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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Appellate Case No.: 2025-001338

Ida Maeve Nordan, Randall Houston Nordan and Chip Eugene McCants, Jr., by and through his parent and natural guardian, Ida Maeve Nordan..... Appellants

v.

Sheriff of Richland County in his official capacity, and Half Moon Pictures LLC, Defendants,

of which Half Moon Pictures LLC .....Respondent

AMENDED FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

"Did the lower court err in granting Half Moon Pictures LLC ("Half Moon") a dismissal of the Plaintiff's Complaint under Rule 12(b)(6) on the grounds that Half Moon owed no duty to the Plaintiff because Half Moon did not create the risk?" Brief of Appellants at 1.

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Where the lower court rendered two independent grounds for dismissal of the Amended Complaint, and Appellants failed to challenge one of those grounds either in its motion for reconsideration or on appeal, must this Court affirm the decision below under the two issue rule because of Appellants' failure to challenge the Court's alternative ground for dismissal?

2. Did the lower court correctly find that, as a matter of law, Half Moon owed no legal duty to the Appellants?

3. Does Appellants' suit violate the First Amendment by attempting to impose civil liability on protected speech?

STATEMENT OF THE CASE

In the evening of May 5, 2023, Robshane Rogers committed a traffic violation in the presence of a Richland County Sheriff's Department ("RCSD") deputy. When the RCSD deputy attempted to make a traffic stop, Rogers sped away and a high-speed car chase ensued, ending when Rogers ran a red traffic light and crashed into a vehicle driven by Appellant Ida Maeve Nordan, with her son Appellant Chip Eugene McCants, Jr. ("CJ") in the passenger seat. A film crew for the television program *On Patrol: Live* ("*OPL*"), produced by Respondent Half Moon, rode along with the arresting officer the night of the incident and passively filmed the attempted stop, car chase, collision, and efforts to secure the scene, all of which was featured in an episode of the program that night.

In the wake of this accident, Appellants brought claims for negligence and bystander liability against RCSD and Half Moon, seeking redress for injuries sustained following Rogers' collision with their vehicle. Half Moon – which did not take part in or encourage any of the efforts to stop Rogers' vehicle or the subsequent pursuit, crash, or aftermath – moved to dismiss. The

trial court held a hearing and subsequently granted the motion, correctly ruling that Half Moon owed Appellants no legal duty as a matter of law because Half Moon did not have a special relationship with the injurer and did not intentionally or negligently create the risk of injury to the Appellants. The trial court also separately ruled, as an independent ground for dismissal, that any injury to Appellants was not foreseeable to Half Moon. Appellants filed a Rule 59(e) motion, which the trial court denied, and this appeal ensued.

STATEMENT OF FACTS

A. The Accident

This lawsuit arises out of a car accident between Plaintiff and Robshane Rogers on May 5, 2023. (R. p. 17, ¶¶ 28, 38). Rogers had committed a traffic violation, which led an RCSD deputy to attempt to pull over Rogers' vehicle. *Id.* ¶ 30. After appearing to pull over, Rogers instead sped away, and the deputy pursued him. (R. p. 44 ("Clip 1") at 00:00-00:30[1]; *see* R. p. 17 ¶ 30). Rogers reached speeds "in excess of 85 mph," and then "Rogers ran through the red light at St. Andrews Road and SC 32-1791 and violently T-boned [Ms. Nordan]'s car," which "then struck a second vehicle on its front driver's side." (R. pp. 18-19, ¶ 38). While the pursuing deputy attempted to secure the scene and place Rogers under arrest, another officer rushed to Ms. Nordan's and her

[1] The portions of the May 5, 2023 episode of *OPL* depicting the incident, as it was telecast on Reelz, were attached as Exhibits 1, 2, and 3 to Half Moon's Motion to Dismiss and have been included in the appellate record. (R. pp. 44-46; *see* DVDs lodged with Court). This Court may consider the video footage, as did the court below, because it is incorporated by reference in the Amended Complaint. (R. pp. 16, 19, ¶¶ 14, 39); *see Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009). Moreover, Plaintiff did not object to the trial court's consideration of the video either below or on appeal, and any such argument is therefore forfeited. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *ABB, Inc. v. Integrated Recycling Grp. of SC, LLC*, 432 S.C. 545, 553, 854 S.E.2d 171, 175 (2021) ("[A] party cannot raise an issue for the first time in an appellate reply brief.").

