THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Charles J. McCutchen, Circuit Court Judge

Civil Action No. 2024-CP-38-00640
Appellate Case No. 2025-001629

Owl Labs, Inc. ..... Appellant,

v.

Orangeburg County School District ..... Respondent.

BRIEF OF APPELLANT OWL LABS, INC.

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STATEMENT OF THE CASE

This appeal arises from Respondent Orangeburg County School District's ("District") failure to fully pay Appellant Owl Labs, Inc. ("Owl Labs") for electronic devices supplied by Owl Labs to the District for remote learning in its classrooms during the COVID-19 Pandemic. Owl Labs commenced this action on September 23, 2022, asserting claims including: (i) breach of contract, (ii) unjust enrichment/quantum meruit/quasi contract, (iii) negligent supervision and retention, and (iv) negligence. Owl Labs seeks recovery of compensatory damages and contractual attorneys' fees and costs.

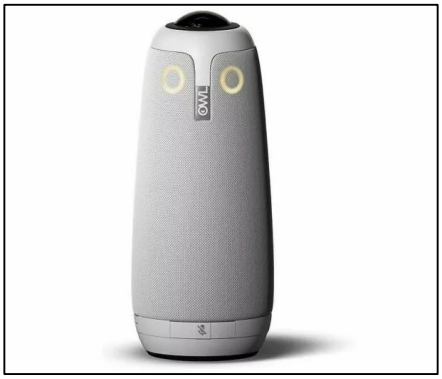
The District moved for summary judgment on November 11, 2024, and filed a supporting memorandum on March 5, 2025. Owl Labs filed a memorandum in opposition on March 6, 2025. The circuit court conducted a virtual hearing on March 13, 2025.

By order dated June 6, 2025, the circuit court granted summary judgment in favor of the District on Owl Labs' claims for negligence, negligent supervision and retention, and its request for attorneys' fees. The circuit court denied summary judgment to the District as to Owl Labs' claims for the breach of contract and quantum meruit. Both parties subsequently filed motions to reconsider, which the circuit court denied by separate orders dated July 15, 2025.

On August 14, 2025, Owl Labs timely filed its notice of appeal, challenging the circuit court's grant of summary judgment on its tort claims and its denial of attorneys' fees.

STATEMENT OF FACTS

Owl Labs is the manufacturer of an audio/video conferencing device called the "Meeting Owl Pro" (the "Device"). The Device features a WiFi-enabled, portable 360° camera, microphone, and speaker that automatically focuses on the active speaker using proprietary technology. (R. at 283 (Smith Dep. 23:15-24:3).) In 2020, amid the COVID-19 Pandemic and widespread remote learning, demand for the Devices surged. (R. at 281 (Smith Dep. 16:25-17:18, 26:20-25); *see also* R. at 293 (McNamara Dep. 29:6-15).)



At the beginning of the 2020 school year, South Carolina schools, including the District, relied on remote learning. The District's Director of Technology, Eric Ham, was tasked with procuring technology for remote learning, using CARES Act funds, and locating a source for purchasing the Devices. (R. at 306-07 (Ham Dep. 59:7-62:17); R. at 321, 323, 334, 337 (Foster Dep. 36:13-19, 41:24-42:5, 84:15-86:9, 98:14-100:2); R. at 355-56 (Gist Dep. 51:24-52:12).) Ham was familiar with Owl Labs' Devices, specifically, because Orangeburg-Calhoun Technical College had purchased them and let the District borrow a couple Devices. (R. at 307 (Ham Dep. 61:4-23).)

After deciding to purchase the Devices, Superintendent Foster and others testified they believed Ham was communicating directly with an "approved" vendor, named Level 8 Communications, LLC ("Level 8"), but that was not the case. (R. at 325, 328 (Foster Dep. 51:9-

21, 64:13-18); R. at 353, 355 (Gist Dep. 28:9-20, 48:14-19).) Instead, Level 8 was *never* an approved vendor; something the District did not discover until more than five months later in March 2021, and *after* its transaction with Owl Labs was complete. (R. at 328-29 (Foster Dep. 64:19-65:3, 66:19-23).) In addition, Ham was not communicating with *any* vendor—approved or otherwise. (R. 308 (Ham Dep. 65:21-66:19).) Instead, Ham was "approached" by his subordinate, David Marshall, the District's Media Communications Specialist, who claimed he could procure the Owl Labs Devices from Level 8. (R. at 302 (Ham Dep. 28:3-7).) Ham delegated his authority to Marshall, by permitting him to communicate with Level 8 about the Devices. (R. at 302-03, 308 (Ham Dep. 28:4-19, 34:13-35:6, 65:21-66:19).)

Ham admitted he allowed Marshall to communicate with third party vendors. (R. at 308 (Ham Dep. 65:13-67:14).) Ham characterized this course of dealing with Marshall as *typical*: "I think it's safe to say that folks [at the District] knew that they could ask . . . Marshall to get or to find out things[.]" (R. at 308 (Ham Dep. 67:11-14).) The District's Director of Finance, Gail Sanders, confirmed she also knew Marshall was responsible for ordering the Devices. (R. at 365 (Sanders Dep. 42:23-43:16).) Another District employee, Daphne Walley testified Marshall regularly made recommendations to District employees related to procurement. (R. at 370 (Walley Dep. 23:8-18).)

Despite claiming to Ham that he could source the Devices through Level 8, on October 23, 2020, Marshall directly contacted Owl Labs via its website, using his District email address, and requested a quote for 875 Devices on the District's behalf. (R. at 447; *see also* R. at 285 (Smith Dep. 29:23-30:7).) Owl Labs' sales employee, Bill Smith, received the email and verified Marshall's credentials, including checking Marshall's LinkedIn account and speaking with Marshall by phone. (R. at 285-86 (Smith Dep. 30:8-15, 31:9-32:24, 34:23-35:3).) During the call,

Marshall confirmed that the District wanted to order Owl Labs' Devices using CARES Act funds. (R. at 285 (Smith Dep. 30:16-22).)

By follow-up email, Marshall, using his District email address, informed Owl Labs:

> On Fri, Oct 23, 2020 at 3:05 PM David Marshall <david.marshall@ocsdsc.org> wrote:
> Hey Bill,
>
> We were able to work out the purchasing issue, so we can purchase directly through you. Can you please give me the quantity discount for the regular Meeting Owl? They want to see both options.
>
> Thanks,
> David
>
> **David Marshall**
> Communications, Business & Community Partnerships
> Phone (816) 830-0064
> Email david.marshall@ocsdsc.org
> **Orangeburg County School District**

(R. at 405.) In response, Owl Labs sent the District a quote for 875 Devices at a discounted price of $819.18 per unit (18% off the regular price of $999 each).[1] (*See* R. at 405-08.) Owl Labs requested a purchase order from the District to proceed. (R. at 411.) Based on these communications, Owl Labs believed it was negotiating with the District; not Marshall individually.

On October 28, 2020, Marshall sent a purchase order to Owl Labs using his District email address. (R. at 409, 411; *see also* R. at 288 (Smith Dep. 44:4-14).) The Purchase Order appeared to be signed by Greg Twitty, the District's Procurement Coordinator. (R. at 409; R. at 288-87 (Smith Dep. 44:4-45:9); *see also* R. at 389 (Meltzer Dep. 25:18-26:20).)

