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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Opinion No. 2024-UP-414 (S.C. Ct. App. Filed Dec. 11, 2024)

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

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 .....Petitioners.

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COUNTER-STATEMENT OF THE CASE

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 first event that led to this tragedy was the failure of a primary coupling mechanism by which the trailer was attached to the truck. This coupling mechanism was a device known as a pintle hitch or pintle hook. (ROA, p. 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 hook, which in turn was permanently affixed to the truck. This bolt was held in place by a screwed-on nut. (*Id.,* p. 557, line 17 to p. 558, line 10 and pp. 731-734).

The second event which caused this tragedy was the failure of the two (2) safety chains which attached the trailer to the truck. 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 C.F.R. 393.70 and S.C. Code 56-5-5150.

In this case what happened is that the hinge bolt fell out of the pintle hook. When the hinge bolt fell out, the pintle hook then fell apart. When the pintle hook fell apart, the trailer's tow bar detached from the truck's pintle hook and the only thing holding the trailer to the truck were the safety chains. The safety chains then snapped. The trailer, now completely detached from the truck, then moved into oncoming traffic. (*Id.*, pp. 1849, 1325-1329, 1543, 2945, line 21 to p. 2946, line 12; p. 2979, line 18 to p. 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. (*Id.,* p. 2492, lines 14-17; Exhibit 7; p. 2493, lines 4-11; p. 2490, lines 1-7; and p. 2633).

Over time, the nut that holds the hinge bolt in place can come loose and fall off. The nut on this particular model of pintle hook will come loose and fall off if there is a "break away tension" applied to it of only 15-25 foot pounds, followed by a lesser sustained torque. (*Id.,* p. 2507, line 5 to p. 2508, line 15). In vibration testing of an exemplary pintle hook identical to the pintle hook involved in this wreck the nut began to work its way loose after being subjected to vibrations for only 49.98 hours. (*Id.,* p. 2512, line 25 to p. 2513, line 2 and p. 2518, lines 8-12). During this testing, the pintle hook was not subjected to any load. (*Id.,* p. 2511, line 21 to p. 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. (ROA, p. 2558, lines 5-11).

Since the nut that the secures the hinge bolt can loosen and fall off, 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 inspect the vehicle that he or she is operating both before and after each trip. (ROA, p. 2666, lines 17-19). This is not only required by law, but is also the industry's standard. (*Id.,* p. 2666, lines 25 to p. 2667, line 2). Each inspection is required to be documented by a Driver's Vehicle Inspection Report. (*Id.,* p. 2667, lines 23-25). 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.*, p. 1611, lines 14-19). This is part of a routine pre-trip inspection. (*Id.*, p. 613, line 22 to p. 614, line 5).

If anyone had inspected the pintle hook prior to the subject wreck, "it would have been obvious" that the pintle hook was coming loose or otherwise coming apart. (*Id.*, p. 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.*, p. 1732, lines 21-23).

Not only would the "obvious" imminent failure of the pintle hook had 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 easily determined simply by looking at the chain because it is stamped with a marking that identifies its grade, in this case Grade 70. (ROA, p. 2472, lines 4-22). The working load limit of each chain in this case was accordingly 6,600 pounds. (*Id.*, p. 2474, lines 23-25). The working load limit of a chain is what is used for design purposes. (*Id.*, p. 2475, lines 5-21). Since the angle of detachment in the event of the failure of the primary coupling device can vary widely, each change should be strong enough by itself to hold the weight of the trailer when loaded. In this case, the trailer was huge. It was 24 feet 7 inches long and 13 feet 5 inches high. By itself, when completely empty it weighed 19,800 pounds, and had a gross vehicle weight rating of 74,000 pounds, meaning it could transport up to 74,000 pounds. The safety chains, accordingly, needed to be about 10 times stronger than they actually were.