son CJ's aid. (R. p. 44 (Clip 1) at 01:15-2:20).[2] Rogers was charged with multiple offenses, including failure to stop for a blue light resulting in great bodily harm, reckless driving, and driving with a suspended license.[3]

That evening, a crewmember from *OPL* had been riding in the vehicle with the deputy when Rogers fled and the deputy pursued. The encounter was filmed from the time of the attempted traffic stop through the aftermath of securing the scene, attending to Ms. Nordan and CJ, and placing Rogers under arrest. Video footage aired live on *OPL* that same evening, on a delay.

B. The Access Agreement

The *OPL* crewmember was riding along in the deputy's vehicle pursuant to a June 2022 Access Agreement between Half Moon and RCSD (the "Access Agreement").[4] The Access Agreement granted Half Moon access to film RCSD operations, subject to several terms. As relevant:

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[2] The FAC falsely alleges that, "[r]ather than attend immediately to her needs, the Sheriff's deputy took the time to give on-scene interviews with Live PD and/or On Patrol: Live." (R. p. 19, ¶ 42). This allegation is belied by the uncontested video footage, which shows an officer race to aid Ms. Nordan while the deputy who pursued Rogers is attempting to secure Rogers at gunpoint. R. p. 44 (Clip 1) at 01:15-02:20). Only after the scene was secure and the second officer was tending to Ms. Nordan and CJ did the pursuing deputy briefly address the *OPL* crew to explain what had happened, including that all parties were alert and that additional emergency medical services were on the way. (R. p. 45 ("Clip 2") at 2:10-2:56).

[3] *See South Carolina v. Rogers*, Case Nos. 2023A4010900051, 2023A4010900052, 2023A4010900053, 2023A4010900054, 2023A4010900055, 2023A4010900056, 2023A4010900057; https://www.scsolicitor5.org/wp-content/uploads/2023/10/Nov2023Firsts-revised.pdf (reflecting May 5, 2023 violation date for these cases); SCRE 201 (court may take judicial notice of facts "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). Plaintiff did not object to the introduction of this publicly available information before the trial court.

[4] Like the video footage, the Access Agreement may be considered on appeal because it is incorporated by reference in the FAC. (*See* R. pp. 15-16, ¶¶ 12-13, 15, 18). Appellants did not object to the trial court's consideration of the Access Agreement below and indeed clarify on appeal that they "take[] no exception" to it. Brief of Appellants at 5.

- *First*, "RCSD Personnel shall conduct themselves pursuant to RCSD policies governing on and off duty conduct. RCSD Personnel shall not make any law enforcement decisions, or take or not take, any law enforcement action due to the presence of [Half Moon] personnel in relation to the Series, and [Half Moon] shall be expressly prohibited from requesting RCSD Personnel make any law enforcement decisions, or take or not take, any law enforcement action due to [Half Moon]'s presence or in relation to the Series." (R. p. 47, § 3).

- *Second*, RCSD's review of the footage before it aired was "solely for the purpose of identifying . . . safety or security risks to RCSD" such as "recognition of a confidential informant, undercover officer, [or] how specific tactics are deployed." (R. p. 48, § 6). Half Moon retained ultimate editorial control: "[I]t is understood that [Half Moon and any television network for which [Half Moon] is producing the series [] shall, in their sole discretion, make the final decision regarding the content and editorial decisions for the Series and each episode thereof." *Id.*

- *Third*, the parties "expressly understood and agreed that [Half Moon]'s role in the Series is that of a neutral third-party documenting law enforcement activity. The parties do not by this Agreement intend to form an employment relationship or a partnership or joint venture between them and in no event shall this Agreement be construed to constitute such an employment relationship, partnership, or joint venture. RCSD and RCSD Personnel shall at all times continue to independently conduct their operations and activities as they customarily operate, without regard to, or as a result of, the filming, recording and production of the series." (R. p. 49, § 12).