Shortly after receiving the District's Purchase Order, Owl Labs realized it inadvertently failed to include freight costs in the quote. The District, through Marshall, immediately objected:

> We simply cannot add any other charges to the invoice. The CARES Act funds were divided up to the penny, and every resource has been used to fund these devices for

[1] This discounted rate saved the District a total of $157,342.50.

> our teachers. Your PO was issued today, although with 16 others that we're working with for other products using these funds. ... [A]dding this [cost] post-agreement is entirely unacceptable. Who's to say that you won't add any other charges before shipping? I can't fathom this. So the question is: Will you fulfill the order as quoted or not?

(R. at 432; *see also* R. at 295-96 (McNamara Dep. 40:12-42:18).) Based on Marshall's communication, and representations of hardship on behalf of the District, Owl Labs agreed to waive the freight and shipping costs.[2] (R. at 431.)

In later emails, the District insisted that Owl Labs expedite shipping of the Devices, indicating it would "risk losing [CARES Act] funding" if it did not receive the Devices by December 2, 2020. (R. at 437-38.) Superintendent Foster testified he personally asked to expedite shipment of the Devices. (R. at 337 (Foster Dep. at 100:10-17).) Marshall relayed that District directive to Owl Labs, which complied with the request. (R. at 411, 437; *see also* R. at 287 (Smith Dep. 37:13-23) ("[I]t was pretty consistent with what we were hearing with the CARES Act. I know most folks needed product in hand before the end of December, so [this request from Marshall] was ... ordinary.").)

[2] The District saved an additional $3,000 in freight costs.

Then, Marshall informed Owl Labs:

---------- Forwarded message ---------
From: **David Marshall** <david.marshall@ocsdsc.org>
Date: Thu, Oct 29, 2020 at 8:47 AM
Subject: Re: Orange County School District -- Owl Labs Follow up
To: Bill Smith <bill@owllabs.com>

Hi Bill,

I found out that we're not tax exempt, as an organization, but finance is not often wrong with their documents. They told me that we're able to be exempt for this specific purchase under form ST-8 under the South Carolina DOR. I've attached it below.

David Marshall
Communications, Business & Community Partnerships
Phone (816) 830-0064
Email david.marshall@ocsdsc.org
Orangeburg County School District

(R. at 410.)

Marshall provided Owl Labs with a South Carolina Department of Revenue Exemption Certificate, which appeared to bear Twitty's signature. (R. at 412-13; *see also* R. at 289 (Smith Dep. 46:14-47:3).) In response to receiving the Purchase Order from the District that matched Owl Labs' quote as well as a tax exemption certificate, both of which appeared to be signed by District's Procurement Coordinator (Twitty), Owl Labs generated Invoice No. 19327, which it sent to the District on October 29, 2020. (R. at 389 (Meltzer Dep. 27:19-28:29:9); R. at 414-15.)

Owl Labs first received a "test payment" of $100 from what it believed to be the District, which Marshall had informed them would come through before the purchase price could be made. (R. at 435; *see also* R. at 397 (Gaughan Dep. 37:19-38:9).) After Owl Labs confirmed receipt of the test payment, and as required by the Purchase Order, on November 12, 2020, Owl Labs received half of the purchase price, $358,391.25, by wire from "Orangeburg County Purchasing," which Owl Labs reasonably believed came from the District. (R. at 399-400 (Radovan Dep. at

20:9-21:7); R. at 445.) Owl Labs confirmed receipt of the money. (R. at 428.) Consequently, Owl Labs shipped all 875 Devices to Ham at the District's warehouse location.

After the District received the Devices, on November 19, 2020, and before the second half of the purchase price was paid by the District to Owl Labs, Marshall introduced Owl Labs by email to other District employees, including its Assistant Superintendent for Curriculum and Instruction, Dr. Andress Carter-Sims. (R. at 419.) Additionally, on December 3, 2020, Owl Labs sent a DocuSign agreement to Ham for Device registration, which Ham reviewed and electronically signed. (R. at 468, 470.)

On December 3, 2020, at least four District employees[3] received an email thread that, if reviewed in full, revealed:

(1) the Devices were purchased by Marshall from Owl Labs using his District email;

(2) Marshall negotiated with Owl Labs beginning in late October 2020;

(3) Owl Labs requested a purchase order from Marshall;

(4) Owl Labs agreed to discounted pricing and waiver of freight and shipping costs;

(5) Owl Labs agreed to expedite shipping;

(6) Marshall sent to Owl Labs a tax exemption form on behalf of the District;

(7) Marshall indicated a "test transaction" of $100 was sent to Owl Labs and Owl Labs' confirmation of receipt of the test payment;

(8) Marshall stated that the first half of the payment would be paid by the District;

(9) Marshall requested expedited shipping;

(10) Marshall stated that $300,000 was sent to Owl Labs; and

(11) Marshall assured the remaining balance would be paid by District.

[3] Assistant Superintendent Andress Carter-Sims, Quencenia Dantzler, Taphnie Sanders, and Eric Ham.

(R. at 310-11 (Ham Dep. 79:4-82:24); R. at 342 (Foster Dep. 117:8-118-19); R. at 467, 473-79.) These communications were received by the District *before* it paid any money to Level 8.

On January 6, 2021, Ham contacted Owl Labs for assistance in setting up the Devices. (R. at 466.) In response, Owl Labs indicated it had "a previous email exchange with David Marshall," which neither Ham nor any other District employee appears to have investigated. (*Id.*) As noted above, the District had received an email thread as early as December 3, 2020, which would have revealed the scope of Marshall's involvement in procuring the Devices from Owl Labs, not Level 8. This email with Ham referring to the earlier communications between Owl Labs and Marshall also occurred *before* the District's second, and final, payment to Level 8.

Owl Labs then began sending several emails to Marshall inquiring about the balance on the invoice. (R. at 440-41; *see also* R. at 397 (Gaughan Dep. 39:5-25).) Marshall initially cited logistical issues for the District's delayed payment. First, he stated the District was unable to pay because it was working remotely and could not issue a wire off-campus. (R. at 441.) Second, he claimed the District had "suffered from a cryptocurrency attack" and was "consulting with our district lawyers[.]" (R. at 440.)

On May 21, 2021, Owl Labs wrote again to the District to remind it of the outstanding invoice. (R. at 436; *see also* R. at 399 (Radovan Dep. 17:6-18:21).) On June 9, 2021, District bookkeeper, Daphne Walley, contacted Owl Labs. (R. at 371-73 (Walley Dep. 26:2-7, 31:16-32:10).) Owl Labs provided documentation of its communications with Marshall. (R. at 427-34.) It was only then that the District allegedly realized that Marshall had misrepresented the transaction, leading the District to believe that the Devices were from Level 8, when in fact he had procured them from Owl Labs.

On June 15, 2021, Owl Labs' Director of Revenue, Narayan Krishnan, and Superintendent

Foster confronted Marshall in a Zoom meeting, during which Marshall confessed to taking the remaining purchase funds from the District. (R. at 326 (Foster Dep. 53:3-54:5); R. at 404 (Krishnan Dep. 26:8-14, 27:23-28:6).) Marshall was indicted in the U.S. District Court for the District of South Carolina on December 8, 2021, and convicted on June 8, 2022. *U.S. v. Marshall*, No. 5:21-cr-00841-MGL. The federal court sentenced Marshall to 33 months in prison and ordered full restitution. Marshall has since been released from prison, but Owl Labs remains unpaid.

