THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case 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.

FINAL BRIEF OF APPELLANTS-RESPONDENTS

R. Patrick Flynn, SC Bar # 65599
Pope Flynn, LLC
P.O. Box 70
Charleston, South Carolina 29402
pflynn@popeflynn.com
Phone: (843) 834-3426
Fax: (803) 354-4899
Attorney for Appellants-Respondents

Charleston, SC

February 2, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATEMENT OF ISSUES ON APPEAL

I. Did the Lower Court Correctly Determine that No Genuine Issue of Material Fact Exists as to the Appellant's Claims Against Beaufort County?

II. Did the Lower Court Correctly Determine that No Genuine Issue of Material Fact Exists as to the Appellant's Claims Against Ceres?

INTRODUCTION

On May 3, 2017, Ms. Susan Shaffer was killed instantly when a storm-debris trailer detached from its truck, crossed the center line of U.S. Highway 21 in Beaufort County, veered into the oncoming lane of traffic, and collided with Ms. Shaffer's vehicle. (Verified Petition of Mark Shaffer at para. 2; R. p. 254).

The truck and trailer were owned, maintained, inspected, and operated by DEH Disaster Recovery, LLC ("DEH"). (R. p. 3592). The driver of the truck and trailer, Ryan Stoltz ("Stoltz") was employed by DEH, and he testified that there were no problems with the hitch when he conducted a pre-trip inspection that morning, and he was driving when the trailer detached and the accident occurred (R. p. 554).

Beaufort County entered into a contract with Ceres Environmental Services ("Ceres") to carry out storm clean-up efforts following Hurricane Matthew, which struck in September of 2016. (R. p. 3499). Ceres had subcontracted work to Spencer A. Olson Trucking ("Olson") on many projects since 2013 pursuant to a Master Subcontract (R. p. 3568), including the hauling of debris for this Beaufort County Project. Olson then subcontracted trucking duties on this project to DEH on March 21, 2017. (R. p. 3592). Neither Beaufort County, Ceres, nor Olson ever had ownership of the truck and trailer involved in the accident, nor did they employ Stoltz at any time.

Appellant brought the underlying lawsuit against all of the above-captioned parties after

the accident, (R. p. 46), and on November 20, 2020, the Appellant accepted $1,150,000 in full settlement from Olson, DEH, and Stoltz. (R. p. 33). Immediately after that settlement was finalized, the Appellant dropped all of its claims against Olson, DEH, and Stoltz and, of key importance to this appeal, Appellant also dropped its vicarious liability claims against Ceres and Beaufort County. (Third-Amended Complaint, R. p. 201).

Note that Ceres accepted the tender of defense from Beaufort County for this lawsuit (R. p. 185) and, for simplicity in this Brief, any reference to "Ceres" shall also incorporate Beaufort County by reference, unless otherwise specified.

Ceres filed its Motion for Summary Judgment on September 28, 2021, because the (1) Appellant never had a colorable claim against Beaufort County under the South Carolina Tort Claims Act, as discussed in Argument I below; and (2) because the Appellant's $1,150,000 settlement with Olson, DEH, and Stoltz resulted in the dismissal of all vicarious liability claims against Ceres, including the non-delegable duty claims which are at issue in this Appeal. By settling those claims, Appellant released its claims against Ceres for any acts or omissions of those downstream in this project, Olson, DEH, and Stoltz.

Judge Bentley Price (hereinafter, "the Lower Court") properly recognized that the dismissal of vicarious liability included Appellant's so-called independent tort claims against Ceres, which were in reality non-delegable duties according to the doctrine of vicarious liability in this State. ("SJ Order" R. p. 30). The Lower Court recognized that, because Ceres had no liability for the acts and omissions of those downstream entities, the Appellant could not support its claims against Ceres, and Summary Judgment was appropriate. *Id*.

Ceres delegated duties to Olson as described in the Ceres-Olson Subcontract (R. p. 3568), and Olson delegated duties to DEH according to its subcontract (R. p. 3592), and Stoltz was the

driver of the truck as an employee of DEH. All of the claims that Appellant identifies as "independent tort claims" against Ceres were, in reality, claims relating to those delegated duties.

As discussed further below, Appellant any delegable and non-delegable duties that Ceres possessed were merely extensions of the vicarious liability doctrine in South Carolina, and once Appellant released those vicarious liability claims, Ceres had no more liability for non-delegable or other duties carried out by itself or Olson, DEH, and Stoltz. Appellant is actually seeking vicarious liability against Ceres for those acts and omissions, even though Appellant already settled and dismissed the consequences of those acts and omissions, and the vicarious liability therefor, in exchange for the settlement sum of $1,150,000. (R. p. 33).

During the hearing on Ceres' Motion for Summary Judgment, Appellant did not present a Memorandum of Law in opposition to the motion but, instead, assumed that the Lower Court would read and absorb some twenty-four (24) deposition transcripts from this case. Appellant addressed the Court through a lengthy power-point presentation at the hearing with snippets of information from the depositions of various witnesses.