- *Fourth*, Half Moon and RCSD "further acknowledge and agree that the parties are fully independent of one another and not collaborating in any capacity hereunder in connection with the Series or any law enforcement activities that occur while Producer is documenting the activities of RCSD or otherwise." *Id.*

The Agreement thus memorialized the self-evident proposition that Half Moon and RCSD operated independently of one another and neither RCSD nor Half Moon were permitted to meddle in or influence the activities of the other. Half Moon was there to record and telecast the actions of law enforcement personnel in Richland County to the viewing public and could not control or direct the activities of RCSD or any of its officers. RCSD, likewise, could not dictate what Half Moon could film or what would ultimately air on *OPL*.

C. Procedural History

Appellants filed the original Complaint in this action on December 14, 2023 against both RCSD and Half Moon. Appellants then filed the operative Amended Complaint ("FAC"),

substituting the Sheriff of Richland County in his official capacity for RCSD as Respondent. (R. p. 14). The FAC alleges two counts against both Respondents: a joint claim for negligence/gross negligence, and a claim for bystander liability on behalf of Plaintiff CJ Nordan.

The FAC does not allege that any action by any *OPL* crewmember played any role in RCSD's pursuit of Rogers's vehicle or the ensuing collision. Instead, the FAC makes only the conclusory and general allegation that "[s]hows like Live PD and/or On Patrol: Live encourage officers to engage in dangerous, high-risk police tactics because it makes for more entertaining television." (R. p. 17, ¶ 24; *see* R. p. 20, ¶ 49(c) (same)).

Half Moon moved to dismiss the FAC and submitted a memorandum of law in support of its motion, arguing that the FAC failed as to Half Moon because (1) Half Moon owed no special duty to Appellants, either through a special relationship with the injurer or through negligent or intentional creation of risk; (2) Appellants' injuries were not foreseeable to Half Moon; (3) Half Moon breached no duty to Appellants; and (4) the First Amendment barred the claims against Half Moon. (R. pp. 32-42). Plaintiff submitted no briefing in response to Half Moon's motion. At the hearing, the trial court asked the parties to file "proposed orders and any brief you want" within 20 days after the hearing. (R. p. 82 lines 2-6; R. p. 21, line 22-R. p. 22, line 3). Half Moon submitted a Supplemental Memorandum in Support of its Motion to Dismiss debunking Plaintiff's theory raised at oral argument that Half Moon owed a duty of care because it somehow negligently or intentionally created the risk that a criminal suspect would flee police and crash into a third party during law enforcement's pursuit of that suspect. (R. pp. 52-57). Appellants submitted a proposed order but again offered no briefing.

The trial court issued its decision on December 18, 2024, granting Half Moon's motion to dismiss. (R. pp. 1, 8). The court agreed with Half Moon that, as a matter of law, it did not owe a

duty to Appellants because (1) Half Moon had no special relationship with the injurer (whether Rogers or RCSD), and (2) Half Moon did not negligently or intentionally create any risk. (R. pp. 3-7). *First*, as to a special relationship, the court found that "accepting all well pleaded allegations as true, . . . [Appellants] fail to allege any facts supporting the kind of special relationship that can impose a duty over the actions of third parties like Rogers," and any "cases where a special relationship has arisen are readily distinguishable." (R. p. 4). And even "[t]o the extent [Appellants] allege that RCSD was the injurer, and Half Moon had a special relationship with RCSD by virtue of its Access Agreement, [Appellants'] claims still must fail" because the Access Agreement "makes clear that [Half Moon and RCSD] operated independently and that the parties bore no responsibility for each other's actions," such that "Half Moon had no legal or practical control over the actions of the officers who responded and assisted with the pursuit and arrest of Rogers." (R. pp. 4-5). The court cited as persuasive authority, a case involving the police ride-along television program, *Live PD*, in which a Texas court had rejected a similar argument even where the plaintiff had been injured "not by a fleeing suspect, but by the actual arresting officers," as opposed to the more "attenuated" circumstances here. (R. pp. 5-6).

