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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

Honorable Bentley D. Price, Circuit Court Judge

APPELLATE CASE NO.: 2022-000328

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

v.

DEH Disaster Recover, 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 Appellant-Respondents.

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

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page:**

Statutes:

Court Rule:

Federal Regulations:

Title 49 of the Code of Federal Regulations:

Other Authority:

STATEMENT OF ISSUES ON APPEAL

I. The Court erred in granting summary judgment in favor of Beaufort County where there exists a genuine issue of material fact that the negligence of Beaufort County proximately caused the death of Susan Shaffer.

II. The Court erred in granting summary judgment in favor of Ceres Environmental Services, Inc. ("Ceres") where there exists a genuine issue of material fact that the negligence of Ceres proximately caused the death of Susan Shaffer.

III. The Court erred in finding as a matter of fact and concluding as a matter of law that the absence of a claim against Beaufort County based upon vicarious liability somehow eliminated, dismissed or prohibited a claim against Beaufort County based upon its own negligent acts which proximately caused the death of Susan Shaffer.

IV. The Court erred in finding as a matter of fact and concluding as a matter of law that the absence of a claim against Ceres Environmental Services, Inc. ("Ceres") based upon vicarious liability somehow eliminated, dismissed or prohibited a claim against Ceres based upon its own negligent acts which proximately caused the death of Susan Shaffer.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

This is an action for the wrongful death of Susan Shaffer as a result of a motor vehicle accident which occurred on May 3, 2017 in Beaufort County, South Carolina. It was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas on August 24, 2017. Record on Appeal, pg. 46. The initial Defendants included the Respondent Beaufort County and the Respondent Ceres Environmental Services, Inc. ("Ceres"). The initial Defendants also included Ryan Colter Stoltz, Matt T. Dotson, Tim Todd Dotson, Brandi Dotson, Dotson & Son Logging, Inc., and Spencer A. Olson Trucking, LLC. On April 9, 2018 the Complaint was amended to add as additional Defendants Buyers Products Company, Truck Pro, LLC and ST Sales, LLC. Record on Appeal, pg. 100. On February 7, 2017 the Complaint was amended a second time to add as an additional Defendant Tetra Tech, Inc. Record on Appeal, pg. 131. On April 22, 2019 a Stipulation of Dismissal as to the Defendant ST Sales, LLC only was entered. Record on Appeal, pg. 196.

On or about December 28, 2020 the Plaintiff settled his claims against the Defendants DEH Disaster Recovery, LLC ("DEH"), Ryan Stoltz ("Stoltz") and Spencer A. Olson Trucking, LLC ("Olson") and an Order Approving the Settlement was entered on that date. Record on Appeal, pg. 33.

On January 26, 2021 the Plaintiff filed a Motion to Amend his Complaint (Record on Appeal, pg. 265) which was granted pursuant to an Order filed on March 2, 2021. Record on Appeal, pg. 43. In accordance with this Order, the Third Amended Complaint was filed on March 5, 2021. This Complaint omitted DEH, Stolz and Olson as Defendants and did not include any claims against Beaufort County or Ceres based on vicarious liability as to these omitted defendants.

The Respondents Ceres and Beaufort County filed their Answer to the Third Amended Complaint on March 18, 2021. Record on Appeal, pg. 218.

On September 24, 2021 the Respondents Ceres and Beaufort County filed a Joint Motion for Summary Judgment. Record on Appeal, pg. 305. This Motion was heard by the Honorable Bentley D. Price, Presiding Judge of the Beaufort County Court of Common Pleas on January 7, 2022 and on February 11, 2022 an Order was entered granting the Joint Motion for Summary Judgment filed by the Respondents Ceres and Beaufort County. Record on Appeal, pg. 26.

On February 18, 2022 the Plaintiff filed a Motion to Reconsider, Alter or Amend the Order Granting the Joint Motion for Summary Judgment. Record on Appeal, pg. 486. The Plaintiff's Motion to Reconsider was denied pursuant to an Order that was filed on March 1, 2022. Record on Appeal, pg. 17. On March 2, 2022 the Plaintiff filed this appeal to the South Carolina Court of Appeals.

A. STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the Appellate Court applies the same standard that governs the Trial Court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Helms Realty, Inc. v. Gibson-Wall Company*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005).

On appeal from an Order granting summary judgment, the Appellate Court should review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Willis v. Wu,* 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Middleborough Horizontal Property Regime v. Montedison,* 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct.App. 1995).

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Nelson v. Charleston County Parks and Recreation Commission,* 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App. 2004).

"Summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues." *Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 545-46, 694 S.E.2d 1, 4 (2010).

Finally, in cases such as the one currently under appeal, in which the burden of proof is the preponderance of the evidence, the nonmoving party is only required to submit "a mere scintilla of evidence" in order to withstand a motion for summary judgment. *Hancock v. Mid-South Management Company,* 381 S.C. 326, 330, 673, S.E.2d 801, 803 (2009).

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF BEAUFORT COUNTY WHERE THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT THAT THE NEGLIGENCE OF BEAUFORT COUNTY PROXIMATELY CAUSED THE DEATH OF SUSAN SHAFFER.

A. FACTUAL BACKGROUND

When Hurricane Matthew hit Beaufort County in October 2016 it left behind a large amount of vegetative debris that had to be picked up and transported to deposal sites. The Respondent Beaufort County contracted with the Respondent Ceres to perform this work. Ceres did not perform any of the trucking or debris hauling services required by the contract itself, but instead performed these contractual obligations using subcontractors. Record on Appeal, pg. 2665, lines 14-16. Ceres was, in effect, acting as in intermediary between Beaufort County and the subcontractors it hired who were actually performing the debris removal and cleanup operation. Record on Appeal, pg. 2948, lines 18-24. One such subcontractor was the former defendant Spencer A. Olson Trucking, LLC ('Olson"). Olson in turn subcontracted the work out to the former defendant DEH Disaster Recovery, LLC ("DEH"). The former defendant Ryan Colter Stoltz ("Stoltz") was an employee of DEH.

The wreck which is the subject of this lawsuit occurred when a huge trailer which was being pulled by a commercial motor vehicle detached completely from the towing vehicle, crossed the centerline, and impacted head-on into Susan Shaffer's vehicle. The commercial motor vehicle that was towing the trailer was being driven by Ryan Stoltz pursuant to his employment with DEH. See Record on Appeal, pg. 1539 for a diagram of the wreck and pg. 1543. See Record on Appeal, pp. 1536-1589.