Second, the chains were improperly attached to the trailer by directly welding them onto the trailer. It is common knowledge in the trucking industry that welding a chain due to the high heat involved reduces the strength of the chain. (*Id.*, p. 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.,* p. 2478, lines 1419). It is not surprising then, that the weakest link of each chain is where it was welded and these are the exact links where the chains failed, causing the trailer to separate from the truck completely. (*Id.*, p. 2478, line 24 to p. 2479, line 8). 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., p. 2480, lines 2-8.

Third and finally, the chains were routed improperly. 49 C.F.R. 393.70(d)(4) requires that the safety chains must be connected to the towed and 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 and this was not done in this case. (*Id.,* p. 2507, lines 4-25). Of course, the fact that the safety chains when 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.

There is additional evidence that the trailer was never inspected, or if it was inspected, the inspector had his eyes closed. The tires on the trailer were in such horrible condition (bald and with exposed ply) that the trailer should have been put out of service until they were replaced. (*Id.*, p. 2494, line 24 to p. 2495, line 2) (*Id.*, p. 1788, lines 11-15) (*Id.,* p. 1789, lines 4-14, 49 C.F.R 393.75). In fact, it was a criminal offense for this trailer to be on the road. (ROA, p. 1495, line 21

to p. 1496, line 5; and p. 1330, lines 12-20). This "illegal criminal condition" was an "open, obvious, apparent condition" that was "easily observable." (*Id.*, p.1693, lines 16-20).

Additional evidence that this trailer was never inspected was the condition of the leaf springs. (*Id.*, p. 1680, lines 3-5). These are the "primary structure" that attaches the axles to the rest of the trailer, which is clearly "a fairly important function." (*Id.*, p. 1683, lines 17-25). Three (3) of the four (4) supporting leaf springs were broken, and the significant rust on the broken leaf springs indicated that they had been broken for a "significant period of time." This was an obvious condition which would have required that the trailer be taken out of service. (*Id.*, p. 2365; p. 2683, lines 1-11 and p. 3059, lines 5-14; and p. 1800, lines 1-6).

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. (*Id.*, p. 1732, line 11 to p. 1733, line 3). Anyone properly inspecting a trailer would have known that the brakes on the trailer were inoperable. (*Id.*, p. 1734, line 18 to p. 1736, line 13).

Although the horrible and illegal conditions of the tires, the leaf springs and the brakes were admittedly not a proximate cause of the wreck, the fact that the trailer was allowed to be in operation on the highways is evidence that the trailer was never properly inspected by either Beaufort County or Ceres.

In short, 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.*, p. 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.*, p. 1789, lines 15-20).

The question naturally arises – how is it possible that such an unsafe trailer came into being? The answer is simple – it was a homemade trailer built by an inexperienced teenager with guidance from his equally inexperienced father. (*Id.*, p. 981, lines 3-20; p. 982, lines 1-5 and p. 983, lines 4-8). It was then sold to an incompetent commercial motor vehicle carrier (DEH) who then assigned it to an incompetent driver (Stoltz). (*Id.,* p. 760, line 22 to p. 771, line 5; p. 766, lines 18-24; p. 769, line 14 to p. 770, line 2; p. 598, line 18; p. 603, line 23). Stoltz had an extremely poor driving record having been cited 15 times for motor vehicle violations, including 3 citations for operating a vehicle with unsafe equipment, 2 violations for possession of marijuana and drug paraphernalia, and careless driving. Neither DEH nor Stoltz knew that pintle hooks needed to be maintained. (*Id.*, p. 779, lines 8-17). They were never instructed, taught or warned on how to properly maintain a pintle hook. (*Id.,* p. 779, lines 18-23). They had no idea what is a safe tire tread depth or at what truck tire tread depth the tire becomes illegal and operating on the road is a criminal act. (*Id.*, p. 782, lines 15-21). DEH admittedly never inspected the truck or trailer that was involved in the wreck prior to the wreck. (*Id.,* p. 788, lines 18-20). DEH admittedly never did any maintenance on the safety chains or the pintle hook. It was unaware that a pintle hook required any kind of routine maintenance. To its knowledge the nut on the pintle hook had never been tightened or secured and DEH does not require daily inspections of its commercial motor vehicles to be documented. (*Id.*, p. 788, lines 18-20; p. 795, lines 12-14; p. 835, lines 2-9; p. 836, lines 10-13 and p. 838, lines 5-7).