Second, as to whether Half Moon negligently or intentionally created any risk: "Even if the Court accepts Plaintiff's allegations that the RCSD deputy on the scene acted negligently in his duties due to the presence of cameras—an allegation Half Moon contends is directly refuted by the footage of the incident—this does not impose a duty on Half Moon because it is Half Moon's actions that must be viewed to determine whether it negligently or intentionally created a risk of harm." (R. p. 6). Thus, "where Half Moon passively filmed police officers doing their jobs in the context of a documentary television show," this case was "vastly distinguishable from cases in which courts have found that a defendant negligently or intentionally created a risk." (R. pp. 6-7

(collecting cases)). Moreover, "generally alleging that the defendant acted with negligence is not sufficient" where, as here, "the plaintiffs' injuries are caused by a third party's criminal conduct." (R. p. 7 (citing *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246-247, 711 S.E.2d 908, 911-12 (2011))). "In sum, Half Moon did not, by virtue of the presence of cameras in RCSD squad cars, create a risk that RCSD deputies would take negligent actions outside the scope of their duties, and it cannot be held to have a duty to prevent the plaintiff from suffering injuries from Rogers or any of the RCSD responding officers." (R. p. 7).

Separately, and critically for this appeal, the trial court held that "the absence of foreseeability provides *an independent basis to dismiss the [Appellants'] negligence claim against Half Moon*," citing several cases in which courts found "media-related injuries unforeseeable in analogous negligence actions." (R. p. 7 n.5 (emphasis omitted)). The trial court further found that Plaintiff CJ's bystander liability claim against Half Moon fell with the negligence claim. (R. p. 7 & n.6).

Appellants moved for reconsideration, making the single argument that the trial court "incorrectly found as a matter of law that Half Moon did not create the risk." (R. p. 59). Appellants did not ask the court to reconsider its holding that Half Moon and Rogers had no special relationship, nor did they contest the dismissal being made with prejudice. And, most importantly, Appellants did not contest the court's alternative and "independent basis to dismiss" that the injury here was unforeseeable to Half Moon. (*See* R. p. 7 n.6). The trial court denied Appellants' motion for reconsideration in a Form 4 Order on June 25, 2025. (R. p. 10).

The instant appeal followed. In their brief, Appellants again do not contest the trial court's holding that Half Moon had no special relationship with Rogers, nor do they mention the trial court's independent holding that the Amended Complaint fails as to Half Moon for lack of a

foreseeable injury. As in their motion for reconsideration, Appellants argue only that the trial court was wrong to find that Half Moon did not negligently or intentionally create the risk of injury. *See* Brief of Appellants at 4-6.

STANDARD OF REVIEW

In reviewing a motion to dismiss, the Court "applies the same standard of review as the trial court." *Carolina Park Assocs. v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 877 (2012). Thus, in reviewing a dismissal under South Carolina Rule of Civil Procedure 12(b)(6) for failure to state facts sufficient to constitute a cause of action, this Court should affirm dismissal unless "the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to plaintiff, would entitle the plaintiff to relief on any theory." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

Notably, a plaintiff may not rest on unsupported inferences or legal conclusions to support her claims; South Carolina "retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules." *Paradis v. Charleston Cnty. Sch. Dist.*, 424 S.C. 603, 613, 819 S.E.2d 147, 153 (Ct. App. 2018) (citation omitted), *rev'd on other grounds*, 433 S.C. 562, 861 S.E.2d 774 (2021). And though the pleadings should be construed so as to "do substantial justice to all parties," this Court "will not, however, write into the pleadings allegations and defenses that are not presented." *Unisun Ins. v. Hawkins*, 342 S.C. 537, 541-42, 537 S.E.2d 559, 561 (Ct. App. 2000).

Moreover, while the Court relies "solely upon the allegations set forth in the complaint," *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004), it may also "consider documents that are incorporated by reference in the complaint but not actually attached thereto," so as to "prevent[] a plaintiff from benefiting from his own

oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based." *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).

