federal Motor Carrier Safety Act] was Minnesota, not Lakewood, Florida," and that Ceres was what is "known as a reincarnated company or a chameleon company, which serves to sometimes hide poor safety performance or safety history and other things that would be problematic with regards to protection of the public good …" (R. p. 2983, line 23 – p. 2985, line 8; *see also* p. 3058, lines 10-19; Napier Dep. Exh. 2, R. p. 3170). Mr. Napier confirmed that the process to determine whether or not Ceres was qualified and/or had the authority to fulfill its contract with

[13] Understandably, DEH and Stoltz deny Mr. Napier's opinions as to any wrongdoing or negligence on their part; however, as Beaufort County and Ceres rely on only strategically selected portions of his testimony, Respondents believe other portions of his and other expert witnesses are both probative and relevant to the issue of Beaufort County and Ceres' own negligent actions that contributed to Plaintiff's injuries.

Beaufort County was "very easy" and is "done all over the United States by brokers and shippers alike." (R. p. 2963, line 14 – p. 2964, line 8).

Mr. Napier testified that Ceres was not "under the addresses that we know, were capable of providing the transportation services that they were providing at the time" of the accident. (R. p. 2959, lines 1-5). He explained that, "when they got the notice to proceed even, and even after the contract was executed, nobody has done the kind of due diligence that would allow for the shipper, in this case the contractor or the contracting entity, the County, did not assure that Ceres had the proper authority or was vetted to do the hauling in which they were contracted to do. And there's nothing that showed that Ceres had any kind of broker authority that allowed for Ceres to use what's been used in this case subcontract or to broker other loads out to another motor carrier. So, they hire, they've entered into a contract with Ceres and had they done the reasonable due diligence that a shipper does with a motor carrier that's going to haul loads, they would have known that Ceres did not have the kind of authority necessary to do what they were contracting with." (R. p. 2963, line 5 – p. 2964, line 1).

Mr. Napier confirmed that "Ceres operating as a so-called chameleon carrier" was a violation of commercial motor vehicle safety standards. (R. p. 2991, line 23 – p. 2992, line 2; *see also* p. 3139, lines 14-17; Napier Dep. Exh. 2, footnote 26, R. pp. 3196-3199). Both Beaufort County and Ceres failed to perform "their reasonable due diligence" resulting in the hiring of Olson, who, without proper authority, double-brokered the work to DEH. (R. p. 2994, lines 1-16; *see also* p. 2995, lines 4-7 ("And, so from the top down, from Beaufort all the way through the entire transaction, the rules for safety and due diligence and things were just, just seemingly ignored"); p. 3058, lines 10-19 (agreeing it was his opinion that Beaufort County and Ceres "failed to act in a prudent and reasonable manner by independently performing the commercial

motor vehicle industry's reasonable due diligence necessary for reasonable contracting with motor carriers in accordance with the commercial motor vehicles safety standards," and also stating "that each one of them failed to do to the other")). Mr. Napier testified that Ceres had no authority to, and in fact, was "prohibited" from brokering the work to Olson, who then "double brokered" it to DEH. (R. p. 3124, line 1 – p. 3125, line 6; p. 2967, line 3 – p. 2969, line 6).

Jim Minor served as Beaufort County's solid waste manager at the time of the incident. (R. p. 2381, lines 3-10). Mr. Minor testified that neither Beaufort County nor Ceres inspected or took steps to ensure all trucks or other equipment were in compliance with all applicable local, state, and federal rule and regulations. (R. p. 2407, line 20 – p. 2409, line 1; p. 2430, lines 5-23; p. 2433, lines 1-15). This Ceres was required to do by contract. (RFP #030415, Supplemental Provisions, R. p. 3536) (Primary Contract, R. p. 3560).

The failures by Beaufort County and/or Ceres to inspect or require inspection of the equipment used in the project contributed to Plaintiff's injuries. Mr. Eby testified that the chains were too small for the working load of the trailer, and they were improperly attached to the trailer by welding, which reduced their strength. (R. p. 2473, line 7 – p. 2474, line 16). Mr. Eby testified that both of these conditions were readily observable. (R. p. 2474, lines 4-10; p. 2603, line 16 – p. 2604, line 16). Moreover, Mr. Napier testified that the safety chains were not crossed, which would have prevented the tow bar from dropping to the ground, which also was a readily observable condition. (R. p. 3017, line 21 – p. 3019, line 2). Had either Beaufort County or Ceres performed inspections, which Ceres was required to do, or even required inspections of the equipment, they would have discovered these issues and, consequently, the accident would never have occurred. In other words, "but for" their failures, the accident would not have occurred.