Appellant's effort to inundate the Lower Court with irrelevant and speculative deposition testimony does not satisfy the Appellant's duty to overcome a motion for summary judgment. The Lower Court cannot be expected to wade through an ocean of deposition testimony in an effort to rescue Appellant's claims, particularly since those claims were previously released by Appellant. The Lower Court recognized that all of those deposition transcripts were irrelevant to the issue at hand, which was whether the Appellant had cognizable claims which it could prove against Ceres. Despite its efforts to revive its previously dismissed claims, South Carolina Courts recognize that those claims related to non-delegable duties which, under the case law discussed below, are merely extended vicarious liability claims, all of which were dismissed in Appellant's settlement.

Appellant did not settle with the defendant which manufactured the trailer and the trailer-hitch which detached and allowed the trailer to separate and collide with Ms. Shaffer. The Lower Court's Order must be affirmed, and the Appellant's remaining claims against those manufacturer defendants must proceed forward without Ceres, Olson, DEH, or Stoltz.

STATEMENT OF THE CASE

On February 11, 2022, the Lower Court granted Ceres' Motion for Summary Judgment ("SJ Order" R. p. 26). Following the Lower Court's denial of Appellant's Motion for Reconsideration (R. p. 17), Appellant filed the instant Notice of Appeal.

Note that at the time of Appellant's $1,150,000 settlement described above, Ceres had active indemnity cross claims against Olson, DEH, and Stoltz. Those parties moved for summary judgment seeking dismissal of those indemnity claims in light of Appellant's dismissal of its vicarious liability claims against Ceres. Circuit Judge Robert Bonds granted Olson, DEH, and Stoltz's motions for summary judgment, dismissing Ceres' cross claims for indemnity (hereinafter, the "Olson SJ Order," R. p. 8; and the "DEH-Stoltz SJ Order," R. p. 1).

It is Ceres' position that even though Appellant's claims against it were properly dismissed by Judge Price, Ceres suffered damages prior to that dismissal for the defense expenses associated with those claims. Accordingly, Ceres appealed Judge Bonds' orders (Notice of Appeal, R. p. 287) in order to preserve Ceres' right to pursue its indemnity claims against Olson, DEH, and Stoltz. Ceres' appeal of those indemnity claims was consolidated with Appellant's instant appeal, *see* Letter Directing Consolidation of Appeals (R. p. 3497), and Ceres' indemnity appeal is briefed separately from the Appellant's instant appeal.

STANDARD OF REVIEW

"***The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder***." *Dawkins v. Fields,* 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (emphasis added). Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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."

A non-moving party cannot rest on the allegations of the pleadings. Once the moving party establishes the absence of a genuine issue of material fact, the non-moving party must then come forward with specific facts showing there is a genuine issue for trial. *See Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 588–89, 635 S.E.2d 649, 654 (Ct. App. 2006) (emphasis added).

The non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Baughman v. American Tel & Tel. Co.,* 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (emphasis added). By unanimous opinion in 2015, the South Carolina Supreme Court ruled that "[e]ven though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, '***it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine***.'" *Grimsley v. S.C. Law Enforcement Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015) (emphasis added), *citing Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

Ceres and Beaufort County may discharge their burden by pointing out to the Court the absence of evidence to support the Appellant's case. *Baughman,* 306 S.C. at 115, 410 S.E.2d at 545. "Although summary judgment is a drastic remedy which should be cautiously invoked,

where a verdict is not reasonably possible under the facts presented, summary judgment is proper." *Evans v. Stewart,* 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006) (emphasis added), *citing Bloom v. Ravoira,* 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000).

"The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. *Baughman, supra*. ***A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial***." *Carolina Alliance for Fair Employment v. South Carolina L.L.R.,* 337 S.C. 476, 485, 523 S.E.2d 795, 800 (1999) (emphasis added).

ARGUMENT

I. The Lower Court Correctly Determined that No Genuine Issue of Material Fact Exists as to the Appellant's Claims Against Beaufort County.

As noted above, "[t]he plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Carolina Alliance,* 337 S.C. at 485, 523 S.E.2d at 800 (citing *Baughman,* 306 S.C. at 115, 410 S.E.2d at 545). The Lower Court properly disregarded irrelevant arguments by Appellant at the hearing, along with the 24 deposition transcripts filed before the hearing, because they did not relate to the essential elements of proof required to establish entitlement under the Tort Claims Act. "A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Carolina Alliance,* 337 S.C. at 485, 523 S.E.2d at 800).

Appellant has not, and cannot, establish that Beaufort County has any liability to Appellant

pursuant to the long-established restrictions in the South Carolina Tort Claims Act, S.C. Code § 15-78-10, *et seq.* Moreover, a plain reading of the South Carolina Supreme Court's opinion in *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002) makes it clear that the Tort Claims Act automatically releases the County from any further liability as soon as the Appellant settled with Olson, DEH, and Stoltz. On each of these bases, the Lower Court properly granted Summary Judgment to Beaufort County, as there is no genuine issue of material fact that contradicts the Tort Claims Act's restrictions.