ARGUMENT

This futile appeal should be rejected for three primary reasons. *First*, the trial court's ruling was based upon *two* separate and independent grounds, one of which Appellants fail to raise on this appeal. Specifically, Appellants wholly fail to address the trial court's holding that Appellants' injuries were not foreseeable to Half Moon. As Appellants do not seek to disturb that holding, any decision on legal duty—the sole basis for their appeal—their appeal runs into the two issue rule, and the trial court's decision must be affirmed.

Second, even if this Court could properly reach the question of legal duty, it is an easy one to resolve. The law is clear that there is no general duty to control the conduct of another or to warn a third person or potential victim of danger except in very limited circumstances. Appellants, however, ask this Court to impose upon Half Moon a legal duty to protect them from any injury inflicted when a third party committed a crime that resulted in a car accident with Appellants. Appellants argue that the presence of a cameraperson for Half Moon's television show, *On Patrol: Live* (*OPL*), in the car of the official who attempted to apprehend that criminal somehow created the risk that Appellants would be injured. This proposition is doomed by the caselaw and documents incorporated by reference into the Complaint. As the trial court properly held, Half Moon did not negligently or intentionally create the risk of injury to Appellants, and their claim must therefore fall.

Third, imposing civil liability here for protected speech such as *OPL* runs afoul of the First Amendment and risks chilling media (and entertainment) coverage of law enforcement and policing, to the detriment of the public interest.

Put simply, this case should never have been brought against Half Moon. Respondent respectfully requests that the Court affirm the trial court's decision.

I. Appellants failed to appeal the trial court's independent basis for dismissal, and thus, the two issue rule requires this Court to affirm.

As a threshold matter, this case must be affirmed under the two issue rule because Appellants do not appeal from an independently dispositive basis for dismissal. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)). Such is the case here: the trial court specifically held that "the absence of foreseeability provides an independent basis to dismiss the [Appellants'] negligence claim against Half Moon." (R. p. 7 n.6). Nowhere in Appellants' motion for reconsideration or their appellate brief do they contest this holding, which is fatal to their appeal.[5] Stated differently, even if this Court were to find that Half Moon owed Appellants a duty, *but see infra* § II, it would not affect the trial court's judgment, which would still stand because of its uncontested holding that there was no foreseeability. *See Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

[5] The passing reference in the conclusion of Appellants' brief to "police behavior which foreseeably ended in the injury of" Ida Nordan in no way constitutes an argument contesting the trial court's finding as to foreseeability. See Brief of Appellants at 8. Regardless, even if this single sentence is sufficient to overcome the two issue rule, Appellants have raised this issue in a conclusory manner, and therefore, the argument is abandoned. *Auto-Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 146, 781 S.E.2d 137, 142 (Ct. App. 2015) ("[W]hen a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal.").

Nor can Appellants rectify this dispositive mistake by raising the issue in their reply brief: they have forfeited any argument as to foreseeability both by failing to raise it below in their motion to reconsider and by failing to raise it in their opening appellate brief. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *ABB, Inc. v. Integrated Recycling Grp. of SC, LLC*, 432 S.C. 545, 553, 854 S.E.2d 171, 175 (2021) ("[A] party cannot raise an issue for the first time in an appellate reply brief."). Accordingly, the Court should end its analysis here and affirm the trial court's decision.

II. The Amended Complaint must be dismissed because Half Moon did not owe Appellants a duty of care as a matter of law.

Even if this Court reaches the question of whether Half Moon owed Appellants a duty of care, Appellants' argument fails. As the trial court correctly held, Half Moon owed Appellants no duty of care.