The truck and trailer being operated by Stoltz were extremely large. A photograph of the truck and trailer in operation, picking up hurricane debris from off of the roadway, was taken

several hours before the wreck. See Record on Appeal, pg. 739. Record on Appeal, pg. 789, 19-25. Photographs of the truck and trailer taken after the wreck are in the Record on Appeal, pp. 932 - 933. The truck was 35 feet 11 inches long and 13 feet 2 inches high. The trailer was 24 feet 7 inches long and 13 feet 5 inches high. Record on Appeal, pp. 1333 - 1334. The truck had a gross vehicle weight rating of 84,000 pounds and the trailer it was pulling had a gross vehicle weight rating of 74,000 pounds. This means that the truck could transport up to 84,000 pounds and the trailer could transport up to 74,000 pounds. Record on Appeal, pg. 1638, lines 18 – 24. The trailer by itself when completely empty weighed 19,800 pounds. Record on Appeal, pg. 2558, lines 5-11.

In order to understand why the negligent acts and conduct of Beaufort County and Ceres directly and proximately caused this tragedy, it is necessary to understand the sequence of events that allowed the trailer to completely detach from the truck while being pulled down the highway.

The coupling mechanism that attached the trailer to the truck was a device known as a pintle hitch or pintle hook. See Record on Appeal, pg. 731. The pintle hook was held together by a key component called a hinge bolt. This bolt attached the top half of the pintle hook to the bottom half of the pintle hitch, which in turn was permanently affixed to the truck. This bolt was held in place by a screwed-on nut. See Record on Appeal, pg. 557, line 17 to pg. 558, line 10 and pg. and pp. 731-734.

The trailer was also attached to the truck by two (2) safety chains. The presence of these safety chains is required by both State and Federal law, and their function is to hold the trailer to the truck in the event that the coupling mechanism, the pintle hook in this case, should fail. 49 CFR 393.70 and S.C. Code 56-5-5150.

In this case what happened is that the hinge bolt fell out. When the hinge bolt fell out, the pintle hook then fell apart. When the pintle hook fell apart, the trailer's tow bar detached form the

truck's pintle hook and the only thing holding the trailer to the truck were the safety chains. The safety chains then broke. The trailer then completely detached from the truck, and moved into oncoming traffic. As one of the experts testified:

> "Q. And to make sure I am clear on the sequence of events: First, the hinge bolt would have fallen out. Secondly, the top lock of the pintle hook would have fallen off. The tow bar would have detached from the pintle hitch. The safety chains would have failed. And then the brake lines would have stretched and broken. Is that the proper order of events?
>
> A. Right. Yes."

Record on Appeal, pg. 1849. See also Record on Appeal, pp. 1325-1329.

This wreck was investigated by the Major Accident Investigation Team (MAIT) of the South Carolina Highway Patrol. As a result of their investigation, MAIT concluded:

> This collision occurred as a result of trailer separation from the main unit. . . .. It appears the receiver hitch had a mechanical failure causing it to break apart. . . . Picture DSCN0079.JPG (Record on Appeal, pg. 2634) showed the top clamp of the receiver hitch laying on the roadway the date of the collision. . . . Picture DSCN0069 (Record on Appeal, pg. 2635) shows a picture of what was left of the receiver hitch the day of the collision. One can observe a hole in the hitch where the hinge bolt would have been, presumably secured with a locking nut. The outside of the hole on each side is smooth and free of excess grease and dirt. The hitch as a whole was greasy with road dirt all over it but the area around the hole where the hinge bolt would be is smooth indicating that it did have a hinge bolt through it recently. Troop 6, STP, and MAIT was never able to locate the hinge bolt. Officers searched the roadway (U.S. 21) from the intersection of U.S. 21 and Sam's Point Dr to the collision with negative contact with the hinge bolt or nuts. It is believed that the hinge bolt was able to slide fully out of the hole at some point which caused a series of failures which released the trailer. It appears the safety chains (one chain on each side) were secured between the truck and trailer but had a failure causing them to break. That break caused the trailer to separate. Periodic scratching on the roadway was located in the number 0l lane up to where the trailer went left, the scratching is presumed to be caused by the trailer hitch bouncing on the roadway. The trailer went left and evidence of separation were observed through two sets of tire marks traveling left through the impact with the Honda in the opposite number 01 lane.

Record on Appeal, pg. 1543. See also, Record on Appeal, pg. 2945, line 21 to pg. 2946, line 12; pg. 2979, line 18 to pg. 2980, line 20, and pp. 2993-2997.

A key component of the pintle hook, accordingly, is the nut that is screwed onto the hinge bolt and holds the hinge bolt in place, since if the nut falls off, then nothing holds the hinge bolt in place, and if the hinge bolt falls out, then the pintle hook falls apart and fails to hold the trailer to the truck. Record on Appeal, pg. 2492, lines 14-17; Exhibit 7; pg. 2493, lines 4-11; pg. 2490, lines 1-7; and pg. 2633.

The nut holding the hinge bolt in place in this case is called a center lock nut. This nut will come loose and fall off if there is a "break away tension" applied to it of only 15 to 25 foot-pounds, followed by a lesser sustained torque. Record on Appeal, pg. 2507, line 5 – pg. 2508, line 15. In vibration testing of an exemplar pintle hook identical to the pintle hook involved in the accident, the hinge bolt and the nut securing the hinge bolt of the pintle hook rotated with respect to the pintle hook a small amount after being subjected to vibrations for only 49.98 hours. Id., pg. 2512, line 25 – pg. 2513, line 2, and pg. 2518, lines 8 – 12. During this testing, the pintle hook was not subjected to any load. Id., pg. 2511, line 21 – pg. 2512, line 3. In real life, of course, the pintle hook that was involved in this wreck was subjected to extreme loads, inasmuch as the trailer, even when completely empty, weighed nearly 20,000 pounds. Record on Appeal, pg. 2558, lines 5-11. The evidence in this case is that it is "basic common knowledge and common sense that a nut on a bolt that's subjected to enough vibration and stress will eventually loosen." Record on Appeal, pg. 799, lines 9 – 16.

Since the nut that secures the hinge bolt can loosen, and since the hinge bolt is critical to holding the pintle hook together, it is not only the standard in the industry, but a legally mandated requirement, that the pintle hook as well as the rest of the trailer be inspected prior to each trip and

at the conclusion of each trip in order to ensure that everything is safe and secure. Each driver of a commercial motor vehicle is obligated by law to do a "pre-op" and "post-op" inspection of the vehicle that he or she is operating. Record on Appeal, pg. 2666, lines 17 – 19. This is not just required by law, but it is also the industry's standard. Id., pg. 2666, line 25 to pg. 2667, line 2. This means that before the truck is placed in operation each day it is inspected, and it is inspected again at the end of the day after shutting the truck down. Id., pg. 2667, lines 5 – 7. These inspections include, among other things, the tires, the safety chains, the coupling devices, as well as the undercarriage. Each inspection is required to be documented by a driver's vehicle inspection report. Id., pg. 2667, lines 23 – 25.