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Rule 56(c), SCRCP, provides that summary judgment is only appropriate if the pleadings and other supporting documents "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." Rule 56(c), SCRCP. The Court is not to weigh the evidence. *See S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). "[W]here further inquiry into the facts of the case is desirable to clarify the application of the law," summary judgment is not appropriate. *Lord v. D & J Enterprises, Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) (citation omitted).

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001); *see also BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). In determining whether to grant summary judgment, the Court must view the evidence and its reasonable inferences in the light most favorable to the nonmoving party. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

"If triable issues exist, those issues must go to the jury." *BPS, Inc.*, 362 S.C. at 325, 608 S.E.2d at 158 (citations omitted). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Id.* at 325-26, 608 S.E.2d at 159 (citations omitted).

ARGUMENTS

The circuit court erred in granting summary judgment by resolving genuine factual disputes in the District's favor and failing to view the evidence in the light most favorable to Owl Labs, as required by Rule 56. The record demonstrates the District (1) knew of Marshall's criminal history; (2) failed to train or supervise him and other employees regarding procurement; (3) vested Marshall with authority (actual, apparent, or implied) to contract for the Devices; (4) knew of Owl Labs' involvement in the transaction; and (5) retained and used 875 Devices without payment. These facts create material disputes regarding the District's negligence and liability in tort (in addition to contract and equity) for the $358,391.25 owed, plus interest, attorneys' fees, and costs.

More specifically, the circuit court's ruling rests on the flawed premise that any duty owed by the District could arise only from the disputed contract. But South Carolina law recognizes multiple duties that exist independently of contract, including when a defendant voluntarily undertakes a duty or negligently creates a risk, an employer's duty to exercise reasonable care in retaining and supervising employees, and vicarious liability under agency and *respondeat superior* for acts within the scope of employment. The evidence in this case implicates these theories, creating genuine factual disputes regarding knowledge, foreseeability, authority, scope of employment, and ratification.

Although the existence of a duty is typically a question of law for the Court, South Carolina authority recognizes that, in certain cases, the question may depend on disputed factual issues that

must be resolved by a jury. *See Carson v. Adgar*, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997) ("In some circumstances, however, the question of whether a duty arises depends on the existence of particular facts. Where the existence or non-existence of a duty depends on facts, it is the duty of the court to instruct the jury as to the defendant's duty, or absence of duty, if either conclusion as to the facts is reached."); *see also* 57A Am. Jur. 2d Negligence § 75 ("Where the facts upon which the existence of a duty depends, are disputed, the factual dispute is for resolution by the jury[.]").

South Carolina courts have repeatedly held that when factual issues exist regarding whether a defendant voluntarily undertook a duty or otherwise assumed a duty of care, the existence of that duty becomes a mixed question of law and fact. *See Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 219, 826 S.E.2d 285, 294 (2019) ("We conclude there are questions of fact that a jury must resolve to ascertain whether a duty of care arose in this case."); *Vaughan v. Town of Lyman*, 370 S.C. 436, 447–48, 635 S.E.2d 631, 637–38 (2006) (holding summary judgment was inappropriately granted where a genuine issue of fact existed on the question of a duty); *Johnson v. Jackson*, 401 S.C. 152, 160, 735 S.E.2d 664, 668 (Ct. App. 2012) (citations omitted) (reversing summary judgment where a genuine issue of material fact existed as to whether the defendant assumed a duty of due care).

This case presents precisely the type of factual questions that render summary judgment improper. In *Doe v. ATC, Inc.*, this Court observed that the elements of negligent hiring and retention (employer's knowledge and foreseeability of harm) are inherently factual inquiries, and such factual considerations "will ordinarily be determined by the factfinder, and not as a matter of law." 367 S.C. 199, 206, 624 S.E.2d 447, 450 (Ct. App. 2005). Those same factual questions are present here, where the scope and existence of any duty turn on disputed evidence regarding what the District knew, whether it was a volunteer with respect to procurement matters, what risks posed

by its employees were foreseeable to it, and the nature of its conduct in light of that knowledge. These disputed facts make the existence of a duty a mixed question of law and fact that should have been submitted to the jury rather than decided as a matter of law on summary judgment.

Regardless of whether the existence of a duty is characterized as a question of law for the court or, under the circumstances here, a mixed question of law and fact for the jury, the circuit court's analysis was fatally incomplete. The circuit court's order rested entirely on the contractual relationship between the parties and failed to acknowledge or consider that additional duties of care—as alleged by Owl Labs—may arise independently of, or in addition to, contractual obligations. By focusing merely on the contract and omitting any analysis or consideration of whether a common law or assumed duty existed, the circuit court effectively foreclosed an entire category of potential liability recognized under the law and thus erred as a matter of law.

The circuit court also erred in granting summary judgment on Owl Labs' request for attorneys' fees where the existence and terms of the agreement remain disputed and where fees are a remedy sought on continuing claims, not a freestanding cause of action.

On this record, summary judgment should not have been entered.

I. The Circuit Court Erred in Granting Summary Judgment on Owl Labs' Claims for Negligence and Negligent Supervision and Retention Where the Record Supports Duties Independent of Contract.

The circuit court granted summary judgment on Owl Labs' two tort-based claims for negligence and, separately, negligent supervision and retention, by concluding that any duty the District may have owed to Owl Labs arose solely from the alleged contract. (R. at 6-7.) That conclusion misstates South Carolina law and ignores evidence establishing genuine issues under multiple independent duty theories. First, the District owes Owl Labs a legal duty because it voluntarily undertook a duty to follow the Procurement Code and negligently created the risk to

Owl Labs. Second, the District owes direct employer duties to hire, retain, train, and supervise its employees with reasonable care. Third, the District owes vicarious liability under principles of agency and *respondeat superior*.

The circuit court's ruling improperly invaded the jury's province by resolving quintessential factual issues, such as knowledge, foreseeability, authority, scope of employment, and ratification. *E.g.*, *ATC, Inc.*, 367 S.C. at 206, 624 S.E.2d at 450 (explaining factual consideration in negligent hiring and retention cases related to foreseeability of harm and knowledge of the employer will ordinarily be determined by the factfinder, and not as a matter of law (citations omitted)); *Murphy v. Jefferson Pilot Commc'ns Co.*, 364 S.C. 453, 463, 613 S.E.2d 808, 813 (Ct. App. 2005) ("The issues of agency relationship and scope of employment are generally for the jury." (citations omitted)); *Barber v. Carolina Auto Sales*, 236 S.C. 594, 599, 115 S.E.2d 291, 294 (1960) ("Whether or not there has been a ratification of an unauthorized act by acceptance or retention of benefits thereof is usually a question of fact for the jury and not one of law for the court." (citations omitted)).

South Carolina recognizes that tort duties may exist independent of contractual privity. In *Degenhart v. Knights of Columbus*, the Supreme Court held an employer may owe a duty "sounding in tort and not in contract" to a non-privity plaintiff when the employer's relationship with its employee places that plaintiff at a foreseeable risk. 309 S.C. 114, 117, 420 S.E.2d 495, 496 (1992); *see also Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 645 n.2, 598 S.E.2d 717, 723 n.2 (2004) (clarifying that such a duty may render the employer liable for torts committed by the employee in the scope of employment).