Appellants' negligence claim requires them to sufficiently plead (1) that Half Moon owed Appellants a legal duty, (2) that Half Moon breached that duty, and (3) that the breach proximately caused the Appellants' alleged injuries. *Bailey v. Segars*, 346 S.C. 359, 366, 550 S.E.2d 910, 913 (Ct. App. 2001). As Appellants acknowledge, "[t]he absence of any one of these elements"—here, the duty of care—"renders the cause of action insufficient." Brief of Appellants at 2; *see Doe v. Batson*, 345 S.C. 316, 322-23, 548 S.E.2d 854, 857 (2001) (noting the "existence of a legal duty of care owed by the defendant to the plaintiff" is an "essential element"). And as Appellants themselves state, "[t]he existence of a duty owed is a question of law for the courts." Brief of Appellants at 2; *see Washington v. Lexington Cnty. Jail*, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999).

Appellants concede that "[u]nder South Carolina law there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." Brief of Appellants at 2; *see Doe ex rel. Doe,* 393 S.C. at 246, 711 S.E.2d at 911; *Faile v. S.C. Dep't of Juv. Just.*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). In other words, "a person usually incurs no liability when he fails to take steps to protect others from harm not created by his own wrongful conduct." *Est. of Parrott v. Sandpiper Indep. & Assisted Living-Del., LLC*, 443 S.C. 405, 417, 904 S.E.2d 455, 462 (Ct. App. 2024) (citation omitted). Few exceptions to that rule exist, and Appellants invoke only one, claiming that Half Moon "negligently or intentionally create[d] the risk." *Doe ex rel. Doe,* 393 S.C. at 246-57, 711 S.E.2d at 911-12; *see* Brief of Appellants at 4-6. But this is an exceedingly narrow exception to the general rule, and Plaintiff's broad interpretation of that exception as applied to Half Moon would swallow the rule if adopted by this Court.

The trial court correctly held that, "[e]ven viewing the facts here in the light most favorable to [Appellants]," Appellants had alleged no actions *by Half Moon* that would negligently or intentionally "create[] a risk of the pursuit and crash by virtue of filming RCSD for an episode on *OPL*." (R. p. 6 (emphasis added)). Importantly, "it is *Half Moon's actions* that must be viewed to determined whether it negligently or intentionally created a risk of harm." *Id.*; *see, e.g.*, *Montgomery v. Nat'l Convoy & Trucking Co.*, 186 S.C. 167, 179, 195 S.E. 247, 252 (1938) (finding trucking company's *own* conduct of having a truck stuck along the roadway created a risk of harm to passing motorists); Restatement (Second) of Torts § 321(1) ("If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect."); *Faile,* 350 S.C. at 334, 566 S.E.2d at 546 (citing Restatement (Second) of Torts § 321(1)). Appellants do not challenge this principle on appeal.

Indeed, Appellants appear to acknowledge that they must find some action on behalf of Half Moon, but in attempting to do so, they fall well short. Appellants suggest that the FAC sufficiently alleges that Half Moon created the risk "through the encouragement and promotion of aggressive policing." Brief of Appellants at 4; *see id.* at 7 (arguing the trial court's statement that Half Moon "passively filmed" RCSD was in error because "the presence of the camera alone screamed 'go, go, go!'").[6] In support, Appellants point to two general allegations in the FAC: first, that "Half Moon and its television show creates celebrities out of peace officers – or at least out of those who provide entertaining policing," (R. p. 16, ¶ 17), and second, that "[s]hows like Live PD and/or On Patrol: Live encourage officers to engage in dangerous, high-risk police tactics because it makes for more entertaining television," (R. p. 17, ¶ 24). Appellants argue that the lower court should have given these allegations more credence, Brief of Appellants at 5, but there is no basis for doing so: they are belied by both the video footage and the Access Agreement, which are both properly considered at this stage, *see supra* pp. 2 n.1, 3 n.4. The uncontested video footage shows zero involvement by the cameraperson throughout the traffic stop, the chase (initiated by Rogers), and the crash. And the Access Agreement confirms that Half Moon and RCSD each specifically agreed that they would not influence the other's performance of their duties or allow their own actions to be influenced by the presence of the other. *Supra* pp. 3-4. As

[6] While Appellants now argue that Half Moon "knowingly" created the risk, Brief of Appellants at 6, that argument is not preserved for appeal since Appellants argued below that "Half Moon *negligently* created a risk of the pursuit and crash." (R. p. 6 (emphasis added)). And with good reason—as explained *infra* pp. 12-16, the FAC's allegations do not even make out a claim of negligence, let alone intent. The FAC is entirely devoid of allegations that Half Moon *intended* to create a risk of injury to Appellants, and Appellants make no sincere argument to that effect on appeal. Relatedly, Appellants appear to have abandoned any pretense that Half Moon acted with gross negligence. (R. p. 20, ¶ 48).

the trial court properly found, "Half Moon passively filmed police officers doing their jobs." (R. p. 6). No other conclusion is permissible given the uncontroverted facts.