In summary, if a proper inspection of the trailer had ever been performed prior to the wreck the loose or missing nut on the hinge bolt would have been discovered and either tightened or replaced and the wreck would not have happened.

Likewise, if a proper inspection of the trailer had ever been performed prior to the wreck the grossly inadequate safety chains would have been discovered and replaced and the wreck never would have happened.

I. THE COURT OF APPEALS DID NOT ERR IN ACKNOWLEDING AND ADDRESSING THE BASIS FOR THE TRIAL COURT'S SUMMARY JUDGMENT ORDER.

A. THE SOLE BASIS FOR THE SUMMARY JUDGMENT ORDER WAS DISPOSED OF BY THE *RUH* DECISION

The sole basis for the Trial Court's granting summary judgment was the erroneous conclusion that the Respondent's direct negligence claims against Beaufort County and Ceres were not independent of the acts and omissions of the previously dismissed Defendants. It is clear from reading the Trial Court's Order granting summary judgment to Ceres and Beaufort County that the Order is based solely and exclusively upon the fact that the Respondent had previously settled with Olson, DEH and Stoltz, and had accordingly amended his Complaint to eliminate all claims that Ceres or Beaufort County were vicariously liable for any acts or omissions of Olson, DEH or Stoltz.

In its findings of fact, the Trial Court found that the record in this case "demonstrated to this Court that the Plaintiff's admitted negligence claim was not, in fact, independent of the acts and omissions of Olson, DEH and Stoltz." (*Id.*, p. 27, Finding of Fact No. 8). the Court found that the Plaintiff had failed to establish "that the amended negligence claim was independent of the acts and omissions of Olson, DEH, and Stoltz. (*Id.*, Finding of Fact No. 9). The Court stated:

> "This Court finds (the) admitted negligence claim is not independent of the acts and omissions previously attributed to Olson, DEH, and Stoltz. On this basis, the amended negligence claim is, in effect, the same as the vicarious liability causes of action Ceres and Beaufort County which Plaintiff previously dismissed."

Id., Finding of Fact No. 10.

Based upon these findings of fact the Court then made the following conclusions of law.

> "The Plaintiff failed to establish that those alleged acts and omissions (the direct negligence claims against Beaufort County and Ceres) 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 and omission 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."

(Id., p. 30, Conclusion of Law No.7). The Court accordingly granted summary judgment on this ground. (*Id.,* p. 31).

In its Order reversing the Trial Court, the South Carolina Court of Appeals correctly noted that the "Circuit Court found the negligence claims in the Third Amended Complaint were not independent of Shaffer's previous vicarious liability claims and granted summary judgment in favor of Beaufort and Ceres on that basis." (Opinion, p. 3). The Court of Appeals correctly noted that the Circuit Court was focused upon Shaffer's argument that negligent hiring was a direct negligence claim, with Beaufort and Ceres arguing that no South Carolina authority existed to support the idea that a negligent hiring claim is a direct negligence. *Id.*

As Ceres and Beaufort County now concede, the decision of this Court in *Ruh v. Metal Recycling Services, LLC,* 439 S.C. 649, 889 S.E.2d 577 has resolved that issue in the Respondent's favor. South Carolina has now expressly joined the majority of States which recognize that an employer is subject to direct liability "for harm caused by the negligent selection of an independent contractor." (*Id.,* 439 S.C. at 652, 889 S.E.2d at 579). More specifically, "the principal in an independent contract relationship may by subject to liability for physical harm proximately caused by the principal's own negligence in selecting the independent contractor." *Id.*

The Court of Appeals was careful to limit its reversal of the summary judgment Order, limiting its decision to simply correcting the Trial Court's erroneous conclusion that eliminating

vicarious liability claims also eliminated direct negligence claims. In so doing, the Court of Appeals stated:

> "We emphasize that we have made no evaluation of the merits of the direct negligence claims against Beaufort and Ceres. Our decision to reverse is controlled by the inconsistency between the rationale supporting the summary judgment and our Supreme Court's reasoning in *Ruh*. Nothing in this Opinion should be taken as a forecast for or against any additional summary judgment arguments or any view of the merits. . . . Given that the parties argued the direct negligence issue without the benefit of *Ruh's* guidance, we reverse the summary judgment and remand."