Indeed, "[a] tort-feasor may be subjected to tort liability for injury to a third party arising out of the tort-feasor's contractual relationship with another, despite the absence of privity between

the tort-feasor and the third party," and that liability "exists independently of contract, and rests upon the tort-feasor's duty to exercise due care." *Shaw v. Psychemedics Corp.*, 426 S.C. 194, 198, 826 S.E.2d 281, 283 (2019) (quoting *Barker v. Sauls*, 289 S.C. 121, 122, 345 S.E.2d 244, 244 (1986)). That common law duty includes the duty to avoid harm to foreseeable plaintiffs. *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004).

Most recently, the Court reiterated that "if a party breaches a duty independent of his contractual obligations, a tort remedy is allowed," absent a valid, enforceable exclusion. *Carroll v. Isle of Palms Pest Control, Inc.*, 446 S.C. 177, 187–89, 918 S.E.2d 532, 537–38 (2025) (clarifying the applicability of the economic loss rule). South Carolina's duty analysis is policy-driven and fact-sensitive. *See Shaw*, 426 S.C. at 198, 826 S.E.2d at 283 (quoting *Araujo v. S. Bell Tel. & Tel. Co.*, 291 S.C. 54, 57–58, 351 S.E.2d 908, 910 (Ct. App. 1986)).

Even the circuit court's Order acknowledged that Owl Labs alleged the District "failed to supervise one or more employees and failed to train its employees and [failed to] enforce its policies regarding procurement, which resulted in [Owl Labs'] damages." (R. at 3.) These allegations invoke the District's independent tort duties, including duties of reasonable care in retention and supervision of its employees, as well as its vicarious liability. The evidence shows there are questions for the trier of fact as to the District's duties in the circumstances of this case. The circuit court's summary dismissal of these duties as merely contractual was in error.

A. The District owed a duty to protect Owl Labs from Marshall's conduct by negligently creating the risk of harm and voluntarily undertaking a duty.

"Under 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." *Faile v. S.C. Dep't of Juv. Just.*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (first citing *Rogers v. South Carolina Dep't of Parole & Cmty. Corr.*, 320 S.C. 253, 464 S.E.2d 330 (1995); then citing *Rayfield v. South Carolina Dep't of Corr.*,

297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988); and then citing Restatement (Second) of Torts § 314 (1965)). However, South Carolina recognizes five exceptions to this rule: "1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant." *Id.* (footnotes omitted).

This case falls squarely within the third and fourth exceptions where the defendant voluntarily undertakes a duty and/or negligently creates the risk of harm.

i. The District owed a duty to protect third party vendors by voluntarily undertaking a duty to follow the Procurement Code.

"While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken." *Vaughan*, 370 S.C. at 446, 635 S.E.2d at 637 (citing *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). "While the law imposes this duty on a volunteer, the question whether such a duty arises in a given case may depend on the existence of particular facts." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (citing *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3 (1997)). "Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder." *Id.* (collecting cases).

Here, the District affirmatively undertook to administer procurement in conformity with the State Procurement Code and the Orangeburg County School District's Procurement Code and Regulations. The evidence shows, *inter alia*, (i) the District established a purchasing function and appointed a Procurement Coordinator (Twitty); (ii) promulgated and invoked vendor-verification and purchasing procedures; (iii) issued purchase orders bearing official signatures; and (iv)

directed pricing, payment sequencing, and shipment timing to satisfy CARES-Act requirements to receive funding during the Pandemic.

By taking those steps, as well as numerous other steps, the District assumed responsibility to exercise reasonable care in carrying out the very compliance tasks that exist to protect third-party vendors and public funds. *See generally* S.C. Code Ann. § 11-35-20(2) (providing the purposes and policies of the South Carolina Consolidated Procurement Code are, in part, "to ensure the fair and equitable treatment of *all persons who deal with the procurement system* which will promote increased public confidence in the procedures followed in public procurement;" and "to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of *all persons engaged in the public procurement process*" (emphasis added)); S.C. Code Ann. Regs. 19-445.3000(E) (providing a school district's own procurement code "should be designed to serve and comply with the purposes and policies enumerated in Section 11-35-20").

Owl Labs relied on that undertaking. It accepted the District's form Purchase Order and tax-exemption certificate, honored the District's pricing and freight objections, agreed to expedited delivery (originating from the Superintendent's request and relayed to Owl Labs through Marshall), shipped 875 Devices to the District's warehouse, and supported the District's registration and deployment of the Devices. All of these acts were done because the District represented to Owl Labs that it was proceeding through its procurement process and following standard procedures. The District's failure to verify the actual vendor, failure to supervise the personnel it empowered to transact on its behalf, and failure to follow the Code's basic controls increased the risk of harm and induced reliance.

At a minimum, these facts create genuine issues of material fact as to whether the District undertook a duty to follow its Procurement Code and policies and exercised due care in engaging in procurement activities for the benefit of third parties. The circuit court's failure to consider whether a duty arose outside of contract and to send these disputed questions underlying the existence of a duty to a jury was reversible error. *See e.g. Miller*, 329 S.C. at 315, 494 S.E.2d at 815 (finding more than one inference can be drawn from the evidence and a question of fact existed whether the operator of a mill voluntary undertook a duty to monitor lake level for the benefit of others); *Johnson*, 401 S.C. at 161, 735 S.E.2d at 668 (reversing summary judgment where a fact question existed as to whether a hospital assumed the responsibility of instructing individuals to park in a location, thereby creating a duty to ensure their safety).

ii. The District owed a duty to protect Owl Labs from Marshall's conduct by negligently creating the risk of harm.

The District's own acts and omissions created the risk that allowed its employee, Marshall (who the District knew was previously accused of a crime), to handle procurement transactions, enabling him to misappropriate public funds and cause foreseeable harm to Owl Labs, a third-party vendor dealing in good faith with the District. The record demonstrates the District affirmatively created a risky environment by instituting a system of unchecked delegation, inadequate training, and nonexistent oversight over procurement functions involving hundreds of thousands of dollars in public funds and multiple employees. This was not a single employee's aberration but a culture of mismanagement extending from the highest administrative levels downward, which is why the District owes duties to Owl Labs in tort.

The District's leadership testified to widespread confusion about who was responsible for key steps in its procurement process, including: vendor verification, what procedures governed procurement approvals, and whether anyone ensured compliance with the Procurement Code.

Twitty, the District's Procurement Coordinator—who was by all accounts the official responsible for verifying vendors—admitted he delegated that obligation to the "end user," thereby illustrating the very breakdown of oversight that defined the District's procurement process. This abdication of responsibility by Twitty (and the District), coupled with the absence of clear training or checks among subordinates within the District, produced a foreseeable and preventable system failure that enabled Marshall to transmit documentation to Owl Labs and contract with Owl Labs in the District's name. At a minimum, it permitted Marshall to contract with an "approved" vendor, Level 8, who was never approved at all and was merely a sham company for Marshall himself.

By creating and maintaining such a structure, the District did not merely fail to prevent harm; it affirmatively created and maintained the hazardous conditions that made financial harm to third parties inevitable. As the Supreme Court has recognized, a duty arises when a party's own acts or omissions "created a situation that they knew or should have known posed a substantial risk of injury to [a third party]." *Edwards v. Lexington Cnty. Sheriff's Dep't,* 386 S.C. 285, 294, 688 S.E.2d 125, 130 (2010). Consistent with that principle, a federal court applying South Carolina law has held a defendant may fall within this exception where it was aware of repeated warnings about systematic vulnerabilities but "failed to correct, update, or upgrade its security protections." *In re Blackbaud, Inc., Customer Data Breach Litig.*, 567 F. Supp. 3d 667, 682 (D.S.C. 2021).