Moreover, the trial court correctly concluded that "where, like here, the plaintiffs' injuries are caused by a third party's *criminal* conduct, generally alleging that the defendant acted with negligence is not sufficient." (R. p. 7). The South Carolina Supreme Court case of *Doe ex rel. Doe*, 393 S.C. at 248, 711 S.E.2d at 912, affirms this principle and is on point here. There, the aunt of an allegedly abused child attempted to develop pictures of suspected signs of abuse through a Wal-Mart photo center, and Wal-Mart both refused to develop the photos because they depicted nudity and failed to report the alleged abuse under a state statute requiring certain professionals to report suspected abuse. *Id.* at 242-43, 711 S.E.2d at 909-10. The Supreme Court found clearly that "Wal-Mart did not negligently or intentionally create the risk of the [child's] father's sexual abuse." *Id.* at 247-48, 711 S.E.2d at 912. Indeed, in that case, an employee had *violated* Wal-Mart's "internal policy . . . [by] destroy[ing] the photos and . . . not inform[ing] the store manager or keep[ing] them as evidence," and even that did not give rise to a duty. *Id.* at 248, 711 S.E.2d at 912. Likewise, here, Half Moon did not create the risk of Rogers's criminal and destructive behavior. And unlike in *Doe ex rel. Doe*, there is no allegation that Half Moon violated the relevant agreement—here, the Access Agreement—which specifically prohibited Half Moon from participating or interfering in policing activities, *see supra* pp. 3-4.

Appellants' theory that Half Moon's mere presence created a legal duty is problematic for another reason. Appellants contend that Half Moon's mere presence *also* constituted the breach of that duty *and* was the cause of Appellants' injuries. (*See* R. p. 20-21, ¶ 49(c), (g)). Thus, merely by being present and filming, Half Moon would have fulfilled all elements of the tort—filming

equals strict liability for any harm to third parties, in Appellants' view. This is not and cannot be the law.

Appellants also take issue with the trial court's treatment of the Access Agreement and further urge this Court to consider a licensing agreement that was not mentioned in the trial court's decision. Brief of Appellants at 5. At the outset, the trial court did not mention the Access Agreement when finding that Half Moon did not create the risk—it discussed the Access Agreement only when finding Half Moon had no special relationship with RCSD or Rogers—a holding Appellants do not challenge on appeal.[7]

In any case, Appellants' argument as to the licensing Agreement fails. Appellants contend that the licensing agreement is incorporated by reference in the FAC, and that the trial court purported to "resolv[e] factual inconsistencies between the Agreements." *Id.* The record below, however, belies Appellants' argument. The FAC contains no allegations regarding the licensing agreement. Half Moon objected to the consideration of the licensing agreement on that basis, Appellants submitted no briefing in reply to Half Moon's argument, and the trial court correctly did not refer to the licensing agreement in its opinion and order.[8] (*See* R. p. 57 n.3). But even if

[7] As to the Access Agreement, Appellants "take[] no exception to the lower court reviewing" the Access Agreement, acknowledging it is "incorporated by reference in the complaint." Brief of Appellants at 5. This is consistent with their position below, where they did not object to the court considering the Access Agreement.