(Id., pp. 4-5) (citations omitted).

Accordingly, the Court of Appeals properly concluded that the summary judgment Order must be reversed because it was based solely and exclusively on an erroneous legal foundation. The Court of Appeals also properly remanded the case, acknowledging that there may be other grounds for summary judgment that were not fully developed given the Trial Court's rationale in granting summary judgment.

B. THE COURT OF APPEALS DID NOT ERR IN FAILING TO AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT ON A GROUND THAT THE TRIAL COURT DID NOT CONSIDER

The Court of Appeals did not err in failing to affirm the Trial Court's grant of summary judgment on a ground that the Trial Court did not consider.

The Petitioner argues that the Court of Appeals erred in failing to recognize that there was a second basis for summary judgment, i.e., the alleged absence of proof of causation, which was sufficient to affirm the Trial Court's summary judgment Order. This was not error, for two (2) reasons. First, this issue was not preserved for appeal. Second, there is overwhelming proof of causation.

As the Petitioner correctly notes, the Trial Court never ruled upon the causation issue as a ground for summary judgment. "It is well-settled that an issue cannot be raised for the first time

on appeal, but must have been raised to **and ruled upon** by the Trial Court to be preserved for Appellate review." *Staubes v. City of Folly Beach,* 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (emphasis added). Error preservation requirements are intended "to enable the lower Court **to rule properly** after it has considered all relevant facts, law, and arguments." *Id.*, quoting *L'On v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added). See also *State v. Nelson*, 331 S.C. 1, 5 n.6, 501 S.E.2d 716, 718 n.6 (1998) ("The ultimate goal behind preservation of error rules is to ensure that an issue raised on appeal has first been addressed to **and ruled** on by the Trial Court.") (emphasis added).

In their brief, Petitioners rely upon the case *Sims v. Amisub of South Carolina, Inc.*, 408 S.C. 202, 758 S.E.2d 187 (2014) which contains the statement that "The Appellate Court may affirm any ruling, Order, or judgment upon any ground appearing in the record." *Id.,* 408 S.C. at 214, 758 S.E.2d at 194. The Court emphasized, that this deviation from the normal rule of Appellate preservation is something that it can do "at our discretion" and only "if we find it is proper and fair to do so." *Id.*, 408 S.C. at 215, 758 S.E.2d at 194. In the case *sub judice*, the Respondent was not allowed to fully present its case on causation.

In fact, during oral argument, the Trial Court stopped Respondent's counsel during his argument on the causation element and in essence, said that he had heard enough and that the Respondent had met its burden regarding the causation issue being a jury issue, interrupting counsel and stating as follows:

> "The Court: Mr. Kuhn, with all due respect, this is probably one of the best opening presentations I've ever seen in my entire life, but that's probably **for a jury**. **You met your standard**, okay? We don't need to - -
>
> Mr. Kuhn: I'll sit down then. Thank you."

(Id., p. 3426, lines 8-13) (emphasis added). Accordingly, the reason why the Trial Court probably did not address the causation element in its Order is it was convinced that there was sufficient evidence of causation for it to be a jury issue and there was no point reciting in its Order that the summary judgment was denied on that ground, when the Court had decided to grant summary judgment on an entirely different ground. There was accordingly no need at that point for Respondent's counsel to continue to present even more evidence regarding the issue of causation.

Furthermore, as the Trial Court correctly noted, there is ample evidence of causation justifying the denial of summary judgment on that ground. This will be addressed in the following section of this brief.