The District's conduct here is no different. It had actual or constructive knowledge that employees lacked training of its procurement procedures, that Twitty regularly deferred to the "end user," rather than following procedure himself, and that Marshall, an employee with a documented history of misconduct, was repeatedly participating in large-scale purchasing transactions on the District's behalf through an unverified vendor: Level 8. Yet, the District took no action to train or supervise Marshall or his supervisors, implement controls, or confirm vendor legitimacy. By

ignoring these warnings and persisting in a system devoid of oversight for years, the District created a situation in 2020 that predictably resulted in harm to an innocent vendor: Owl Labs.

Viewed in the light most favorable to Owl Labs, the evidence reveals at least the following pervasive institutional failures that collectively created the risk of harm to third party vendors like Owl Labs and supplies the District's duty to third-party vendors, including Owl Labs:

(1) The District's Procurement Coordinator, Greg Twitty, admitted he relied on end users to verify vendor legitimacy, even though the Procurement Code required him to confirm that a vendor was approved to do business with the District, and several other employees testified it was Twitty's role. (R. at 316, 318-19, 325 (Foster Dep. 14:6-10, 22:21-23:1, 25:19-22, 28:24-29:9, 52:9-33); R. at 350-51, 357 (Gist Dep. 13:4-10, 17:14-18, 61:9-19); R. at 369, 374 (Walley Dep. 18:17-19:6, 45:6-16); R. at 378-79, 382-83 (Twitty Dep. at 14:9-17, 15:7-16:1, 30:20-31:20, 33:22-34:3).)

(2) The District's employees, including its Director of Technology (Ham), Director of Finance (Sanders), Assistant Superintendent for Finance (Gist), and IT bookkeeper (Walley), each testified they received little to no training on procurement procedures or vendor verification, despite their involvement in authorizing large purchases on the District's behalf. (*See* R. at 300 (Ham Dep. 17:18-18:8); R. at 350 (Gist Dep. 15:2-9); R. at 360 (Sanders Dep. 13:7-19); R. at 369 (Walley Dep. 16:10-23).)

(3) The District's Director of Technology (Ham) was responsible for purchasing technology with CARES Act funds and delegated full procurement authority to his subordinate, Marshall, permitting him to communicate directly with outside vendors on the District's behalf, without supervision. (R. at 302-03, 308 (Ham Dep. 28:4-19, 32:11-13, 34:13-35:6, 66:1-19).)

(4) Marshall used his District email address, letterhead, and internal systems to request quotes, send purchase orders, and transmit tax-exempt certificates bearing the Procurement Officer's signature, all allegedly without detection. (*E.g.*, R. at 405, 410-11, 419, 428-32, 437-38.)

(5) Multiple District employees, including those copied on Marshall's emails with Owl Labs on December 3, 2020, and Ham's email with Owl Labs on January 6, 2021, had notice that Marshall was dealing directly with Owl Labs and that payments were being made, yet no one intervened or verified the vendor or transaction. (R. at 419, 467-83.)

(6) The District knew Marshall had prior criminal charges, including for assault and sexual misconduct, but retained him in a position giving him access to procurement systems and public funds. (R. at 456-57, 460, 463.)

(7) Superintendent Foster and senior administrators approved payments to Level 8, without confirming its registration or reviewing available public records that would have exposed that Level 8 was not authorized to transact with the District. (*See* R. at 378-79 (Twitty Dep. 14:9-17, 15:7-16:1).)

These facts, individually and collectively, demonstrate far more than an isolated employee's misconduct and instead demonstrate a pattern of administrative negligence and abdication of responsibility. The District created and enabled a systemic, foreseeable risk that unsupervised employees could misuse public funds and deceive innocent vendors. At a minimum, these facts create genuine issues of material fact for trial as to the existence of the District's duties to third-party vendors, including Owl Labs, and its breach of those duties.

Under *Faile* and its progeny, a duty arises when a defendant's conduct creates the very risk of harm that injures the plaintiff. Here, the District's negligence in training and supervising related to its procurement system (or lack thereof) created the risk of harm that injured Owl Labs. It cannot now avoid liability by blaming the predictable outcome of its own institutional failures on Marshall alone. Because the record contains ample evidence that the District's policies and practices affirmatively created the risk of harm to Owl Labs, summary judgment was improper. Under the circumstances of this case, the existence of this duty and the scope of the District's negligence present questions of fact for the jury and should be remanded for trial. At a minimum, the circuit court erred in failing to consider whether a duty existed under this exception.

The District's liability under this "created the risk" exception reinforces, rather than duplicates, its separate duties to train, supervise, and control its employees and its separate liability under *respondeat superior*. Each theory arises from the same core principle of South Carolina law that when a defendant's conduct places others in foreseeable danger, a duty arises to act reasonably to prevent that harm. *See, e.g.*, *James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008). Here, the District's creation of a procurement structure devoid of oversight not only

satisfies the "created the risk" exception but also exemplifies the very negligence its independent duties were meant to prevent.

B. The District owed independent, common law duties to hire, train, retain, and supervise with reasonable care.

South Carolina law imposes a clear and independent duty on employers to exercise reasonable care in hiring, retaining, and supervising employees when the employer knew or should have known the employment created an undue risk of harm to others. *Id.*; *ATC, Inc.*, 367 S.C. at 205–08, 624 S.E.2d at 450–51. As the Supreme Court explained in *James*, "the employer's liability under such a theory does not rest on the negligence of another, but on the employer's own negligence." 377 S.C. at 631, 661 S.E.2d at 331.

This duty is not derivative of any contract and extends to foreseeable third parties who may be harmed by the employer's failure to act reasonably and exercise necessary control. *See Degenhart*, 309 S.C. at 117, 420 S.E.2d at 496 (explaining tort duty may flow to non-privity plaintiff based on employer–employee relationship); *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 302, 468 S.E.2d 292, 299 (1996) ("An employer owes a duty of care to a third party when the possible harm resulting to the third party by the employee could have been reasonably anticipated by the employer.").

The elements of negligent hiring and retention focus on the employer's knowledge and the foreseeability of harm, and questions regarding those elements "will ordinarily be determined by the factfinder, and not as a matter of law." *ATC, Inc.*, 367 S.C. at 206, 624 S.E.2d at 450 (citations omitted). In negligent retention cases, an employer can be liable for retaining employees who knowingly "are in the habit of misconducting themselves in a manner dangerous to others." *Id.* (quoting Restatement (Second) of Torts § 317 cmt. c (1965)). "[A] single isolated incident of prior misconduct (of which the employer knew or should have known) may support a negligent retention

claim, provided the prior misconduct has a sufficient nexus to the ultimate harm." *Id.* at 207, 624 S.E.2d at 451.

Here, Marshall's conduct creates genuine issues of material fact for trial as to the District's knowledge of his criminal record and the foreseeability of harm to third parties. Moreover, the evidence, at minimum, compelled the circuit court to consider whether a duty existed independent of the parties' contractual relationship, an inquiry the circuit court improperly overlooked.

i. The District's retention of Marshall and its failure to supervise Marshall created a foreseeable risk of harm.