[8] The trial court never mentioned the licensing agreement in its order, so it is impossible for the court to have resolved any purported inconsistencies between the two agreements. Further, any argument concerning the license agreement is unpreserved because the trial court did not purport to rely on that agreement and Appellants failed to seek reconsideration on that ground. *See*, *e.g.*, *Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80 ("Issues and arguments are preserved for appellate review only when they are raised to *and* ruled on by the lower court." (emphasis added)); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.").

this Court were to consider the licensing agreement, Appellants have grossly mischaracterized that agreement's contents and its significance, and the agreement has no relevance to the questions of a duty of care or foreseeability. *Id.*

Finally, in a three-sentence bullet point, Appellants take issue with the trial court's statement that "Half Moon had no . . . ability to influence Rogers, who is the one that fled RCSD and collided with [Appellants'] vehicle." (R. p. 6); *see* Brief of Appellants at 6 ("The Amended Complaint asserts repeatedly that the "ability to influence" existed in the mere presence of the cameras, in the financial incentive to create entertaining content and in the allure of fame."). This conclusory argument, which is devoid of any legal authority, should be ignored by this Court. *See Auto-Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 146, 781 S.E.2d 137, 142 (Ct. App. 2015) ("[W]hen a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal."). Even if considered on its merits, this argument is perplexing for two reasons: First, this finding was part of the trial court's decision as to whether Half Moon had a special relationship with either Rogers or RCSD, an issue Appellants do not raise on appeal (and thus have forfeited). This finding has nothing to do with the only issue Appellants *do* raise, *viz.*, the creation of risk. Second, not even the most favorable inference could make the leap between Appellants' allegation that Half Moon's presence encouraged *RCSD* to pursue a fleeing suspect and *the suspect's* decision to avoid arrest, given that the FAC does not make the (highly implausible) allegation that Rogers, the one who decided to flee a traffic stop and exceed speeds of 85 miles per hour, was aware of the cameras *in the deputy's squad car*.

III. The First Amendment bars the claims against Half Moon.

The First Amendment to the United States Constitution independently bars each of the Appellants' claims against Half Moon. This Court may, in its discretion, "affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c),

SCACR. Half Moon made this constitutional argument below (R. pp. 40-42), and it is therefore appropriate as an independent ground for affirmance. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (explaining that a court may affirm, but not reverse, for any reason in the record).

The First Amendment provides immunity from many civil actions when speech protected by the Constitution is at issue. Allowing the Appellants' claims against Half Moon to proceed would no doubt lead to self-censorship, which would "dampen the vigor and limit the variety of public debate." *Davidson v. Time Warner, Inc.*, No. Civ.A. V–94–006, 1997 WL 405907, at *17 (S.D. Tex. Mar. 31, 1997) (citation omitted). "First Amendment analysis must be applied to civil suits [for] negligence" because "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at *15 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 277 (1964)); *see also Olivia N. v. Nat'l Broad. Co.*, 126 Cal. App. 3d 488, 494 (Cal. Ct. App. 1981) (recognizing that "the chilling effect of permitting negligence actions for a television broadcast is obvious"). Allowing such claims would also infringe on the media's exclusive right over editorial decisions and would likewise violate the viewing public's "right . . . to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Columbia Broad. Sys. v. Democratic Nat. Comm.*, 412 U.S. 94, 102 (1973).

These principles are particularly applicable here, where Appellants' read of the law would shutter any television program depicting real law enforcement activities, for fear of liability arising from law enforcement's or suspected criminals' independent actions. This kind of self-censorship is exactly the kind of restraint on First Amendment rights the U.S. Supreme Court warned against when it prohibited the imposition of civil liability for non-defamatory publications. *See*, *e.g.*, *Sullivan*, 376 U.S. at 277; *see also Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009) ("Where,

as here, the First Amendment is implicated by the assertion of tort claims arising from speech, we have the obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." (cleaned up)), *aff'd*, 562 U.S. 443 (2011). This chilling effect would make media wary of filming law enforcement, which in turn would harm public awareness of law enforcement and policing, and limit public debate on those important issues.[9] This result cannot be tolerated.

CONCLUSION

For the foregoing reasons, Half Moon respectfully requests that this Court affirm the ruling of the trial court.

Respectfully submitted,

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[9] Even if this Court accepts Appellants' narrow characterization of *OPL* as an "entertainment program," that does not change the First Amendment analysis here. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news.")

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