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.

REPLY BRIEF OF APPELLANT OWL LABS, INC.

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INTRODUCTION

Respondent Orangeburg County School District ("District") opens its responsive brief by asserting that "[t]he essential facts of this case are not in dispute" and that "[b]oth Plaintiff and Defendant were victims of a criminal wire fraud by former District employee David Marshall." (Resp't's Initial Br. 4). Appellant Owl Labs, Inc. ("Owl Labs") respectfully disagrees. The District's framing depends on a narrative that cannot be reconciled with the record or with the legal standard governing summary judgment. It is for this reason that summary judgment was improperly granted to the District on its Motion for Summary Judgment as to Owl Labs' negligence claims.

The District's position is itself internally inconsistent. On the one hand, the District portrays Marshall as a powerful insider who "used his position with the District to steer the District to purchase video cameras from his corporate alter ego, Level 8," while leveraging District processes and personnel to carry out the transaction. (Resp't's Initial Br. 4-5.) On the other hand, the District argues Marshall lacked *any* apparent authority to transact on the District's behalf and that Owl Labs, an outside vendor, should have immediately recognized that the Purchase Order was invalid and Marshall was unauthorized. (Resp't's Initial Br. 7, 9-13.) The District cannot reconcile these two positions. Marshall cannot simultaneously be sufficiently empowered to initiate and carry out a large-scale procurement scheme for the District and yet be so unauthorized that a third party should have detected the purported impropriety as a matter of law. This dichotomy supports Owl Labs' position that there are genuine issues of material fact for trial on its negligence claims.

The District compounds this contradiction by faulting Owl Labs for allegedly failing to conduct "normal, required due diligence," asserting that "a single telephone call or email to the

District" would have prevented the issue. (Resp't's Initial Br. 7-8.) That assertion is not supported by the record. More importantly, it is legally irrelevant to the issue before this Court: Whether the District owed Owl Labs a duty of care sufficient to preclude summary judgment on Owl Labs' negligence-based claims. Any relevance of the issue of Owl Labs' due diligence goes to the District's affirmative defense of comparative negligence, which only underscores why summary judgment on Owl Labs' negligence claims was improper.

As evident in the record, Owl Labs communicated with multiple District employees by phone and in writing, received purchase documentation bearing District signatures, complied with District-directed pricing and shipping demands, delivered the Devices to the District's warehouse, and later worked directly with District officials to register and deploy them. (*See* R. at 409, 411-13, 419, 431, 437; R. at 466-83.) By contrast, the record reflects that the District itself failed to perform even basic internal safeguards, including failing to verify vendor approval, failing to supervise or train employees it placed in procurement roles, and failing to act on information in its possession identifying Owl Labs as the vendor before paying a sham entity. (*See, e.g.*, R. at 302, 308 (Ham Dep. 28:3-7, 65:13-66:13); R. at 378-79, 382-83 (Twitty Dep. 14:9-17; 15:7-16:1; 30:20-31:20; 33:22-34:3); R. at 15 (Gist Dep. 15:2-9); R. at 369 (Walley Dep. 16:10-23); R. at 360 (Sanders Dep. 13:10-19); R. at 467, 473-79.) Those failures form the foundation of Owl Labs' negligence-based claims, and the District's assertion that Owl Labs should have made a single phone call neither negates the District's own failures nor absolves it of its duties as a matter of law.

As the District concedes, "[a]t no time did the District know that Mr. Marshall was affiliated with Level 8." (Resp't's Initial Br. 5). It is precisely this lack of knowledge that was the product of the District's own failure to follow its policies and procedures and negligence in

supervising and training its employees, not any omission by Owl Labs. As the record clearly shows, the District not only allowed Marshall to conduct the instant transaction with Owl Labs through Level 8, it also consistently allowed Marshall, on the District's behalf, to conduct business with Level 8. It is this past conduct that made it foreseeable to the District that Marshall would do the same thing, again, in the future; and he did, with Owl Labs.

In short, the District asks this Court to accept that it may fail to train and supervise multiple levels of its employees, fail to follow (and in fact ignore) its own procurement policies, benefit from transactions undertaken to meet its operational needs, retain the benefit of those transactions, and then shift the loss entirely to innocent vendors by invoking its own internal failures as a shield. The law does not permit that result. As the District itself acknowledges, the issues in this case "arose out of the District's need to purchase video conferencing devices." (Resp't's Initial Br. 5).