Viewed in the light most favorable to Owl Labs, the record establishes ample evidence from which a reasonable jury could find that the District knew or should have known that retaining and empowering Marshall created a foreseeable risk of harm to third parties. Superintendent Foster testified the District's background checks were intentionally designed to uncover "any criminal background" because such offenses are unsuitable of a candidate for employment with the District. (R. at 345-46 (Foster Dep. 132:6-133:8).) Despite that policy, the District continued to employ Marshall after he was charged with serious criminal offenses in 2017. (R. at 453-55.) Despite knowledge of these charges, the District allowed Marshall to work in proximity to students and staff.

The District compounded that negligence by repeatedly giving Marshall significant procurement authority, permitting him to communicate directly with vendors, negotiate purchase terms, and manage transactions involving hundreds of thousands of dollars in public funds, all with little or no supervision. The evidence shows the District had prior dealings with Level 8, the sham vendor established by Marshall, *before* the Owl Labs transaction, demonstrating the District's knowledge and the foreseeability of harm to other vendors over multiple occasions. (*See* R. at 302 (Ham Dep. 28:20-29:6, 30:12-31:1).) *See ATC, Inc.*, 367 S.C. at 206, 624 S.E.2d at 450

(citations omitted) (emphasizing the two fundamental elements of employer knowledge and foreseeability of harm). These facts, viewed together and in a light most favorable to Owl Labs, establish the District knew or should have known of Marshall's propensity for misconduct and the risk that his unsupervised access to vendors and communications related to expenditure of public funds posed to third parties such as Owl Labs.

The Supreme Court's decision in *Rickborn* confirms that an employer's failure to supervise an employee whose carelessness or misconduct is known can create liability to third parties. 321 S.C. at 302, 468 S.E.2d at 299. There, the employer knew its agent had previously mishandled applications for insurance and was regarded internally as a poor performer, yet the employer continued in its failure to supervise him adequately. *Id.* at 303, 468 S.E.2d at 299. The Court held the employer liable for the foreseeable harm that resulted to a third party as a result of the employer's breach of a duty of care owed to the third party to properly supervise its employee. *Id.* at 305, 468 S.E.2d at 301. Similarly, in this case, the District was on notice of Marshall's misconduct and unfitness—through both its knowledge of his prior criminal record, and its claim that Marshall was not *authorized* to communicate with vendors or transact on the District's behalf—yet it allowed him to so communicate regarding the District's procurement of the Devices and failed to supervise or restrict his access to procurement duties.

It is this evidence regarding the District's failure to supervise Marshall as to other procurement transactions and its failure to terminate Marshall's employment before the transaction due to repeated misconduct, and not just its failure to supervise him as to his creation of this contract, that gives rise to the District's legal duty to Owl Labs. The circuit court erroneously concluded otherwise, failing to address these relevant facts and controlling law regarding Owl Labs' claim for negligent supervision and retention. *See Beneficial Financial I, Inc. v. Windham,*

431 S.C. 256, 278-79, 847 S.E.2d 793, 805 (Ct. App. 2020) (reversing award of summary judgment on a claim for negligent and reckless training and supervision, finding there were genuine issues of material fact for trial as to the training and supervision of employees regarding the transaction in dispute).

In addition, as to the transaction in issue, the record demonstrates that the District permitted Marshall to carry out procurement activities with its knowledge, authority, and resources. The District delegated purchasing responsibility for these Devices to Ham, who, in turn, expressly delegated that authority to Marshall. The District knew or should have known that Marshall was purchasing these Devices for the District, an undertaking that necessarily involved communication and negotiation with third party vendors and ultimately the commitment of public funds.

The District's own emails, on which multiple District employees are copied, revealed the scope and extent of Marshall's communications with Owl Labs before it paid the second half of the purchase price to a sham entity, Level 8. Ham admitted he learned about Level 8's purported ability to supply the Devices *from Marshall* but failed to verify that Level 8 was a legitimate or approved vendor. (R. at 302, 308 (Ham Dep. 28:3-7, 65:13-66:13).) It was not. Ham also acknowledged that if he had conducted even a minimal check, he would have discovered Level 8 was not on state contract. (R. at 302, 304 (Ham Dep. 29:22-24, 38:18-24).)

Instead, Marshall carried out the District's procurement activities using the District's property and resources. He communicated with Owl Labs exclusively through his District-issued email account. (R. at 405, 410-11, 419, 428, 432, 437-38.) He introduced Owl Labs to other District personnel, who participated in the correspondence and received the Devices on the District's behalf. (R. at 419.) Additionally, Ham, who undisputedly had authority and was acting within the scope of his authority, reviewed and signed the DocuSign agreement with Owl Labs for Device

registration *prior* to the District's payment of any funds to Level 8 for any devices. (R. at 468-70.) These employees either knew or should have known that Owl Labs was the vendor from which the District was purchasing the Devices. (*E.g.*, R. at 342 (Foster Dep. 117:8-118:19).) Its failure to discover otherwise until after the transaction with Owl Labs is due to the District's own negligence and failure to supervise.

Multiple District employees were copied on Marshall's email communications with Owl Labs in November and December 2020. (R. at 467-83.) Those emails clearly identified Owl Labs as the seller, referenced shipment of the Devices to the District's warehouse, and outlined the payment schedule. Ham admitted that if any of the recipients had read the emails in full, they would have known the Devices were purchased directly from Owl Labs, not Level 8. (R. at 311-12 (Ham Dep. 82:19-24, 83:17-85:4).) He further conceded that, to his knowledge, none of the five employees copied on the communications "read past the first lines." (R. at 311 (Ham. Dep. 83:3-8).) Additionally, on January 6, 2021, Ham received an email from Owl Labs which indicated that it had "a previous email exchange with David Marshall," which neither Ham nor any other District employee appears to have investigated. (R. at 466.)

A jury could easily infer from this testimony that the District had actual or constructive knowledge of Marshall's dealings with Owl Labs, and that reasonable supervision would have prevented payment to Level 8. It is undisputed the District had the ability to exercise control over Marshall, and it could have exercised its control to prevent this transaction from occurring. Moreover, as explained below, a reasonable jury could also find that, by having notice and failing to act or reject the goods, the District ratified Marshall's actions and is therefore liable, in tort, for Owl Labs' damages.

ii. The record demonstrates pervasive failures in training and supervision.

The District's negligence was not limited to Marshall. Its systematic failures in training and oversight created the environment that enabled the harm to occur. Testimony from Procurement Coordinator Twitty, Director of Finance Sanders, Assistant Superintendent for Finance Gist, and IT bookkeeper Walley all demonstrates a pervasive lack of training within the District as to the Procurement Code and establishes a pattern of delegation without oversight. (*See, e.g.*, R. at 350 (Gist Dep. 15:2-9); R. at 360 (Sanders Dep. 13:10-19); R. at 369 (Walley Dep. 16:10-23); R. at 378-79, 382-83 (Twitty Dep. 14:9-17; 15:7-16:1; 30:20-31:20; 33:22-34).)