Mr. Napier tied Ceres' operation as a "chameleon carrier" and other failures to the cause of Plaintiff's injuries:

> Q: Did any of that have anything to do with the failure of this pintle hitch?
>
> A: Absolutely.
>
> …
>
> Q: Okay. Well, tell me about it?
>
> A: All of it did. I mean, it ultimately led to using an unqualified driver and unqualified carrier, who shouldn't have been there doing what they did, who didn't do any of the things. None of that would have happened if you didn't use an unqualified Ceres, who hired an unqualified Olson, who hired an unqualified DEH …

(R. p. 3131, line 6 – p. 3132, line 5). Simply put, the accident "would not happened but for those failures." (R. p. 3132, lines 15-16). Even viewed in the light most favorable to Beaufort County and Ceres, this is evidence of negligence on the part of each, negligence that contributed, in part, to Plaintiff's injuries.

Finally, there are no claims in the Third Amended Complaint alleging negligence on the part of either DEH or Stoltz. Moreover, there has been no finding and will be no finding that either DEH or Stoltz was negligent and/or that their negligence caused Plaintiff's injuries. As a result, Beaufort County and Ceres' equitable indemnification claim against DEH and Stoltz fails, and should be dismissed with prejudice.

There is ample evidence of Beaufort County and Ceres' negligence and contribution to Plaintiff's injuries to bar them from recovering under the theory of equitable indemnity, even if they could establish a special relationship existed between them and DEH and Stoltz, which is denied.

CONCLUSION

For the reasons stated herein, this Court should affirm the grant of summary judgment to DEH and Stoltz and dismiss Beaufort County and Ceres' appeal with prejudice.

Respectfully submitted,

MCANGUS GOUDELOCK & COURIE, LLC

January 10, 2023

s/ Helen F. Hiser

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Appeal No.: 2022-000328

Mark Shaffer, as Personal Representative of the Estate of Susan Shaffer,..... Appellant,

v.

DEH Disaster Recovery, LLC, Ceres Environmental Services, Inc.; Beaufort County, A Political Subdivision of the State of South Carolina; Ryan Colter Stoltz; Matt T. Dotson; Tim Tod Dotson; Brandi Dotson; Spencer A. Olson Trucking, LLC; Buyers Products, Co.; and TruckPro, LLC, ...Defendants,

Of which Ceres Environmental Services, Inc. and Beaufort County, A Political Subdivision of the State of South Carolina are the.....Appellants-Respondents,

And Spencer A. Olson Trucking, LLC, DEH Disaster Recovery, LLC, and Ryan Colter Stoltz are the.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondents DEH Disaster Recovery, LLC, and Ryan Colter Stoltz complies with Rule 211(b), SCACR.

January 10, 2023

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And Spencer A. Olson Trucking, LLC, DEH Disaster Recovery, LLC, and Ryan Colter Stoltz are the ..... Respondents.

PROOF OF SERVICE

I certify that I have served the final Brief of Respondents DEH Disaster Recovery, LLC, and Ryan Colter Stoltz on Appellant, Mark Shaffer, as Personal Representative of the Estate of Susan Shaffer, and other counsel of record on this day by emailing and by depositing a copy of it in the United States Mail, postage prepaid, addressed to counsel as follows:

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January 10, 2023

Via S.C. Courts E-Filing & U.S. Mail
The Honorable Jenny Abbott Kitchings
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RE: Mark Shaffer, as Personal Representative of the Estate of Susan Shaffer, Deceased v. Ryan Colter Stoltz, DEH Disaster Recovery, LLC, Ceres Environmental Services, Inc., Beaufort County A Political Subdivision of the State of South Carolina, Matt T. Dotson, Tim Tod Dotson, Brandi Dotson, Dotson & Son Trucking, LLC, Spencer A. Olson Trucking, LLC, Buyers Products Company, TruckPro, LLC, ST Sales, LLC and Tetra Tech, Inc.
Civil Action No.: 2017-CP-07-01739 (Beaufort)
Date of Incident: May 3, 2017
Carrier Claim No.: 180204-GF
MGC File No.: 20302.17106
Appeal No.: 2022-000328

Dear Ms. Kitchings:

Enclosed for filing please find the final Brief of Respondents DEH Disaster Recovery, LLC and Ryan Colter Stoltz, and Respondents' Proof of Service concerning the same. One bound original is being placed in the mail to the Court at the above-listed address. Please do not hesitate to contact me if you have any questions.

Please do not hesitate to contact me if you have any questions.

Yours truly,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: Counsel of Record