Trooper Milsap is employed as an Officer/Inspector with the South Carolina State Transport Police. Record on Appeal, pg. 1605, line 21 – pg. 1606, line 4. He is familiar with how a commercial motor vehicle should be inspected for compliance with state and federal laws. Id., pg. 1606, line 18 – pg. 1607, line 7. As part of a routine inspection, one of the items that is inspected is the coupling device, or specifically, any pintle hook which may be present on a vehicle, looking for anything related to the potential failure of the pintle hook. Id., pg. 1608, line 22 – pg. 1609, line 4. A routine inspection includes checking the hinge bolt of the pintle hook to make sure it's not loose, because sometimes "the actual pintle hook will be sagging because the bolts have been loosened." Id., pg. 1611, lines 14 – 19. This is part of a routine pre-trip inspection. Id., pg. 1613, line 22 – pg. 1614, line 5.

As previously noted, the event that initially led to this tragic wreck was the hinge nut coming loose and falling off, thereby allowing the hinge bolt to fall out, leading to the failure of the pintle hook. If someone had inspected the pintle hook prior to the wreck, "it would have been

obvious" that "the pintle hook" was coming loose or otherwise coming apart. Record on Appeal, pg. 1720, lines 13 – 23.

In other words, "if the nut was working loose or was missing entirely, that would have been visible at that day's pre-trip inspection." Id., pg. 1732, lines 21 – 23.

Not only would the "obvious" imminent failure of the pintle hook have been discovered if the trailer had been properly inspected, but the imminent failure of the safety chains would also have been apparent, for several reasons.

First, the chains were ridiculously inadequate. The strength of a safety chain can be determined simply by looking at the chain because it is stamped with a marking that identifies its grade. In this case, each so-called safety chain was grade 70 transport chain. Record on Appeal, pg. 2474, lines 4 – 22. The working load limit of each chain was accordingly 6,600 pounds. Id., pg. 2474, lines 23 – 25. The working load limit of chain is what is used for design purposes, since it has a factor of safety built in that is applied relative to the breaking strength of the chain. Id., pg. 2475, lines 5 – 17. Accordingly, the standard in the industry for design purposes is to use the working load limit of a safety chain. Id., pg. 2475, lines 18 – 21. Since these chains are being used as safety chains, and the angle of detachment in the event of the failure of the coupling device can vary widely, each chain should be strong enough **by itself** to hold the weight of the trailer when loaded. Record on Appeal, pg. 2476, line 25 to pg. 2477, line 4. The math is simple: each chain has a working load limit of 6,600 pounds, the trailer by itself weighs 19,800 pounds, and the trailer has a Gross Vehicle Weight Rating of 64,000 pounds. One witness testified that just by looking at the safety chains it was obvious that they were not strong enough to hold the trailer. Record on Appeal, pg. 1386, lines 12-14.

Second, the chains were improperly attached to the trailer by directly welding them onto the trailer. It is known in the trucking industry that welding a chain due to the high heat involved reduces the strength of the chain. Record on Appeal, pg. 2479, lines 5 – 6. In this case, precision microscopic testing of the subject chains by an expert revealed that the welding cut the strength of each chain approximately in half, a significant weakness. Id., pg. 2478, lines 14 – 19. It is not surprising then, that the weakest link of each chain is where it was welded and these are the exact spots where the chains failed, causing the trailer to separate from the truck completely. Id., pg. 2478, line 24 – pg. 2479, line 8. The essential purpose of the safety chains is to keep the trailer from detaching from the truck in the event that the primary coupling mechanism should fail. Id., pg. 2480, lines 21 – 24. As one defense expert testified:

> "Q. In this particular case given the size or strength of the so-called safety chains and the method of attachment by welding was it **reasonably foreseeable** that these safety chains would not be able to fulfill that function?
>
> A. Right."

Id., pg. 2480, lines 2 – 8 (emphasis added). There are a number of ways to attach a safety chain to a trailer safely without welding a chain, such as, for example, by utilizing a device called a safety chain retainer. Id., pg. 2480, line 17 – pg. 2481, line 3.

In short, these so-called "safety chains" had a working load limit of about half of 6,600 pounds and were attached to a trailer that when empty weighed 19,800 pounds and when full weighed 64,000 pounds. It is no wonder they snapped like threads the first time they were needed.

Third, the chains were routed wrong. 49 CFR 393.70(d)(4) requires that the safety chains must be connected to the towed and the towing vehicles and to the tow bar in a manner which prevents the tow bar from dropping to the ground in the event the primary coupling mechanism fails. In the subject case, this is accomplished by crossing the safety chains as they pass underneath

the tow bar in an X or crisscross pattern. This was not done in this case. Id., pg. 2507, lines 4 – 25. Of course, the fact that the safety chains went straight from the truck to the trailer, instead of being crisscrossed is a condition that would have been open and obvious to anybody doing even a cursory inspection.

In addition to the fact that the securing nut on the pintle hitch was coming loose, and the safety chains were too weak, improperly attached and improperly routed, all open, apparent and obvious conditions, there is additional evidence that the trailer was not inspected, or if it was inspected, the inspector had his eyes closed.

The tires on the trailer were in horrible condition. See Record on Appeal, pg. 2365. More precisely, the tires were in such bad shape that if their condition had been known or discovered the trailer should have been put out of service until they were corrected. Id., pg. 2494, line 24 – pg. 2495, line 2. 49 CFR 393.75 mandates that no motor vehicle shall be operated on any tire that has body ply or belt material exposed through the tread or sidewall. The trailer in this case had multiple tires with body ply or belt material that was exposed through the tread or sidewall. Record on Appeal, pg. 1788, lines 11 – 15. 49 CFR 393.75(c) mandates that with respect to tires that are not on the front wheel have a tread groove depth pattern of at lease 2/32 of an inch when measured in a major tread groove, and some of the tires on the subject trailer had a tread groove pattern depth that was not at least 2/32 of an inch when measured in a major tread groove. Id., pg. 1789, line 20 – pg. 1790, line 3. Based on the tire condition alone, this trailer should not have been permitted to be on the highways and in operation. Id., pg. 1789, lines 4 – 14.

In fact, having this trailer on the road was a criminal offense. Record on Appeal, pg. 1495, line 21 – pg. 1496, line 5. Following the wreck, the MAIT Team cited the truck with violating Sections 396.3(a)(1), 393.75(a)(1), 393.75(c) and, again, 393.75(a)(1) of Title 49 of the Code of

Federal Regulations, which is the part of the Federal Motor Carrier Safety Act. Record on Appeal, pg. 1330, lines 12 – 20.

Moreover, this "illegal criminal condition" was something that was "an open, obvious, apparent condition" that was "easily observable." Record on Appeal, pg. 1693, lines 16-20.