C. THERE IS A GENUINE ISSUE OF MATERIAL FACT THAT THE DEATH OF SUSAN SHAFFER WOULD NOT HAVE OCCURRED BUT FOR THE ACTS AND OMMISSIONS OF CERES AND BEAUFORT COUNTY

"It bears mentioning here that there can be more than one proximate cause of an injury." *Wickersham v. Ford Motor Company,* 432 S.C. 384, 394 n.4, 853 S.E.2d 329, 334 n.4 (2020), citing *Matthews v. Porter,* 239 S.C. 620, 627, 124 S.E.2d 321, 325 (1962).

Both Beaufort County and Ceres were negligent in hiring and retaining contractors and subcontractors without ensuring they were competent, properly licensed or performing their legally mandated duty of inspecting the equipment that they were utilizing. Additionally, both Beaufort County and Ceres were negligent in failing to perform their contractual obligations to inspect the equipment used in the debris cleanup, which would include the trailer involved in the wreck. This lack of due diligence allowed the dangerously defective trailer to remain in service, directly contributing to the wreck. Had proper inspections by Beaufort County and Ceres been performed the mechanical failures – specifically the loose pintle hook and the weak safety chains - - would have been identified and remedied, and the wreck would not have occurred.

A. BEAUFORT COUNTY

Beaufort County negligently hired and negligently retained the contractors and subcontractors who were performing the scope of work under the Hurricane Debris Cleanup Contract. Furthermore, 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.

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. (ROA, p. 3168)

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. (ROA, p. 3169. See also ROA, p. 2949, lines 13-17; p. 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." (ROA, p. 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." (ROA, p. 2959, lines 1-5). If 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." (ROA, p. 2963, line 22 to p. 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." (ROA, p. 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. (ROA, p. 2984, line 17 to p. 2985, line 6). This is ascertainable through publicly available information. (ROA, p. 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. Hiring a chameleon carrier "creates an unacceptable risk of harm to the public." (ROA, p. 3196, Footnote 26). See also, Federal Register Vol. 80, No. 229, and is a violation of commercial motor vehicle safety standards. (ROA, p. 2991, lines 23 to p. 2992, line 1); see also (ROA, g. 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.*, p. 2983, line 23 to p. 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 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. (ROA, p. 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. (ROA, 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. (ROA, pp. 2433 and 2430). Beaufort County, however, never inspected a single vehicle. (ROA, p. 2340 and p. 2408). This is despite the representation by Beaufort County in the Contract that every piece of equipment "will be inspected." (ROA, p. 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. (ROA, p. 2406 and 2427). In short, Beaufort County made absolutely no effort to see if any vehicle was ever inspected by anyone. (ROA, p. 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, or else the failing pintle hook and weak safety chains would have been remedied, and Susan Shaffer would be alive today.

B. CERES

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, p. 15, quoting 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. *L.B. Foster Company, Inc. v. Hurnblad,* 418 F.2d 727 (9th Cir. 1969). This includes a duty "to go to considerable pains" to 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. (ROA, p. 3168).

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. (ROA, p. 3169). See also (ROA., p. 2949, lines 13-17; p. 2951, lines 18-24).

Ceres' hiring Olson and DEH, constituted "a violation of the industry practices and safety standards." (ROA, p. 2959, lines 11-16). In short, "neither DEH, or Olson, . . . were capable of providing the transportation services that they were providing at the time." (ROA, p. 2959, lines 1-5) (emphasis added). Ceres should have known that its subcontractors were not qualified. (*Id.*, p. 2964, line 16. See also, p. 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., ROA, p. 2966, line 22 to p. 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." (ROA, p. 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 inquiries 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."

(ROA, p. 2968 to p. 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." (ROA, p. 2978, line 16 – 18). Ceres' conduct in this case constituted "a violation of the industry practices and safety standards." (ROA , p. 2959, line 8-p. 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. (ROA, p. 2188).