A. This Claim is Specifically Barred by the South Carolina Tort Claims Act.

Beaufort County is a governmental entity that is statutorily governed by the South Carolina Tort Claims Act ("TCA"). The TCA "governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity . . . ." *Flateau v. Harrelson*, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003).

In order to provide some relief from the oppressive doctrine of absolute sovereign immunity, our Legislature agreed to grant some Plaintiffs a very limited opportunity to seek recovery from the State, its political subdivisions, and employees. S.C. Code § 15-78-40. The TCA offers this extremely limited relief in very few circumstances, and only when individuals from the State, its political subdivisions, and employees are specifically "acting within the scope of official duty, immunity from liability and suit for any tort ***except as waived***." S.C. Code § 15-78-20(b) (emphasis added).

To emphasize the rare exceptions, our legislature further declared that the TCA "must be liberally construed ***in favor of limiting the liability of the State***." S.C. Code § 15-78-20(f) (emphasis added).

Now, consistent with that extremely limited relief from the doctrine of absolute sovereign

immunity, our legislature recognized circumstances involving complex projects such as the clean-up efforts following a hurricane, and ***specifically excluded any independent contractors from the definition of "employee,"*** as follows:

> "Employee" means any officer, employee, agent, or court appointed representative of the State or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty including, but not limited to, technical experts whether with or without compensation, ***but the term does not include an independent contractor doing business with the State or a political subdivision of the State.***
>
> S.C. Code § 15-78-30(c) (emphasis added).

Of course, the doctrine of vicarious liability does not apply to governmental entities, although that is not relevant to the present argument, because Appellant has already released Beaufort County and Ceres from any vicarious liability claims, effectively a release and dismissal with prejudice from those claims. Our legislature stated that a governmental entity is not liable for a loss resulting from "an act or omission of a person other than an employee including but not limited to the criminal actions of third persons." S.C. Code § 15-78-60(20).

Additionally, governmental entities are specifically excluded from any claims for non-delegable duties. *See Smith v. Regional Med. Ctr. of Orangeburg & Calhoun Ctys.,* 394 S.C. 110, 713 S.E.2d 656 (Ct. App. 2011). The South Carolina Supreme Court clarified this issue in *Simmons v. Tuomey Regional Medical Center,* 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000): "The term 'nondelegable duty' is somewhat misleading. A person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. ***It actually is the liability, not the duty, that is not delegable.*** The party which owes the nondelegable duty ***is vicariously liable*** for negligent acts of the independent contractor. *Id.* (emphasis added). As noted above, any reference to non-delegable duties or liability as to either Beaufort County or Ceres in this matter

were rendered inapplicable ***as soon as Appellant dismissed its vicarious liability claims against them*** pursuant to Appellant's settlement with Olson, DEH, and Stoltz.

The Appellant does not allege that the driver Stoltz was an employee of the County, and Appellant specifically acknowledges that Stoltz was, in fact, merely an employee of DEH, a sub-subcontractor to Ceres. The driver was four levels below Beaufort County in the organization of this hurricane relief project, and was far from the actual County employees who have any chance of being covered by the limited relief offered in the TCA.

In *Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001), the South Carolina Court of Appeals stated that "[t]o prove causation, a plaintiff must demonstrate both causation in fact and legal cause. ***Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence***. *Id.* (emphasis added). Appellant has failed to offer any proof, because there is none, which could possibly indicate that an actual County employee covered by the TCA would satisfy the above-quoted "but-for" standard set forth by the South Carolina Court of Appeals.

It is beyond dispute, and certainly not a genuine issue of material fact in this lawsuit, that this accident was due to any acts or omissions of a County employee covered by the South Carolina Tort Claims Act or any employee of Ceres. Instead, the only evidence established is that this accident was, in fact, caused by the acts or omissions of either Ryan Stoltz, who has been dismissed with prejudice, and potentially other manufacturer defendants against whom the Appellant is asserting product-liability claims. Beaufort County, a governmental entity cannot be held liable for the negligent acts or omissions of an independent contractor, and must be dismissed under Rule 56, SCRCP. *See also, Smith v. Regional Med. Ctr. of Orangeburg & Calhoun Ctys., supra,* 394 S.C. at 110, 713 S.E.2d at 656.

B. The Tort Claims Act also bars this Claim Under *Wade v. Berkeley County*.

The South Carolina Tort Claims Act, S.C. Code § 15–78–70(d), when read consistent with *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002), provides that Beaufort County must be released from liability because Appellant released Spencer Olson, DEH, and Stoltz, and dismissed its vicarious liability claims against Beaufort County and Ceres with prejudice.

The Tort Claims Act, S.C. Code § 15–78–70(d), states as follows:

> A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

In *Wade v. Berkeley County,* the South Carolina Supreme Court ruled that (1) a release and dismissal of the type Appellant granted to Spencer Olson, DEH, and Stoltz is a settlement under the Tort Claims Act[1]; and (2) if a settlement occurs in a lawsuit in which the Tort Claims Act is implicated, i.e., where a County is sued for vicarious liability as it is here, then that settlement bars any further action against Beaufort County. ***This collision between the truck driven by Stoltz and the Appellant's decedent constitutes the same occurrence and, therefore, Appellant's claims against Beaufort County must be dismissed***.