The pintle hook, safety chains and tires weren't the only things that would have caused this trailer to fail on inspection. The leaf springs are the main connection between the axles of the trailer and the trailer frame. Id., pg. 1680, lines 3 – 5. They are the "primary structure" that attach the axles to the rest of the trailer, which is clearly "a fairly important function." Rogers Deposition, pg. 1683, lines 17-25. Three of the four supporting leaf springs were broken. One defense witness testified as follows:

> Q. Okay. Do you know if in addition to the exposed ply on the tires, or lack of tread depth on the tires, the subject trailer had broken leaf springs on its suspension system?
> A. Yes.
> Q. And is that a condition that would have required this trailer to be taken out-of-service in accordance with reasonably accepted safety standards in the commercial motor vehicle industry?
> A. Yes.

Record on Appeal, pg. 3059, lines 5-14. See also, Record on Appeal, pg. 1800, lines 1-6. The significant rust on the broken leaf springs indicated they had been broken for a "significant period of time." Record on Appeal, pg. 2683, lines 1 – 11. As with the failing pintle hook, the inadequate safety chains, and the bald tires, this was an obvious condition. Record on Appeal pg. 2365.

Additionally, the brakes on the trailer were in such bad shape and so ineffective that the trailer should have been put out of service and not allowed on the road for this reason alone. Record on Appeal, pg. 1732, line 11 – pg. 1733, line 3. Anyone properly inspecting the trailer would have known that the brakes on the trailer were inoperable. Id., pg. 1734, line 18 – pg. 1736, line 13.

If a proper inspection of this trailer had ever been performed at any time prior to the wreck it would have been taken out of service and off the roads. Id., pg. 84, lines 4 – 14. The fact that this trailer was on the road at all at the time of the accident indicates that either an inspection prior to the wreck was not performed or if it was performed it was not performed in a reasonably competent manner. Id., pg. 1789, lines 15 – 20. In fact, the condition of the trailer was so obviously horrible, particularly the obvious issues with the tires, that Trooper James of the Highway Patrol openly doubted Stoltz's claim that he ever inspected the truck. Record on Appeal, pg. 1513, lines 5 – 22, stating "If he (Stoltz) did a pre-trip inspection, why was he on the road with the tires in that condition?" Id., pg. 1513, lines 19 – 22.

The question naturally arises – how is it possible that such an unsafe trailer came into being? The answer is simple – it was built a homemade trailer by an inexperienced teenager with guidance from his equally inexperienced father. Record on Appeal pg. 981, lines 3-20; pg. 982, lines 1-5 and pg. 983, lines 4-8. It was then sold to an incompetent commercial motor carrier (DEH), and who assigned it to an incompetent driver (Stoltz).

Dodd Hartley is the owner and operator of DEH, which is essentially a one-man operation. Record on Appeal, pg. 760, line 22 – pg. 771, line 5. Ryan Stoltz was hired initially by DEH as a groundsman, dragging branches along the ground into a pile to be picked up, hauled away and disposed of by someone else. Id., pg. 766, lines 18 – 24. During the Hurricane Matthew clean up operation, around February or March of 2017 (a few months prior to the accident) Hartley, apparently desperate for a driver, removed Stoltz as a groundsman and Stoltz started driving the truck and trailer which were involved in the accident, going back and forth to the dump site after the truck and trailer were loaded. Id., pg. 769, line 14 – pg. 770, line 2. Although Stoltz possessed a Commercial Drivers License, he had rarely used it (Record on Appeal pp.598, line 18)) and he

had an extremely poor driving record (he had been cited 15 times for motor vehicle violations, including three citations for operating a vehicle with unsafe equipment, two violations for possession of marijuana and drug paraphernalia, and careless driving) Record on Appeal, pg. 603,line 23.

Both Dodd Hartley and Stoltz were ignorant of the fact that pintle hooks needed to be maintained. Id., pg. 779, lines 8 – 17.

. To Mr. Hartley's knowledge, Ryan Stoltz was never instructed, taught or warned on how to properly maintain a pintle hook. Id., pg. 779, lines 18 – 23.

To Mr. Hartley's knowledge, before Ryan Stoltz was put behind the wheel of his truck nothing was done to make sure he knew how to safely operate the truck and trailer double combination. Id., pg. 779, line 25 – pg. 780, line 4.

Mr. Hartley was in charge of safety on behalf of DEH. Id., pg. 782, lines 2 – 3. Mr. Hartley had no idea what is a safe tire tread depth, or at what truck tire tread depth the tire becomes illegal and operating it on the road is a criminal act. Id., pg. 782, lines 15 – 21.

Prior to hiring Mr. Stoltz as a driver, Mr. Hartley did not check his driving record. Id., pg. 782, line 24 – pg. 783, line 1. Mr. Hartley did not maintain a personnel file on Mr. Stoltz other than a basic application and a copy of his license. Id., pg. 783, lines 11 – 14, and pg. 785, lines 8 – 14.

To his knowledge, Mr. Hartley never inspected the truck and trailer that were involved in the wreck prior to the wreck. Id., pg. 788, lines 18 – 20.

To Mr. Hartley's knowledge, no one ever tightened the nut that secured the hinge bolt of the pintle hook. Id., pg. 795, lines 12 – 14. Mr. Hartley agreed that DEH does not do any maintenance on safety chains or pintle hooks. Id., pg. 835, lines 2 – 9. Mr. Hartley was not aware

of the fact that a pintle hook required any kind of routine maintenance. Id., pg. 836, lines 10 – 13. DEH does not require that the daily inspections of its commercial motor vehicles be documented. Id., pg. 838, lines 5 – 7. When Mr. Hartley purchased the pintle hook and had it installed on the truck it came with a sheet of instructions, but he did not bother to read them. Id., pg. 895, line 15 – pg. 896, line 3.

All of the foregoing simply emphasizes why it was so important in this case for Beaufort County and Ceres, in performing this highly dangerous clean up operation, to exercise due care in hiring and retaining the contractors who actually performed the work, and why Beaufort County and Ceres should have fulfilled their obligation to inspect and approve the equipment used, as they promised to do.

B. ARGUMENT

Beaufort County negligently hired and negligently retained the contractors and subcontractors who were performing the scope of work under the Hurricane Debris Cleanup Contract. Additionally, Beaufort County assumed the duty of inspecting the equipment used in the performance of its contract and not only negligently performed this duty but failed to perform it altogether.

"An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor to do work which will involve a risk of physical harm unless it is skillfully and carefully done." Restatement (Second) of Torts, Section 411.