Ceres contracted to guarantee that all subcontractors complied with any documentation requirements. (*Id.*, Exhibit 3, p. 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, p. 35). Ceres contracted to do daily inspections of all equipment to "ensure" it is in proper working order. (*Id.*, Exhibit 3, p. 51). Ceres contracted to see that all drivers complied with all CMV requirements, both federal and state. (*Id.*, Exhibit 3, p. 51). Ceres contracted to do a "thorough inspection" of all equipment prior to the use each day. (*Id.*, Exhibit 3, p. 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, p. 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. (ROA, p. 1496, line 23 – p. 1497, line 4).

The condition of the trailer was "consistent with an improper incomplete pre- and post-trip inspection, or one have not being done at all." *Id.,* p. 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., p. 104, lines 15-20.

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 (1) inadequate, (2) improperly attached, and (3) improperly routed. If Ceres had acted with due care and performed its contractually obligated duties, Susan Shaffer would still be alive today.

II. THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW.

The Court of Appeals correctly applied the proper standard of review. The Court of Appeals expressly noted that an Appellate Court reviews the granting of summary judgment under the same standard applied by the Trial Court pursuant to Rule 56 of the South Carolina Rules of

Civil Procedure. (Opinion of Court of Appeals, p. 3). The Court of Appeals noted that the "mere scintilla" standard does not apply under Rule 56(c), and instead the proper standard is the "genuine issue of material fact" standard set forth in the text of the rule. *Id.* The Court of Appeals noted that Rule 56 provides that the moving party is entitled to summary judgment if the evidence before the Court shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law and that when applying this standard, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Id.*, citations omitted.

The Petitioner, however, under this assignment of error, although it is labeled as an allegation that the Court of Appeals erred by failing to apply the proper standard of review, is actually complaining that the Court of Appeals did not affirm the granting of summary judgment on the ground that there was no genuine issue of material fact on the issue of causation. As previously noted, the Trial Court intentionally did not grant summary judgment on the issue of causation, telling Respondent's counsel at oral argument that it had heard enough on the issue of causation, that the Respondent "met the standard" on that issue and that it was an issue for the jury. ROA, p. 3426, lines 8-13). As previously noted herein, there is ample evidence that but for the direct negligence of both Beaufort County and Ceres in not fulfilling their independent duties to directly inspect the trailer that killed Susan Shaffer, the wreck would not have occurred.

III. THERE WAS NO PRESERVATION ISSUE FOR THE COURT OF APPEALS TO ADDRESS.

The Petitioners allege that the Court of Appeals erred in overlooking the Respondent's failure to preserve issues on appeal. In support of this assertion, the Petitioners point to the fact that the Respondent did not submit a Memorandum in Opposition to the Motion for Summary

Judgment prior to the hearing on the motion and the fact that the Respondent filed numerous depositions in opposition to the motion.

This is not your ordinary automobile wreck case. It involves safety rules and requirements imposed upon commercial motor vehicles and their operators by the Federal Motor Carriers Safety Act, additional safety requirements imposed upon emergency management vehicles by the Federal Emergency Management Agency, and safety components such as pintle hooks and safety chains, whose maintenance and inspection requirements are not within the realm of ordinary knowledge. These are concepts that are better explained using charts, diagrams, photographs, and other visual medium, as opposed to simply the printed word. Accordingly, Respondent chose to present his argument to the Trial Judge by way of a power point presentation in lieu of a routine Memorandum. (ROA, p. 3413, pp. 17-20). Additionally, in order for the Court to have a full and complete understanding of the lawsuit, depositions were submitted in lieu of affidavits. Of the more than seventeen (17) experts who gave depositions, nearly all were employed by Co-Defendants and obtaining an affidavit would have been problematic. In any event none of this has anything to do with Appellate issue preservation. The Respondent zealously opposed the Motion for Summary Judgment and after the Order was issued filed a detailed Motion to Reconsider, Alter or Amend the Order (*Id.,* p. 486), and then timely appealed, raising in his Brief the exact issues upon which the Court of Appeals ruled.

Ironically, this "issue preservation" issue is one which the Petitioners have failed to preserve in order to raise it at this late date before the Supreme Court. If, as Petitioners now contend, a failure to file a Memo prior to the hearing on the Summary Judgment Motion and the reliance on depositions in lieu of affidavits is a failure to preserve a challenge to the granting of

the Summary Judgment Motion on appeal, this is an issue which should have been raised to the Court of Appeals prior to the decision by the Court of Appeals, not at this late date.