Note that in *Wade v. Berkeley County* the driver was sued by the Appellant, and after they executed a covenant not to execute, which constituted a settlement as to the driver, the County was later substituted in as a defendant in the case. While the Supreme Court held that the County could

[1] In *Wade v. Berkeley County*, *supra*, there was some discussion as to whether the covenant not to execute had the same force and effect of a release and constituted a settlement of the claim. "While a covenant not to execute is not a release, it is nonetheless a settlement between the parties to the agreement. *See Ackerman v. Travelers Indem. Co.,* 318 S.C. 137, 456 S.E.2d 408 (Ct.App.1995); 76 C.J.S. *Release* § 4 (1994) (release is a present abandonment or relinquishment of a right or claim; a covenant not to execute is a promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering into the agreement). 348 S.C. at 228, 559 S.E.2d at 587-88. There is no such dispute or discussion of that question in the Shaffer case, because the Appellant formally released Olson, DEH, and Stoltz and, further, Appellant additionally dismissed the vicarious liability claim against Beaufort County and Ceres.

be liable in *Wade* because it was not in the case when it was settled, and was substituted into that case later, that was a loophole which allowed Plaintiff in that case to keep its claims against the County. "[T]o invoke the provisions of § 15–78–70(d), there must be a settlement or judgment in an action under the Act or a settlement of a claim under the Act. While this construction may not limit County's liability as required under the Act, we cannot ignore the clear legislative history of § 15–78–70(d)." *Wade,* 348 S.C. at 230, 559 S.E.2d at 588-89.

However, the present case is actually a much more clear and concise application of the *Wade* court's ruling because, in this case, (1) there is no question but that this was a settlement between Appellant, Olson, DEH, and Stoltz; (2) there is no question that this lawsuit constituted "an action under the act" under § 15–78–20(b)[2]; and (3) there is no question about Beaufort County actually being a party-defendant in the Shaffer case when the settlement occurred. The Lower Court properly granted Ceres and Beaufort County's Motion for Summary Judgment (R. p. 26), and that Order must be affirmed.

II. The Lower Court Correctly Determined that No Genuine Issue of Material Fact Exists as to the Appellant's Claims Against Ceres.

A. Appellant Has Failed to Offer Any Evidence that Establishes that any Act or Omission by Ceres caused the Accident.

---

[2] The Shaffer lawsuit was brought against the County on the basis that Stoltz was acting within the scope of official duty as a driver in this storm clean-up project. For that reason, the Shaffer lawsuit is "an action under the Act." The Tort Claims Act, S.C. Code § 15–78–20(b) provides:

> The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, ***while acting within the scope of official duty***, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved. ***The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents*** . . . .

S.C. Code § 15–78–20(b)

In his Brief of Appellant at p. 5, the Appellant makes a statement which he asserts as a matter of fact that "[i]n this case what happened is that the hinge bolt fell out." That is the central theme in Appellant's case, and it is upon that basis that Appellant contends that (1) on the day of the accident, the driver Stoltz failed to conduct a pre-trip inspection of the hitch and its bolt which served as the attachment point for the truck and trailer; (2) if Stoltz had carried out that inspection, the driver would have seen that the nut securing the hinge bolt was loose; and (3) because the trailer collided with Ms. Shaffer after it detached, the driver's failure to inspect the hitch was the proximate cause of the accident. Appellant concludes that this accident would not have happened but for the driver's failure to conduct that pre-trip inspection. Appellant's Brief at p. 20.

The fallacy in Appellant's logic is that there is, in fact, no evidence as to why the hitch failed and allowed the trailer to detach, because the top half of the pintle hitch and the hinge bolt were never recovered by investigators, and were not seen by anyone immediately before or after the accident. *See* MAIT Report cited in Brief of Appellant at p. 6 (R. p. 1543). In fact, the only eyewitness to the condition of the pintle hitch and bolt assembly on the day of the accident was the driver Stoltz, who testified at deposition that he did conduct a pre-trip inspection, and he did not identify any loosening of the nut on the hinge bolt, nor did he see any other abnormal conditions that would have indicated that the pintle hitch would fail during that day. Deposition of Ryan Stoltz (R. p. 554).

In his opposition to Ceres' Summary Judgment Motion, Appellant did not offer a shred of evidence that would establish what caused the pintle hitch to fail. Plaintiff did offer 24 deposition transcripts, most by expert witnesses who had never seen the pintle hitch prior to the accident, and were unable to see the upper portion, nut, and bolt of the pintle hitch after the accident, as it was never recovered. (R. p. 1543). Appellant failed to acknowledge in the Brief of Appellant that

glaring gap in the knowledge of those expert witnesses. Without that critical evidence, their opinions of causation were mere speculation, and contrary to the actual testimony of the driver Stoltz in his deposition. (R. p. 554). Further, none of those experts had any evidence that could contradict the testimony by Stoltz that he actually carried out a pre-trip inspection on the day of the accident, and that there was no evidence of failure or loosening upon his inspection of the pintle hitch. (R. p. 554).