This standard of care has been held expressly applicable to an entity that hires an incompetent commercial motor carrier. For example, in *L.B. Foster Company, Inc. v. Hurnblad,*

418 F.2d 727 (9th Cir. 1969) an incompetent motor carrier was hired to haul steel and caused a crash. In upholding the jury's verdict for the plaintiff, the Court of Appeals held:

> ". . . If the work is such as will be highly dangerous unless properly done and is of a sort which requires peculiar competence and skill for its successful accomplishment, one who employs a contractor to do such work may well be required to go to considerable pains to investigate the reputation of the contractor, and if the work is particularly dangerous unless carefully done, to go further and ascertain the contractor's actual competence."

Id. The Court held the foregoing standard applied when hiring a commercial motor carrier. *Id.*

The evidence in this case shows that Beaufort County negligently hired Ceres, and Ceres negligently hired Olson and DEH. Neither Ceres, Olson, nor DEH was qualified, licensed, or authorized to perform the services for which they were hired. Just as it would be negligence for a hospital to hire a doctor who is not licensed to practice medicine, it is negligence to hire a commercial motor vehicle carrier who is not licensed to perform the services of a commercial motor vehicle carrier. This is because the operation of commercial motor vehicles is inherently dangerous and accordingly subject to strict safety standards. As one of the expert witnesses in this case testified:

> "The CMV (Commercial Motor Vehicle) safety standards exist, and are widely adopted, specifically due to the unique dangers and operational challenges posed by the varying distinct characteristics of CMVs and the specialized transportation risks for operating on the public roadways. Generally, CMVs have unique characteristics (size/weight differences, increased stopping distances, air operated braking systems, **complex coupling concerns**, articulating nature, maneuverability concerns, conspicuity issues, etc.), which demands specialized training, developed drivers' skills and techniques to ensure the safety of all concerned. Notwithstanding, CMV operations generally require constant working exposure to countless unique operational risks, unparalleled by the routine operation of privately owned vehicles (POVs). The unique characteristics of CMVs, as well as the arduous operational task required of CMV operators, makes operating CMVs **inherently more dangerous** than POVS."

Record on Appeal, pg. 3168 (emphasis added).

Neither Ceres, nor Olson, nor DEH, was licensed or had the authority to perform the debris hauling services for which they were contracted. Ceres did not have the authority to broker any services to either Olson or DEH, and neither Olson nor DEH was authorized or licensed to perform for hire transportation services in South Carolina. As Mr. Napier, an expert hired by a co-defendant, testified:

> "Based on my review of the evidence produced and publicly available information, Beaufort County, as the shipper contracting with Ceres, failed to reasonably determine whether or not Ceres was properly authorized to perform the transportation services as contracted. Beaufort County failed to reasonably ascertain and/or verify the transportation authority requirements, or property-broker authorization requirements, had been met to provide the trucking transportation services for the removal of the debris."

Record on Appeal, pg. 3169. See also Record on Appeal, pg. 2949, lines 13 – 17; pg. 2951, lines 18 – 24.

Accordingly, Beaufort County hiring Ceres, and Ceres in turn hiring Olson and DEH, constituted "a violation of the industry practices and safety standards." Record on Appeal, pg. 2959, lines 11 – 16. In short, "neither DEH, or Olson, or Ceres for that matter was, under the addresses that we know, were capable of providing the transportation services that they were providing at the time." Record on Appeal, pg. 2959, lines 1 – 5.

It is a "very easy" process to determine if a commercial motor vehicle carrier is qualified to perform the services for which they are being hired. Beaufort County failed to do this, and if Beaufort County had "done the reasonable due diligence that a shipper does with motor carrier that is 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." Record on Appeal, pg. 2963, line 22 to pg. 2964, line 1.

In this case, the failure of Beaufort County and Ceres to properly qualify the subcontractors created a situation where "all kinds of rules were being broken to operate equipment that's not ready to operate." Record on Appeal, pg. 2978, line 16 – 18.

Beaufort County's failure to investigate the operating authority and qualifications of its contractor led to the hiring of incompetent and unqualified subcontractors who hadn't a clue as to how to make sure the trailer was properly attached to the truck, a failure that directly led to Susan Shaffer's death.

Additionally, proper due diligence by Beaufort County would have revealed that Ceres was what is known in the industry as a "chameleon" carrier. Record on Appeal, pg. 2984, line 17 to pg. 2985, line 6. This is ascertainable through publicly available information. Record on Appeal, pg. 2988, lines 19 – 22. A chameleon carrier is a carrier that furnishes false or misleading information, or conceals material information in connection with the registration process. It is a crime to be a chameleon carrier. 49 CFR 385.306. It is also a crime to "aid, abet, or encourage" a chameleon carrier. 49 CFR 390.13. "This dangerous practice involves unscrupulous owners of motor carriers with poor safety histories "ceasing" operations, changing their names and obtaining new U.S. DOT numbers and operating authority, and reopening as new companies in order to evade enforcement action by the FMCSA or avoid performing the necessary corrective actions to make their operations safe. Michael Napier Deposition, GAO-09-924 and GAO-12-364. Hiring a chameleon carrier "creates an unacceptable risk of harm to the public." Record on Appeal, pg. 3196, Footnote 26. See also, Federal Register Vol. 80, No. 229.

> "Q. And Ceres operating as a so-called chameleon carrier, is that a violation of commercial motor vehicle safety standards?
>
> A. Yes."

Record on Appeal, pg. 2991, line 23 to pg. 2992, line 1.

In summary:

> "Q. Beaufort County, Ceres, and Olson 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?
>
> A. That is my opinion, but notwithstanding it's also my opinion that each one of them failed to do to the other."

Record on Appeal, pg. 3058, lines 10 – 19. "Beaufort County . . . failed to reasonably determine whether or not Ceres . . . was properly authorized to perform the transportation services outlined . . . in the contract." *Id.*, pg. 2983, line 23 to pg. 2984, line 3.

It is respectfully submitted that the foregoing quotes were sufficient in and of themselves to withstand the subject motion for summary judgment.

In addition to Beaufort County negligently hiring and retaining Ceres, Beaufort County and was negligent in performing its obligations under the Debris Removal Contract.

Beaufort County had to approve in writing all subcontractors. Beaufort County did not simply perform this vetting of subcontractors negligently, it totally abrogated its responsibility and took absolutely no effort whatsoever to approve the subcontractors. Record on Appeal, pg. 2394, lines 2 – 11.