The District's Procurement Code requires the District to confirm a vendor is legally qualified to contract with the governmental entity. (R. at 332 (Foster Dep. 78:6-14).) Twitty, who was responsible for compliance with the state Procurement Code, testified he relied on the "end user" of the transaction to verify a vendor's status. (R. at 378-79, 382-83 (Twitty Dep. 14:9-17; 15:7-16:1; 30:20-31:20, 33:22-34:3).) Twitty admitted he relied on Ham to verify the vendor was approved in this case. (*Id.*) Ham, in turn, testified he had received little to no training on the Procurement Code and did not verify Level 8's status. (R. at 300 (Ham Dep. 17:18-18:8).) Superintendent Foster and other District officials testified Twitty was responsible for verifying vendors, yet Twitty did nothing to confirm that Level 8 was authorized to contract with the District before a transaction nearing $1 million. (R. at 316, 318, 319-20 (Foster Dep. 14:6-13, 21:6-22:3, 22:21-23:11, 28:24-29:2); R. at 350-51, 357 (Gist Dep. 13:4-10, 17:14-18; 61:9-19); R. at 369, 374 (Walley Dep. 18:17-19:6, 45:6-16); R. at 379 (Twitty Dep. 18:6-19:11).)

The record shows the District failed to inquire and continued to rely on Marshall's representations, even though everyone at the District contended (after the fact, in this litigation) that Marshall was not authorized to handle procurement transactions. No District employee

reviewed the Secretary of State's publicly available records, which would have revealed Marshall's ownership of Level 8 and likely prevented any transaction with it. (R. at 304 (Ham Dep. 37:17-24, 38:13-24); R. at 329-30 (Foster Dep. 68:22-69:4).) Only after Owl Labs pressed for payment did the District belatedly "discover" that the checks issued to Level 8 were endorsed by Marshall. (R. at 361-62 (Sanders Dep. 19:23-20:1).) When asked what the District could have done to avoid this situation, Walley testified: "I guess we could have made sure that all of our vendors were actually in the vendor file, were actually vetted as bona fide vendors." (R. at 375 (Walley Dep. at 49:25-50:4).) But the District failed to do so here, evidencing that even the most basic level of scrutiny was not performed.

"An employer is liable for negligence in failing properly to instruct employees, or failing to assure that the instructions are obeyed," including where there is evidence that the employer "knew that the employee was not following company policy." 30 C.J.S. Employer—Employee § 216. Here, the District's leadership knew or should have known that employees were disregarding procurement procedures, delegating authority to untrained subordinates, and releasing public funds without verification. Its failure to act constitutes, at a minimum, ordinary negligence.

iii. Factual disputes preclude summary judgment.

The following evidence, viewed collectively and in a light most favorable to Owl Labs, demonstrates that genuine issues of material fact exist for trial on Owl Labs' claim for negligent training, retention, and supervision:

(1) The District retained Marshall despite his prior criminal charges;

(2) Marshall was able to negotiate and execute transactions using District emails, purchase orders, and tax-exempt certificates bearing copies of official signatures;

(3) Senior officials and staff testified they had little or no instruction on vendor verification or Procurement Code compliance;

(4) Twitty and Ham disclaimed responsibility and failed to confirm Level 8's

legitimacy before authorizing payment;

(5) District employees copied on Marshall's email correspondence with Owl Labs failed to read the communications, which identified Owl Labs as the vendor; and

(6) The District's witnesses acknowledged the District could have prevented the loss by simply confirming that all vendors were in the "vendor file" and "bona fide," but the District never implemented such checks.

The cumulative effect of these failures demonstrates that genuine issues of material fact exist as to whether the District breached its duty to exercise reasonable care in training, retaining, and supervising its employees as to procurement activities involving substantial amounts of public funds. The District knew or should have known of Marshall's unfitness and lack of authority, disregarded clear procurement procedures, failed to provide necessary oversight or training, and ignored warning signs evident in its own records. The circuit court erred in disregarding this evidence and granting summary judgment on Owl Labs' claim for negligent supervision and retention. Summary judgment must therefore be reversed.

C. The District is also liable under principles of agency and *respondeat superior.*

The circuit court further erred in granting summary judgment on Owl Labs' negligence claim by failing to recognize that Marshall's conduct falls squarely within the District's responsibility under long-established agency and *respondeat superior* principles. South Carolina law is clear that an employer "is called to answer for the tortious acts of his servant, the employee, when those acts occur in the course and scope of the employee's employment." *James*, 377 S.C. at 631, 661 S.E.2d at 330 (citing *Sams v. Arthur*, 135 S.C. 123, 128–131, 133 S.E. 205, 207–08 (1926)); *see also S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 179, 348 S.E.2d 617, 621 (Ct. App. 1986) ("*[R]espondeat superior* makes a master liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment."). Such liability "is not predicated on the negligence of the employer, but upon the acts of the employee,"

performed while "going about the employer's business[.]" *James*, 377 S.C. at 631, 661 S.E.2d at 330 (citing *Sams*, 135 S.C. at 128–131, 133 S.E. 205, 207–08).

"An act falls within the scope of the servant's employment if it was reasonably necessary to accomplish the purpose of the servant's employment, and it was done in furtherance of the master's business." *Wade v. Berkeley Cnty.*, 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct. App. 1998). Accordingly, "the master is liable for the torts of his servant even when the servant acts against the express instructions of his master, so long as the servant acts to further the master's business." *Id.* "What is within the scope of employment may be determined by implication from the circumstances of the case." *Id.* "Any doubt as to whether the servant was acting within the scope of his authority when he injured a third person must be resolved against the master, at least to the extent of requiring that the question be submitted to the jury." *Id.* Agency and authority determinations, including whether conduct was within the scope of employment and whether an employee acted with express, implied, or apparent authority, are quintessential jury questions unless the essential facts are undisputed. *See* 23 S.C. Jur. *Agency* § 63.

Here, the record displays genuine factual disputes as to whether Marshall's actions were undertaken within the course and scope of his employment. As the District's Media Communications Specialist, Marshall was directed by his supervisor, Ham, to assist in the procurement of technology to facilitate remote learning during the Pandemic. (R. at 302-03 (Ham Dep. 28:4-19, 34:13-35:6); *see also* R. at 485.) Acting in that role, Marshall used his District email account to communicate with Owl Labs, transmitted a purchase order that appeared to bear the Procurement Officer's signature, provided a tax-exempt certificate reflecting the District's tax status, and arranged shipment of the Devices directly to the District's warehouse.

The District authorized Ham to use nearly $1 million in public funds to purchase the

Devices, and Ham delegated that authority to Marshall, which invokes a duty on behalf of the District to verify the recipient of those funds and ensure payment was made to the appropriate entity. The District later accepted and used all 875 Devices obtained through this transaction. Marshall's acts were plainly intended to further the District's business of education and facilitating remote learning during the Pandemic. (*See, e.g.*, R. at 421-22.) The record also demonstrates that Marshall regularly handled the procurement of items for various employees throughout the District, showing the scope of his employment included procurement, (*See, e.g.*, R. at 302-03, 306, 308 (Ham Dep. 28:4-29:6, 30:12-32:13, 34:9-35:6, 56:6-57:18, 67:5-14)), despite the District's later claim that he was not so authorized.

Even if Marshall later misappropriated the District's funds, that act does not erase the District's liability for his prior acts undertaken within the scope of employment and apparent authority. Even if Marshall acted contrary to the District's instructions or misrepresented the identity of the contracting party, the District remains liable for his actions undertaken in furtherance of its business and within the scope of his employment, particularly where the District received and retained the benefits of those actions. Under these facts, a jury could reasonably conclude that Marshall's conduct was within the scope of his employment and that the District is responsible for his conduct as his employer.