Nonetheless, Appellant created his entire appellate argument without any probative evidence about the pintle hitch or the actual pre-trip inspection by the driver Stoltz on the day of the accident. The Lower Court recognized that the Appellant was unable to establish a genuine issue of material fact, and properly granted Ceres' Motion for Summary Judgment. Despite the 24 deposition transcripts, Appellant was not able to establish a genuine issue of fact relating to the pre-trip inspection or the failure of the pintle hitch that would support its claims against Ceres.

It was, therefore, appropriate for the Lower Court to disregard irrelevant facts which were not probative of the material issues necessary for Appellant to establish in its claims against Ceres. "The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery ***against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case*** and on which that party will bear the burden of proof at trial. *Baughman, supra*. ***A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial***." *Carolina Alliance, supra,* 337 S.C. at 485, 523 S.E.2d at 800 (emphasis added).

> It would hardly be argued that the testimony of a witness who said he saw a wreck in South Carolina would raise a factual issue if he simultaneously admitted that he was in a hospital in Boston, Massachusetts, at the time. ***The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt***

> ***to create an issue of fact that is not genuine.*** In this case, the seller did not introduce any evidence, such as an affidavit by the seller herself that the signature was not hers, that created a genuine issue of fact.
>
> *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984).

As the Supreme Court held in the language of *Main v. Corley* quoted above, the Appellant failed to adduce any evidence of witnesses who had any actual knowledge of what caused the pintle hitch to fail.

The South Carolina Court of Appeals has recognized the limits of testimony and affidavits in opposition to summary judgment motions, and has ruled that such testimony may be disregarded when it is insufficient to warrant the finding of a fact and instead offers mere speculation. In *Bradley v. Doe*, 374 S.C. 622, 634-35, 649 S.E.2d 153, 160 (Ct. App. 2008), the Court of Appeals considered the sufficiency of sworn affidavit testimony in an uninsured motorist case, and held that in order to be reliable and probative, testimony in opposition to summary judgment must provide reasonable certainty and a causal connection to the injury:

> For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." *Shealy v. Doe*, 370 S.C. 194, 205, 634 S.E.2d 45, 51 (Ct. App. 2006). Bradley's affiants had no personal knowledge of the facts of the accident. ***Their observations before and after the accident did not establish with reasonable certainty a causal connection between Bradley's injury and an unknown vehicle***.
>
> *Bradley*, 374 S.C. at 634-35, 649 S.E.2d at 160 (emphasis added).

In the Brief of Appellant at p. 5, without any supporting evidence, Appellant asserted that "[i]n this case what happened is that the hinge bolt fell out." Instead, the Appellant should have simply admitted that, without any evidence to show that Stoltz did not make a pre-trip inspection;

without any photographs of the condition of the hinge bolt and nut before or after the accident; without any eyewitness testimony as to the failure of the pintle hitch; and without any forensic investigation of material physical evidence due to the loss of the pintle hitch, Appellant cannot overcome his burden of establishing a genuine issue of material fact regarding any so-called independent tort claims against Ceres.

The Appellant has not set forth, has not properly supported, and cannot support a cause of action for negligence against either Ceres. In order to establish its cause of action for negligence, Appellant must prove that: (1) Ceres owed Appellant a duty of care; (2) Ceres breached that duty of care; and (3) that a breach of such a duty of care by Ceres proximately caused Appellant's damage. *See Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998).

In *Parks v. Characters Night Club, supra*, 345 S.C. at 491, 548 S.E.2d at 609, the South Carolina Court of Appeals stated:

> To prove causation, a plaintiff must demonstrate both causation in fact and legal cause. ***Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence***. Legal cause turns on the issue of foreseeability. An injury is foreseeable if it is the natural and probable consequence of a breach of duty. Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach. It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen his or her negligence would probably cause injury to someone.

Id. (emphasis added; citations omitted).

Ceres discharged its burden by pointing out the absence of evidence to support the Appellant's case. *Baughman, supra,* 306 S.C. at 115, 410 S.E.2d at 545. The Appellant has not produced any evidence which establishes that the Appellant's claims were caused by any act or omission of Ceres or Beaufort County.

In *Peterson v. National RR Passenger Corp*., 365 S.C. 391, 618 S.E.2d 903 (2005), the South Carolina Supreme Court concluded that, based upon the limitations of the scope of the findings and testimony by the expert witnesses, that expert testimony was simply not sufficient to establish their asserted theory as to the proximate cause. The Court acknowledged the admissibility of that testimony, but recognized that it is subject to scrutiny when examining the bases for that testimony. "Accordingly, we hold that the expert testimony, while admissible, fails to provide that failure to maintain the ballast in accordance with Respondents' own policies caused or contributed to the train's derailment." *Id.* at 398, 618 S.E.2d at 907.