IV. BEAUFORT COUNTY IS NOT IMMUNE UNDER THE SOUTH CAROLINA TORT CLAIMS ACT FOR THE NEGLIGENCE OF ITS OWN EMPLOYEES.

A. RESPONDENT'S CLAIM AGAINST BEAUFORT COUNTY IS NOT BARRED BY THE SOUTH CAROLINA TORT CLAIMS ACT

Petitioners argue that the Cout of Appeals erred by overlooking Beaufort County's immunity under the South Carolina Tort Claims Act, § 15-78-10, et seq. of the South Carolina Code of Laws. This argument by Petitioners, however, is based upon the erroneous assumption that Beaufort County's liability is based upon the actions of independent contractors. To the contrary, Beaufort County's liability in this case is based upon the actions of its own employees.

Beaufort County is who decided to negligently hire and retain Ceres, an unlicensed, unauthorized chameleon carrier.

Beaufort County is who negligently approved the hiring of Olson and DEH as contactors, each of whom was also unauthorized, unlicensed and equally incompetent. (ROA, p. 2133) (Contract Section 7.0 "All subcontractors must be approved, in writing, by the County . . ..").

It was Beaufort County who, prior to its use, inspected and approved the trailer that killed Susan Shaffer. (*Id.,* p. 2163) (Contract Section 10.2 "Equipment will be inspected by the County's authorized representatives prior to its use by the Contractor(s)").

It is worth noting that Beaufort County, in its Petition for Writ of Certiorari, mentions the defective pintle hook but never once makes even a passing reference to the undersized, improperly attached, and improperly routed safety chains. Quite frankly, it is beyond comprehension and difficult to understand how Beaufort County could have allowed this dangerous trailer to operate

on its highways, day after day, week after week, month after month, with such an open, obvious and apparent dangerous condition.

B. THIS CLAIM AGAINST BEAUFORT COUNTY IS NOT BARRED BY THE HOLDING IN *WADE V. BERKELEY COUNTY*

Beaufort County argues that the Court of Appeals failed to properly apply *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002), contending that the Tort Claims Act automatically released the County from any liability as soon as the Respondent settled with Olson, DEH and Stoltz.

This case is easily distinguishable from *Wade v. Berkeley County* inasmuch as in *Wade* the liability of Berkeley County was premised upon vicarious liability of the released Co-Defendant, whereas in the instant case Beaufort County's liability is premised upon its own egregious conduct. In *Wade*, a motorist who was injured in an automobile wreck filed a negligence suit against the other driver, an employee of Berkeley County. The driver testified at the time of the wreck he was acting in the course and scope of his employment with Berkeley County. The motorist settled with the County employee and then attempted to sue Berkeley County. The Court held that the settlement with the County employee, which was under a covenant not to execute, did not bar the injured motorist's action against Berkeley County. *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002).

In the case now before the Court Olson, DEH and Stoltz were not County employees. The settlement with them, accordingly, had absolutely nothing to do with the South Carolina Tort Claims Act. More precisely, the settlements with Olson, DEH and Stoltz were not settlements "under this chapter" within the meaning of Section 15-78-70(d) of the South Carolina Tort Claims Act.

In summary, since the Respondent has not previously settled with any employee of Beaufort County neither the dicta of *Wade v. Berkeley County* nor the mandate of Section 15-78-70(d) of the South Carolina Code of Laws provides Beaufort County with any immunity for its negligent conduct.

CONCLUSION

The Petitioner asked the Trial Court to grant summary judgment on the issue of causation and the Trial Court refused to do so. As the Trial Court expressly stated during argument, that was an issue for the jury. The Court of Appeals, relying upon *Ruh v. Metal Recycling Services, LLC*, addressed the sole ground upon which summary judgment was granted, and properly reversed and remanded this case back to the Circuit Court for further proceedings.

It is accordingly requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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