This Court's decision in *Froneberger v. Smith*, 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013), further illustrates that summary judgment is inappropriate where issues of agency and scope of employment are disputed. There, this Court reversed a circuit court's grant of summary judgment, holding that the proper inquiry was whether the employee's acts were "(1) in furtherance of [the employer's] business and (2) reasonably necessary to accomplish the purpose of her employment." *Id.* at 53, 748 S.E.2d at 633. As in *Froneberger*, the record here presents genuine

issues of material fact on both these questions. *Id.* at 53-54, 748 S.E.2d at 633 ("Any doubt as to whether the servant was acting within the scope of his authority when he injured a third person must be resolved against the master, at least to the extent of requiring that the question be submitted to the jury." (quoting *Wade*, 330 S.C. at 319, 498 S.E.2d at 688)).

An employer's liability may also arise where it had actual notice of similar unauthorized acts by its employee "or that they were committed so frequently and under such circumstances as to justify the presumption of notice." 30 C.J.S. Employer—Employee § 209. The evidence establishes Marshall regularly participated in procurement activities and vendor communications, including with Level 8, the same entity through which the District claims to have paid for the Devices. These acts occurred with sufficient frequency and transparency that the District may be presumed to have notice of, and acquiesced in, Marshall's conduct.

In sum, evidence creating genuine issues of material fact as to *respondeat superior* liability includes:

(1) Marshall was directed by his supervisor, Eric Ham, to assist in purchasing the Devices;

(2) He used the District's official email, facilities, and accounts to negotiate and finalize the purchase;

(3) He transmitted purchase orders and tax-exempt documentation bearing District signatures;

(4) He coordinated directly with Owl Labs regarding pricing, shipping, and delivery to the District's warehouse, even taking directives from the Superintendent to have the vendor expedite the delivery;

(5) Multiple District employees were copied on emails reflecting Marshall's communications with Owl Labs;

(6) The District received, retained, and used all 875 Devices procured through Marshall's efforts; and

(7) The District later paid another vendor (Level 8) for the same Devices, demonstrating its acknowledgment of the transaction as its own.

Because these facts create at least a reasonable inference that Marshall acted within the scope of his employment, summary judgment was improper. The circuit court erred in disregarding the District's liability under established agency and *respondeat superior* principles, and its grant of summary judgment on Owl Labs' negligence claim must be reversed.

D. Alternatively, the District ratified Marshall's acts and is therefore liable.

Even assuming, *arguendo*, that Marshall exceeded or lacked authority, the District is nonetheless liable under the doctrine of ratification. Under South Carolina law, "[w]here a principal retains the benefits of a transaction entered into by its agent, the principal is deemed to have ratified the contract and may not later challenge . . . authority." 23 S.C. Jur. *Agency* § 90; *see also Mortg. & Acceptance Corp. v. Stewart*, 142 S.C. 375, 140 S.E. 804, 805 (1927) ("They cannot retain these benefits and deny the very consequences of the agency."). Ratification, which turns on intent, may be inferred from acts that "clearly and unequivocally evince" an intention to adopt the agent's conduct, including acceptance of benefits with knowledge of the material facts. 30 C.J.S. Employer—Employee § 210; 23 S.C. Jur. *Agency* § 89. An employer that ratifies the acts of its employee is directly liable for injuries to third parties resulting from the employee's wrongful act. *See generally* 30 C.J.S. Employer—Employee § 210.

The District's conduct satisfies these elements. It reaped and retained substantial benefits from Marshall's procurement of the Devices, including: (1) a discounted purchase price for the Devices totaling $157,342.50; (2) a waiver of the freight costs totaling $3,000; and (3) expedited shipping of the Devices (which the Superintendent requested), all of which Marshall negotiated with Owl Labs for the District's benefit. The District also accepted delivery of the Devices, deployed them in classrooms, accepted direct assistance from Owl Labs in installation and setup, and made payments to an unverified vendor despite being on notice of Owl Labs' involvement.

By retaining the benefits of Marshall's actions with full knowledge of the surrounding circumstances, the District ratified his acts and cannot now disclaim responsibility for them. At a minimum, the record raises genuine issues of material fact regarding the extent of the District's knowledge and intent in accepting these benefits, which are issues that must be resolved by a jury, not on summary judgment.

II. The Circuit Court Erred in Granting Summary Judgment on Owl Labs' Request for Attorneys' Fees.

The circuit court also erred in granting summary judgment on Owl Labs' claim for attorneys' fees because the existence and terms of a contract between Owl Labs and the District remain in genuine dispute. In denying the District's motion for summary judgment on Owl Labs' breach of contract claim, the circuit court found "a genuine issue of material fact exists as to the existence and terms of [the District's] contract with [Owl Labs] for [the District] to purchase the Owl Devices." (R. at 5.)

Nevertheless, the circuit court simultaneously concluded "there is *no contract* or statute that would permit the recovery of attorneys' fees[.]" (R. at 7 (emphasis added).) These rulings cannot be reconciled. By acknowledging that a factual dispute exists as to the contract's existence and terms, the circuit court necessarily recognized that the scope of any contractual remedies, namely the right to recover attorneys' fees, must also be determined by the trier of fact. Summary judgment on that issue was therefore premature.

South Carolina law is clear that attorneys' fees and costs may be awarded if provided for by contract or statute. *See Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238-39, 616 S.E.2d 431, 434 (Ct. App. 2005) (quotations omitted). Whether a contract provides for such recovery is a question of fact where the contract's existence or terms are disputed. *Cf. Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) ("Construction of

an ambiguous contract is a question of fact to be decided by the trier of fact.").

Here, the evidence demonstrates a genuine issue of material fact regarding whether the District entered into a contract incorporating Owl Labs' terms of service, which expressly provided for recovery of attorneys' fees. Specifically, on December 3, 2020, Owl Labs sent a DocuSign agreement to Eric Ham for review and execution to register the Devices received by the District. (R. at 470.) Ham reviewed and executed the agreement on behalf of the District. (R. at 468.) That agreement referenced and incorporated Owl Labs' terms of service. (R. at 486-500.) As in effect on December 3, 2020, those terms provide that Owl Labs is entitled to recover legal fees and expenses. (R. at 490.) There is no dispute that Ham had authority to enter into this agreement with Owl Labs.

The District's receipt and use of all 875 Devices, its execution of the DocuSign agreement, and its reliance on the transaction to meet CARES Act funding requirements are all facts from which a jury could conclude that the District assented to the terms and conditions governing the purchase, including the provision for attorneys' fees entered into by Ham on District's behalf. Because the record contains sufficient evidence from which a reasonable factfinder could determine that a contract existed and that it provided for attorneys' fees, the circuit court's entry of summary judgment on that issue was in error.

At a minimum, the question of whether the parties' agreement entitles Owl Labs to recover its attorneys' fees and costs is intertwined with the disputed issues of contract formation, scope, and performance, all of which the circuit court reserved for trial. These matters must be resolved by the jury, not by summary judgment. Accordingly, the Court should reverse the circuit court's ruling on Owl Labs' claim for attorneys' fees and remand for further proceedings.

CONCLUSION

Owl Labs respectfully requests that this Court reverse the circuit court's grant of summary judgment on its claims for (i) negligence and (ii) negligent supervision and retention, and, therefore, reinstate those claims for trial. Owl Labs also requests that this Court reverse the circuit court's ruling that foreclosed recovery of Owl Labs' contractual attorneys' fees. The case should be remanded on all claims asserted by Owl Labs for a jury to resolve the disputed factual issues regarding the District's independent duties, agency and scope, contract formation and terms, and Owl Labs' entitlement to the full remedies available at law and in equity.

Respectfully submitted,

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