Without sufficient evidence presented by the Appellant as to the causation in the present case, the Lower Court properly granted Summary Judgment in favor of Ceres, and that Order must be affirmed.

B. Appellant Dismissed Vicarious Liability Claims Against Ceres and, Thus, it Released Ceres from the Non-Delegable Duties that Appellant Refers to as "Independent Torts" including Negligent Hiring.

As described in the Introduction section of this Brief, the Lower Court understood that in order to carry out its vast responsibilities under the storm-debris removal project following Hurricane Matthew, Ceres engaged Olson as an independent contractor to carry out the debris hauling duties (R. p. 3568), and Olson subcontracted with DEH for trucking services (R. p. 3592).

The Lower Court recognized that the Appellant's claims arise out of the acts and omissions of Stoltz, the truck driver employed by DEH. The truck and trailer were owned by DEH, the maintenance and inspection of the truck and trailer were carried out by DEH, and the driver of the truck at the time of the accident was an employee of DEH.

As the accident involved the DEH truck driven by Stoltz, the Lower Court properly concluded that any liability claimed against Ceres would be vicarious, for the acts and omissions

of Olson, DEH, and Stoltz, or for the non-delegable duties held by Ceres, including the hiring of Olson for the project. Those non-delegable duties are part of the vicarious liability doctrine in South Carolina, and Appellant has already released Ceres from all vicarious liability. Accordingly, the Lower Court properly granted Summary Judgment to Ceres, and that Order must be affirmed.

Appellant received $1,150,000 in settlement for the vicarious liability claims against Ceres and direct claims against Olson, DEH, and Stoltz, and the Appellant is now free to move forward with its product-defect claims against the remaining defendants, who manufactured the trailer and the pintle hitch.

The Duties Delegated to Olson, DEH, and Stoltz:

Ceres hired Olson Trucking pursuant to its Master Subcontract Agreement (R. p. 3568). Olson then hired DEH, the employer of the truck driver Stoltz. All of the duties owed by Olson, DEH, and Stoltz sprang from Ceres' subcontract with Olson. Ceres specifically required Olson to carry out all required inspections, operational and equipment checks, and training that would ensure that this project was performed according to all applicable laws and regulations.

When Appellant settled with Olson, DEH, and Stoltz, that settlement involved all their acts and omissions which arose out of the delegation of duties from Ceres to Olson, then Olson to DEH, and DEH to its employee, Stoltz. The following is an excerpt of the Ceres-Olson Subcontract (R. pp. 3573-74 and p. 3583), showing duties which were delegated by Ceres and were carried out by Olson, DEH, and Stoltz:

> 4.10 **Subcontractor agrees at its own expense:** (1) to take all necessary precautions to protect the work of other trades from any damage caused by Subcontractor's operations; and (2) **to watch over, care for and protect from damage or injury, by any cause whatsoever, all of Subcontractors Work, complete or otherwise, and all of its materials, supplies, tools and equipment at or near the Project.** Subcontractor agrees, without loss or damage to Contractor, to make good any loss or damage to any and all such Work, materials, supplies, tools, and equipment up to the final acceptance of the entire Project by the Owner.

4.11 **Subcontractor shall be responsible for the safety of its operations and its employees and shall take all reasonable safety precautions with respect to its Work. Subcontractor shall comply with all safety policies and procedures initiated by Contractor for the Project,** including Contractor's policy regarding drugs, alcohol and controlled substances **and shall comply with all applicable laws, ordinances, rules, regulations and orders of any public authority for the safety of persons or property, including, but not limited to, the Federal Occupational Safety and Health Act (OSHA).** Subcontractor shall immediately notify Contractor of any injury to any of the Subcontractor's employees. Subcontractor shall require its personnel to attend any safety meetings Contractor might conduct and direct Subcontractor to attend.

4.13 **Subcontractor warrants that all materials and equipment utilized in the performance of the Work on the Project shall be in good working order and in compliance with all local, state and federal safety requirements.** All loads shall be covered with tarps at Subcontractor's sole cost and expense. These warranties shall be in addition to and not a limitation of any other warranty or remedy provided by law or by the Subcontract Documents. Subcontractor hereby agrees to provide all warranties and guarantees to Owner for its Work required by the Owner under its agreement with the Contractor.

Article 11: **This Subcontractor agrees to assume entire responsibility and liability, to the fullest extent permitted by law, for all damages or injury to all persons, whether employees or otherwise, and to all property, arising out of it, resulting from or in any manner connected with the execution of the work provided for in this Subcontract, or occurring or resulting from the use by the Subcontractor. its agents or employees, of materials, equipment, instrumentalities or other property, whether the same be owned by the Contractor, the Subcontractor or third parties.** Further, the Subcontractor, to the fullest extent permitted by law, agrees to indemnify and save harmless the Contractor, its agents and employees from all such claims including, without limiting the generality of the foregoing, claims for which the Contractor may be or may be claimed to be, liable and legal fees and disbursements paid or incurred to enforce the provisions of this paragraph. The Subcontractor further agrees to obtain, maintain and pay for such Commercial General Liability insurance coverage and endorsements as will insure compliance with the provisions of this paragraph.