The Debris Removal Contract provided that only vehicles that had been "specifically authorized" by Beaufort County could be used in the performance of the Contract. Record on Appeal, pp. 2398 – 2399. The Contract further provided that all equipment must have been "thoroughly inspected" prior to its initial use, and thereafter daily inspections of each piece of equipment was required by the Contract. Record on Appeal, pp. 2433 and 2430. Beaufort County, however, never inspected a single vehicle. Record on Appeal, pg. 2340 and pg. 2408. This is despite the representation by Beaufort County in the Contract that every piece of equipment "will

be inspected." Record on Appeal, pg. 2408. Not only did Beaufort County fail to inspect any of the vehicles, it did not require Ceres to inspect the vehicles, and did not know if Ceres ever inspected any vehicle. Record on Appeal, pg. 2406 and 2427. In short, Beaufort County made absolutely no effort to see if any vehicle was ever inspected by anyone. Record on Appeal, pg. 2406. As previously noted, if the vehicle that killed Susan Shaffer had ever been inspected it would have failed the inspection and been pulled off the road, and Susan Shaffer would be alive today.

II. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF CERES ENVIRONMENTAL SERVICES, INC. ("CERES") WHERE THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT THAT THE NEGLIGENCE OF CERES PROXIMATELY CAUSED THE DEATH OF SUSAN SHAFFER.

A. FACTUAL BACKGROUND

The reader's attention is directed to the Factual Background set forth in Issue I, *supra*, as it is equally applicable to this Issue.

B. ARGUMENT

Ceres had a duty to exercise reasonable care to employ competent and careful subcontractors to perform the hurricane debris removal services inasmuch as this work involved a risk of physical harm unless it was skillfully and carefully done. Appellant's Brief, supra, pg. 15, quoting Restatement (Second) of Torts, Section 411.

As previously noted, this standard of care has been held expressly applicable to an entity that hires an incompetent commercial motor carrier. Appellant's Brief, supra, pg. 15, citing *L.B. Foster Company, Inc. v. Hurnblad,* 418 F.2d 727 (9th Cir. 1969). This includes a duty "to go to considerable pains" and ascertain the contractor's actual competence. *Id.* 418 F.2d at 731-32. This duty expressly applies when hiring a commercial motor carrier. *Id.*

The evidence in this case shows that Ceres negligently hired Olson and DEH. Neither Olson nor DEH was qualified, licensed, or authorized to perform the services for which they were hired. The operation of commercial motor vehicles is inherently dangerous and accordingly subject to strict safety standards. More specifically, the "complex coupling concerns" make commercial motor vehicles "inherently more dangerous" than other vehicles. Record on Appeal, pg. 3168.

As previously noted, none of Cere's subcontractors was licensed or had the authority to perform the debris hauling services for which they were contracted. Ceres did not have the

authority to broker any services to either Olson or DEH, and neither Olson nor DEH was authorized or licensed to perform for hire transportation services in South Carolina.

Record on Appeal, pg. 3169. See also Record on Appeal, pg. 2949, lines 13 – 17; pg. 2951, lines 18 – 24.

Ceres' hiring Olson and DEH, constituted "a violation of the industry practices and safety standards." Record on Appeal, pg. 2959, lines 11 – 16. In short, "neither DEH, or Olson, . . . were capable of providing the transportation services that they were providing at the time." Record on Appeal, pg. 2959, lines 1 – 5 (emphasis added).

Ceres should have known that its subcontractors were not qualified. *Id.,* pg. 2964, line 16. See also, pg. 2965, lines 20 – 24.

To make it worse, Ceres subcontracted with Olson, and then allowed Olson to subcontract again with DEH. This is a practice known as "double brokering." As to this practice, Mr. Napier testified:

> "This double brokering as I'm calling it, where Ceres gives it to Olson, and Olson gives it to DEH, that is a matter of **widely prohibited practice in the industry** and, it would be even more prohibited because Olson did not have the ability or the authorization to broker those loads to DEH."

Id., Record on Appeal, pg. 2966, line 22 to pg. 36, line 2 (emphasis added). It is prohibited because it inherently involves "extra risks" and "it allows for un-vetted workers to get involved in moving freight." Record on Appeal, pg. 2967, lines 5 – 20.

The standard in the industry is for the top tier contractor to investigate and to specifically approve in writing all lower tier subcontractors. This is a standard that is designed to ensure safety, to-wit:

> "A. Minimize the risk and make sure that the carrier has been properly vetted by a reasonable process **to make sure it's a safe and competent motor carrier**. All of

those are safety concerns, as well as financial risk and other things. So but, yes, there is a safety component to it as well.

Q. All right.

A. And failure to properly conduct these kinds of due diligence inquires are in fact considered **risky entrustment actions** on the part of those that get involved in it.

Q. You want to make sure the people you are putting out on the road know what they are doing and can operate their commercial motor vehicle in a safe, proper regulatory compliance standard industry compliant manner basically?

A. And that's correct."

Record on Appeal, pg. 2968 to pg. 2969, line 6.

In this case, the failure of Ceres to properly qualify the subcontractors created a situation where "all kinds of rules were being broken to operate equipment that's not ready to operate." Record on Appeal, pg. 2978, line 16 – 18. Ceres' conduct in this case constituted "a violation of the industry practices and safety standards." Napier Deposition, pg. 2959, line 8 – pg. 2960, line 9.

Ceres's failure to investigate the operating authority and qualifications of subcontractors led to the hiring of incompetent and unqualified subcontractors who hadn't a clue as to how to make sure the trailer was properly attached to the truck, a failure that directly led to Susan Shaffer's death.

In its contract with Beaufort County, Ceres contracted to perform the project safely, not only for its employees and its subcontractors, but "most importantly for the citizens of Beaufort County," which would have included Susan Shaffer. Record on Appeal, pg. 2188.

Ceres contracted to guarantee that all subcontractors complied with any documentation requirements. *Id.,* Exhibit 3, pg. 35. These documentation requirements included, among other things, daily inspections of every truck.

Ceres contracted to manage all subcontractors' personnel and equipment in a "safe manner." *Id.,* Exhibit 3, pg. 35.

Ceres contracted to do daily inspections of all equipment to "ensure" it is in proper working order. *Id.,* Exhibit 3, pg. 51.

Ceres contracted to see that all drivers complied with all CMV requirements, both federal and state. *Id.,* Exhibit 3, pg. 51.

Ceres contracted to do a "thorough inspection" of all equipment prior to the use each day. *Id.,* Exhibit 3, pg. 53. This "thorough inspection" of all equipment, performed prior to use each day, would include inspecting "to ensure major components are properly functioning." *Id.,* Exhibit 3, pg. 53.

If Ceres had fulfilled its duty to inspect the trailer, or its duty to require the drivers to comply with CMV requirements, the wreck would not have happened.

With respect to the failure to inspect, the trailer was not only dangerously defective, but it was actually a criminal offense to have this trailer on the roadway at the time of the wreck. Record on Appeal, pg. 1496, line 23 – pg. 1497, line 4.

As noted above, both Beaufort County and Ceres had an obligation to inspect the trailer daily. If they had performed this inspection, they would have noted that the so-called safety chains were both inadequate, and improperly attached. If they had noticed this, this would have led to the trailer being pulled off the road.