Ceres-Olson Subcontract (R. pp. 3573-74 and p. 3583) (emphasis added).

Even after it released of all vicarious liability claims against Ceres, and although the Appellant has not cited a single South Carolina case in support of his position, Appellant now argues that Ceres must still be liable for various claims, including negligent hiring due to Ceres' engagement of Olson as an independent contractor. But Appellant fails to recognize that the South Carolina Supreme Court has definitively ruled that the tort of negligent hiring is to be adjudicated as a non-delegable duty that a party retains even though it engaged independent contractors to

perform work which caused injury to third parties. *See Simmons v. Tuomey Reg. Med. Ctr.*, 341 S.C. 32, 533 S.E.2d 312 (2000).

Without reference to any South Carolina case law on this issue in his Brief, Appellant refers to the non-delegable duties as "independent tort obligations" and argues that those claims survive the dismissal of vicarious liability. Certain torts including negligent hiring are recognized under South Carolina law, but they are considered and referred to as "non-delegable duties" which a party has under certain circumstances. The Court of Appeals articulated this doctrine in *Simmons v. Tuomey Reg. Med. Ctr.*, 330 S.C. 115, 498 S.E.2d 408 (Ct. App. 1998), which decision was affirmed as modified by *Simmons v. Tuomey Reg. Med. Ctr.*, 341 S.C. 32, 533 S.E.2d 312 (2000).

> A nondelegable duty is essentially an exception to the general rule that principals are not liable for the torts of independent contractors.
>
> According to Dean Prosser:
>
> A different approach, manifested in several of the exceptions to the general rule of nonliability [for independent contractors], has been to hold that the employer's enterprise, and his relation to the plaintiff, are such as to impose upon him a duty which cannot be delegated to the contractor.... [T]he cases of "nondelegable duty" ... hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him.
> . . . . .
> It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.
>
> *Simmons,* 330 S.C. at 120, 498 S.E.2d at 410, citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71, at 511 (5th ed.1984).

On appeal, the South Carolina Supreme Court affirmed the ruling that non-delegable duties are recognized as part of the vicarious liability doctrine in this State. In *Simmons*, 341 S.C. at 32, 533 S.E.2d at 312, the Supreme Court confirms that, while it was perfectly appropriate for Ceres to delegate duties to its subcontractor Olson Trucking, including duties to inspect equipment, operate safely, and carry out other administrative requirements (Ceres-Olson Subcontract, R. pp. 3573-74 and p. 3583), the delegation of those duties does not relieve the prime contractor from liability for the negligence or other failure of the subcontractor to perform those duties.

Justice Waller, writing for the Supreme Court in *Simmons,* provided the following explanation:

> The term "nondelegable duty" is somewhat misleading. A person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. ***It actually is the liability, not the duty, that is not delegable***. ***The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor.*** *Simmons*, 330 S.C. at 123, 498 S.E.2d at 412; *see also* F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts 654 (1997).
>
> *Simmons,* 341 S.C. at 42, 533 S.E.2d at 317 (emphasis added).

Accordingly, if a party is held liable for breach of one of these non-delegable duties, that party is held vicariously liable for the acts of independent contractors and employees under certain circumstances. Unfortunately for Appellant's efforts against Ceres in this matter, the Appellant has previously released Ceres from any vicarious liability for the acts and omissions of Olson, DEH, and Stoltz and, therefore, Appellant has previously released Ceres from any claims for these non-delegable duties such as negligent hiring.

As noted above, after receiving $1,150,000 in settlement from Olson, DEH, and Stoltz, Appellant immediately dismissed and effectively released Ceres from that liability. In *Davis v. Lunceford*, 287 S.C. 242, 243, 335 S.E.2d 798, 799 (1985), the South Carolina Supreme Court

confirmed that "[w]hen an action is dismissed without prejudice, the statute of limitations will bar another suit if the statute has run in the interim." Appellant's dismissal of the vicarious liability claims was part of its settlement with Olson, DEH, and Stoltz and, in any event, because more than three years had passed since the accident in May of 2017, the statute of limitations has expired on that vicarious liability cause of action. S.C. Code § 15-3-530.

In *James v. Kelly Trucking*, 377 S.C. 628, 661 S.E.2d 329 (2008), the United States District Court certified the question of whether South Carolina law prohibits a plaintiff from pursuing a negligent hiring, training, supervision, or entrustment claim once the employer admits vicarious liability when the negligence committed by the employee causes damage to the Plaintiff. The Supreme Court held that such a claim was not barred because vicarious liability was admitted, but the Court also noted that the "considerations limiting a plaintiff's available causes of action in the typical case are that the plaintiff must be able to demonstrate a prime facie case for each cause of action and that a plaintiff may ultimately recover only once for an injury." *Id.* at 633, 661 S.E.2d at 331.

The *James* case stops short of holding that vicarious liability must be established in order to prove a claim for negligent hiring, but its holding does confirm the principle articulated by the Supreme Court that "[t]he party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor." *Simmons,* 341 S.C. at 42, 533 S.E.2d at 317.

The Lower Court recognized that the analysis of the South Carolina Supreme Court in *Simmons*, *id.*, supports the finding that the "independent torts" asserted by Appellant against Ceres, such as the alleged negligent hiring of Olson to carry out duties in this hauling project were, in actuality, considered "non-delegable duties" which subject a party to vicarious liability in circumstances such as the project at issue. The Lower Court, thus, properly recognized that the

Appellant's dismissal of all vicarious liability claims against Ceres constituted a bar to further claims against Ceres, regardless of whether Appellant calls those duties "independent torts" or more properly "non-delegable duties" pursuant to *Simmons*. *Id.*

The entirety of Appellant's legal authority on this issue is the citation of a case from the 9th U.S. Circuit Court of Appeals, originating in the Western District of Washington State, decided in 1969 but involved an automobile collision in 1963. That case, *Foster Co. v. Hurnblad*, 418 F.2d 727, 730 (9th Cir. 1969), discussed Washington State law regarding the applicability of a claim for negligent selection, but it is apparent that Washington State law, as of 53 years ago, had not evolved in a way to address the comprehensive doctrine of non-delegable duties as part of vicarious liability as has been developed in South Carolina.

In fact, the *Hurnblad* case was called into question fairly recently by the Oklahoma Court of Appeals in *Le v. TQL*, 431 P.3d 366, 377 (Okla. App. 2018) citing *Hurnblad, supra*, and *Schramm v. Foster*, 341 F.Supp.2d 536, 551 (D. Md. 2004):

> In fact, *L. B. Foster* reached a conclusion somewhat at odds with the pronouncement of Schramm, and the theory urged here. *L. B. Foster* held that the duty of greater inquiry arose because the cargo in question - 40,000 pounds of steel - was of a weight and character which presented a particularly dangerous operation in comparison to more general transport. Id. at 731. *L. B. Foster* then applied the Restatement principle that if "the work is peculiarly dangerous unless carefully done" the hirer has a duty to "go further and ascertain the contractor's actual competence." *Id.* at 732. We find no record facts or precedent indicating that a load of strawberries would fall under the rule expressed in *L. B. Foster*, and no further authority for the duty declared by *Schramm*. We are further doubtful that the expansion of the duty required when hiring a federally licensed motor carrier to transport freight proposed in *Schramm* would be approved of by either the Oklahoma Legislature or the Oklahoma Supreme Court.

It thus appears that Appellant's reliance upon the *Hurnblad* decision is unreliable at best, given the absence of comparative analysis to the current jurisprudence in South Carolina.

Ceres, to the contrary, relies upon *Simmons* and the other South Carolina authority cited above which establishes that the Appellant's release of all vicarious liability claims against Ceres makes this negligent hiring claim inconsistent with South Carolina's rule that such non-delegable duties are an integral component of vicarious liability jurisprudence as discussed above.

As noted above, "[t]he plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. *Baughman, supra*. A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Carolina Alliance for Fair Employment v. South Carolina L.L.R.,* 337 S.C. 476, 485, 523 S.E.2d 795, 800 (1999).

The Lower Court properly recognized that, because Appellant has released Ceres from any liability for the acts or omissions of its subcontractors, Olson, DEH, and Stoltz, the Appellant is unable to establish the cause of action for negligent hiring. Accordingly, the Lower Court's Order granting summary judgment to Ceres must be affirmed.

CONCLUSION

For the foregoing reasons, the Lower Court correctly determined that no genuine issues of material fact exist in support of the Appellant's claims against Ceres or Beaufort County. Appellant settled its claims against Olson, DEH, and Stoltz and released those claims and all vicarious liability claims against Ceres and Beaufort County. Appellant accepted $1,150,000 in settlement funds in exchange for the dismissal of those claims, and now Appellant seeks another "bite at the apple." The Lower Court properly recognized Appellant's claims were an unsupported

and thinly-veiled effort to circumvent the well-established doctrines of non-delegable duties and vicarious liability in this State, and the Lower Court's Order must be affirmed.

Respectfully Submitted,

February 2, 2023

Charleston, SC

R. Patrick Flynn (SC Bar # 65599)
Pope Flynn, LLC
P.O. Box 70
Charleston, South Carolina 29402
(843) 834-3426
Fax: (803) 354-4899
pflynn@popeflynn.com
Attorney for Appellants-Respondents

RECEIVED
Feb 02 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case 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, R. Patrick Flynn, Counsel for the above-captioned Appellants-Respondents, hereby certifies that the Final Brief of Appellants-Respondents, which is being filed herewith, complies with Rule 211(b), SCACR.

[Signature Block on Next Page]

Respectfully Submitted,

February 2, 2023

Charleston, SC

R. Patrick Flynn (SC Bar # 65599)
Pope Flynn, LLC
170 Meeting Street, Suite 510
Charleston, South Carolina 29401
(843) 834-3426
pflynn@popeflynn.com
Attorney for Appellants-Respondents