The chains were clearly marked with their strength. This marking indicates that each chain had a working load limit of 6,600 pounds. The National Association of Chain Manufacturers, the ASTM (a nationally recognized standards authority), the federal government (49 CFR 393.5) and South Carolina (S.C. Code 56-5-5150), all agree that it is negligent to have two (2) safety chains

rated at 6,600 pounds each pulling a trailer that, when completely empty, weighs over 19,000 pounds. If the safety chains had been adequate, they would not have broken, and Susan Shaffer would not have been killed.

Even if the chains were the right size to begin with, they were improperly attached. The chains were welded directly to the tow bar. Attaching a chain link by welding it directly to a tow bar is a violation of the appropriate standard of care, because the high heat of welding weakens the chain. In this case, the chain was tested and it was determined that the welding cut the strength of the chain link in half. Accordingly, it is not surprising that both chains broke exactly at the weld.

As previously noted, the event that initially led to this tragic wreck was the hinge nut coming loose or otherwise coming apart, leading to the failure of the pintle hook. If someone had inspected the pintle hook earlier in the day, "it would have been obvious" that "the pintle hook" was coming loose or otherwise coming apart. Record on Appeal, pg. 1720, lines 13 – 23.

In short, "if the nut was working loose or was missing entirely, that would have been visible at that day's pre-trip inspection." *Id.*, pg. 1732, lines 21 – 23.

In addition to the fact that the inadequate and improper chains, as well as the loose or missing nut, were obvious conditions that would have been noticed if a reasonable inspection had been conducted by Beaufort County or Ceres, there is ample evidence that this trailer was never inspected by either entity. For example, the tires were illegal because they were bald to the point that steel belt was showing, an obvious condition. Likewise, three of the four leaf springs that attach the body of the trailer to its axles were either broken or disconnected entirely, also an obvious condition to a cursory glance. The brakes on the trailer were not functioning properly. Finally, the safety chains, even if they had been of adequate strength and properly attached to the tow bar, were not properly routed. There was also a broken clasp on one of the safety chains.

Record on Appeal, pg. 1387, lines 3-15; pg. 1388, lines 12-18, pg. 1388, line 24 to pg. 1389, line 4; pg. 1408, line 18 to pg. 1409, line 9; pg. 1410, line 25 to pg. 1411, line 14; pg. 2473, line 19 to pg. 2474, line 10; pg. 2474, line 23 to pg. 2475, line 6; pg. 2475, lines 18-21; pg. 2476, lines 1-14; pg. 2476, line 25 to pg. 2477, line 23; pg. 2478, lines 5-6; pg. 2478, line 14 to pg. 2479, line 8; pg. 2479, lines 21-24; pg. 2481, lines 1-3; pg. 2486, line 21 to pg. 2487, line 3; pg. 2488, lines 12-22; pg. 2490, lines 1-10; pg. 2492, line 14-17; pg. 1494, line 20 to pg. 1496, line 5; pg. 1496, line 23 to pg. 1497, line 4; pg. 1513, lines 10-22; and pg. 1983.

In short, the condition of the trailer was "consistent with an improper incomplete pre- and post-trip inspection, or one not have being done at all." *Id.,* pg. 1809, lines 21 – 23. Stated somewhat differently:

> "Q. In your opinion would that indicate that either an inspection prior to the trip wreck was not performed or if it was performed it was not performed in a reasonably competent manner?
>
> A. I would agree with that."

Id., pg. 104, lines 15 – 20.

As noted above Ceres, according to the express terms of its contract, assumed the duty of thoroughly inspecting all equipment on a daily basis. It also assumed the duty of ensuring that all subcontractors and their employees abided by all commercial motor vehicle legal requirements, which also include inspections of all equipment prior to each trip.

If Ceres had fulfilled its obligation to see that only competent and qualified subcontractors were hired, Susan Shaffer would not have been killed.

If Ceres had "thoroughly inspected" the truck and trailer on a daily basis, as it promised to do in its contract, it would have noted that the trailer was in horrendous shape and an obvious danger to be on the highways. More specifically, it would have noted that the pintle hook was

falling apart and that the safety chains were inadequate, improperly attached, and improperly routed. If Ceres had acted with due care and performed its contractually obligated duties, Susan Shaffer would still be alive today.

III. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT THE ABSENCE OF A CLAIM AGAINST BEAUFORT COUNTY BASED UPON VICARIOUS LIABILITY SOMEHOW ELIMINATED, DISMISSED OR PROHIBITED A CLAIM AGAINST BEAUFORT COUNTY BASED UPON ITS OWN NEGLIGENT ACTS WHICH PROXIMATELY CAUSED THE DEATH OF SUSAN SHAFFER.

In the initial Complaints, the Plaintiff alleged that Beaufort County is liable for the wrongful death Susan Shaffer not only as a result of its own direct negligent acts and conduct, but that it was also vicariously responsible for the negligent acts and conduct of its co-defendants. See, Record on Appeal, pp. 46-56; pp. 100-121; pp. 131-156; and pp. 199-217. After the Plaintiff settled with the co-defendants Olson, DEH and Stoltz, the Plaintiff, in his Third Amended Complaint, omitted the allegation that Beaufort County was vicariously responsible for any negligent acts and conduct of Olson, DEH, or Stoltz. The Third Amended Complaint retained all allegations against Beaufort County concerning Beaufort County's own alleged negligent acts and conduct, and also retained the allegation that Beaufort County was vicariously responsible for the acts and conduct of the Respondent Ceres and the Co-Defendant Tetra Tech, Inc. Record on Appeal pp. 199-217.

In granting the Joint Motion for Summary Judgment the Court found as a matter of fact that the Plaintiff failed "to establish a genuine issue of material fact as to any distinction between the amended negligence claims and the vicarious liability claims, which were previously dismissed against Ceres and Beaufort County." See Record on Appeal, pg. 28, Finding of Fact #12. Based upon this factual finding, the Court then concluded as a matter of law as follows:

> "The Plaintiff's Memorandum, Exhibits, and arguments in opposition to this Motion failed to establish a genuine issue of material fact that the death of Ms. Shaffer would not have occurred but for the acts and omissions which Plaintiff now attributes to Ceres and Beaufort County. The Plaintiff failed to establish that those alleged acts and omissions were independent of the acts and omissions which Plaintiff previously attributed to Olson, DEH, and Stoltz. Because Plaintiff dismissed the vicarious liability claims relating to those acts or omissions of Olson,

> DEH, and Stoltz, Ceres and Beaufort County have no liability for the acts and omissions of Olson, DEH, and Stoltz. Merely restating the negligence cause of action cannot revive the vicarious liability claim in this manner."

Record on Appeal, pg. 30, Conclusion of Law #7.

Based upon this conclusion of law, the Court granted summary judgment in favor of the Respondent Beaufort County.

It is respectfully submitted that the Trial Court overlooked the fact that the Third Amended Complaint alleges that Respondent Beaufort County is not only vicariously responsible for the acts and conduct of the Respondent Ceres and the Co-Defendant Tetra Tech, but the thrust of the Third Amended Complaint, which simply repeats the allegations in the prior Complaints, is that Beaufort County is responsible for Ms. Shaffer's death as a result of its own direct negligent acts and conduct. Beaufort County's negligence is discussed in detail in Argument I, supra, but in essence, Beaufort County negligently hired incompetent contractors to perform extremely dangerous work, for which they were not qualified; Beaufort County negligently supervised the work; and despite being obligated to inspect the truck and trailer which killed Susan Shaffer, did not do so. As previously noted, a simple inspection by Beaufort County, as it agreed to do, and which it was obligated to do, would have revealed the loose connection on the pintle hook, and the inadequate safety chains. It is apparent that Beaufort County never inspected the subject truck and trailer, inasmuch as the truck and trailer contained numerous other defects (tires, brakes, broken leaf springs, broken clasps), which were open, apparent and obvious to even a casual observer.

It is respectfully submitted that the Trial Court erred in concluding that simply because Olson, DEH and Stoltz are no longer parties to this lawsuit and because Beaufort County is not vicariously responsible for the negligence of these dismissed Defendants, that Beaufort County is no longer, as a matter of law, responsible for its own negligence.

IV. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT THE ABSENCE OF A CLAIM AGAINST CERES BASED UPON VICARIOUS LIABILITY SOMEHOW ELIMINATED, DISMISSED OR PROHIBITED A CLAIM AGAINST CERES BASED UPON ITS OWN NEGLIGENT ACTS WHICH PROXIMATELY CAUSED THE DEATH OF SUSAN SHAFFER.

In the initial Complaints, the Plaintiff alleged that Ceres is liable for the wrongful death Susan Shaffer not only as a result of its own direct negligent acts and conduct, but that it was also vicariously responsible for the negligent acts and conduct of its co-defendants. See, Record on Appeal, pp. 46-56; pp. 100-121; pp. 131-156; and pp. 199-217. After the Plaintiff settled with the co-defendants Olson, DEH and Stoltz, the Plaintiff, in his Third Amended Complaint, omitted the allegation that Ceres was vicariously responsible for any negligent acts and conduct of Olson, DEH, or Stoltz. The Third Amended Complaint retained all allegations against Ceres concerning Ceres's own alleged negligent acts and conduct, including, for example Ceres' failure to properly inspect the trailer as it was contractually obligated to do. Record on Appeal, pp. 199-217.

In granting the Joint Motion for Summary Judgment the Court found as a matter of fact that the Plaintiff failed "to establish a genuine issue of material fact as to any distinction between the amended negligence claims and the vicarious liability claims, which were previously dismissed against Ceres and Beaufort County." See Record on Appeal, pg. 28, Finding of Fact #12. Based upon this factual finding, the Court then concluded as a matter of law as follows:

> "The Plaintiff's Memorandum, Exhibits, and arguments in opposition to this Motion failed to establish a genuine issue of material fact that the death of Ms. Shaffer would not have occurred but for the acts and omissions which Plaintiff now attributes to Ceres and Beaufort County. The Plaintiff failed to establish that those alleged acts and omissions were independent of the acts and omissions which Plaintiff previously attributed to Olson, DEH, and Stoltz. Because Plaintiff dismissed the vicarious liability claims relating to those acts or omissions of Olson, DEH, and Stoltz, Ceres and Beaufort County have no liability for the acts and omissions of Olson, DEH, and Stoltz. Merely restating the negligence cause of action cannot revive the vicarious liability claim in this manner."

Record on Appeal, pg. 30, pg. 5, Conclusion of Law #7.

Based upon this conclusion of law, the Court granted summary judgment in favor of the Respondent Beaufort County.

It is respectfully submitted that the Trial Court overlooked the fact that the thrust of the Third Amended Complaint, which simply repeats the allegations in the prior Complaints, is that Ceres is responsible for Ms. Shaffer's death as a result of its own direct negligent acts and conduct. Ceres' negligence is discussed in detail in Argument II, supra, but in essence: Ceres was not authorized to do the work; Ceres negligently hired incompetent contractors to perform extremely dangerous work, for which they were not qualified; Ceres negligently supervised the work; and Ceres despite being obligated to inspect the truck and trailer which killed Susan Shaffer, did not do so. As previously noted, a simple inspection by Ceres, as it agreed to do, and which it was obligated to do, would have revealed the loose connection on the pintle hook and the inadequate safety chains. If only one of these conditions had been noted and fixed, the wreck would not have happened. It is apparent that Ceres never inspected the subject truck and trailer, inasmuch as the truck and trailer contained numerous other defects (tires, brakes, broken leaf springs, broken clasps), which were open, apparent and obvious to a casual observer.

It is respectfully submitted that the Trial Court erred in concluding that simply because Olson, DEH and Stoltz are no longer parties to this lawsuit and because Ceres is not vicariously responsible for the negligence of these dismissed Defendants, that Ceres is somehow, as a matter of law, absolved of responsibility for its own negligence.

CONCLUSION

Viewing the evidence, and the inferences that can be reasonably be drawn from the evidence, in the light most favorable to the Appellant, there is at the very least a genuine issue of material fact as to whether the negligence of Beaufort County and Ceres proximately contributed to Susan Shaffer's death. They each had an obligation to exercise due care in the selection of contractors to perform the highly dangerous hurricane clean up operation. They each had an obligation to properly inspect the equipment being used in the clean up operation. There is ample evidence that they failed to fulfill either of these obligations.

Simply because Beaufort County and Ceres are not vicariously responsible for the negligence of the dismissed defendants, does not exonerate them from their own negligent conduct.

It is accordingly respectfully requested the Order of the Trial Court granting the Joint Motion of Beaufort County Ceres for Summary Judgment be reversed and this case remanded back to the Beaufort County Court of Common Pleas.

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January 20, 2023

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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

Honorable Bentley D. Price, Circuit Court Judge

APPELLATE CASE NO.: 2022-000328

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

v.

DEH Disaster Recover, 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

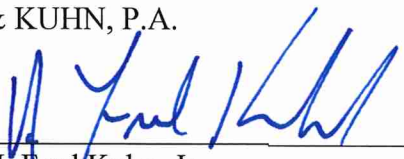
of which Ceres Environmental Services, Inc. and Beaufort County, A Political Subdivision of the State of South Carolina are the Appellant-Respondents.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief complies with Rule 211(b), SCACR.

MOSS & KUHN, P.A.

By: 

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