Because the record supports competing facts and inferences underlying Owl Labs' claims for negligence, negligent supervision and retention, and attorneys' fees, the circuit court's grant of summary judgment must be reversed. The circuit court further erred by misapplying the economic loss rule and failing to consider whether the District owed duties independent of any purported contract.

ARGUMENTS

I. Issues of Material Facts Prevent Summary Judgment on Owl Labs' Negligence-Based Claims.

The District erroneously presents this appeal as if it arose from a motion to dismiss under Rule 12(b)(6), SCRCP. (Resp't's Initial Br. 3-4, 12, 15.) To be clear, this case is before the Court on appeal from an order granting summary judgment.[1] "On appeal from an order granting summary

[1] The circuit court correctly denied the District's Motion to Dismiss on July 20, 2023.

judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (citing *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004)). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* (quoting *Middleborough Horizontal Prop. Regime Council of Co–Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* (quoting *Nelson v. Charleston County Parks & Recreation Comm'n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004)).

This case is rife with factual disputes and disputed inferences that render summary judgment in the District's favor on Owl Labs' negligence claims improper. Indeed, some of the "facts" asserted by the District are flatly contradicted by the record. As just one example, the District asserts that "Level 8 obtained the devices from Owl Labs, and [Level 8] did not pay fully for the devices." (Resp't's Initial Br. 1.) But the evidence shows Owl Labs delivered the Devices directly to the District's warehouse, and Level 8 never possessed the Devices, nor did it ever have a contract with Owl Labs.

More troubling, the District continues to equivocate on whether Level 8 was an approved vendor, asserting the Procurement Coordinator, Greg Twitty, "looked up Level 8 in the system and saw that it was an approved state vendor." (Resp't's Initial Br. 8.) That assertion is wrong. As the District conceded at the summary judgment hearing, Level 8 was never an approved state vendor and falsely represented itself as such. (R. at 66:13-21.) What Twitty looked up in the system and saw (*after* the issue with Level 8 was coming to light) was that the District previously, and

improperly, transacted with Level 8, which was undisputedly *not* an approved state vendor, and that Level 8 had used another vendor's number. (R. at 377-78, 380 (Twitty Dep. 11:11-14:1, 22:11-23:19).)

Against this backdrop, the District's assertion that "South Carolina law does not recognize a tort duty owed by a school district to a commercial vendor arising solely from the purchase of goods"[2] collapses. (Resp't's Initial Br. 12.) South Carolina law recognizes that, while duty is often a legal question, "[i]n some circumstances, . . . the question of whether a duty arises depends on the existence of particular facts," and where those facts are disputed, the factual dispute is for the jury. *Carson v. Adgar*, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997); *see also, e.g.*, *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 219, 826 S.E.2d 285, 294 (2019) (concluding questions of fact existed 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 is precisely such a case. Whether the District voluntarily undertook procurement safeguards, affirmatively created the risk that was foreseeable to the District and injured Owl Labs, owed independent duties to train and supervise its employees, or is liable under principles of agency turns on disputed facts and competing reasonable inferences that must be resolved by a jury. The circuit court erred by resolving those issues as a matter of law in favor of the District, as

[2] A sweeping principle of law which is itself not supported by any case law or authority offered by the District.

the moving party; by ignoring duties independent of any purported contracts; and by misapplying the economic loss rule.

The record reflects a genuine dispute over who bore responsibility for vendor verification and whether the District undertook that function to protect vendors and public funds. District leadership testified that vendor verification was the responsibility of the Procurement Coordinator, Greg Twitty. (R. at 316, 318-20 (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).) Yet, Twitty admitted he did not comply with express procurement obligations, instead, relying on "end users" to verify vendors, effectively displacing that responsibility onto untrained employees. (R. at 378-79, 382-83 (Twitty Dep. 14:9-17; 15:7-16:1; 30:20-31:20, 33:22-34:3).)

A jury could reasonably conclude the District either undertook procurement compliance and negligently performed it, or it operated a procurement system in which no one verified vendors at all, either of which supports the existence of a duty. *See Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997); *see also* 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)).

Relatedly, the record reflects pervasive failures in training and supervision that extended well beyond Marshall's individual conduct and present genuine issues of material fact inappropriate for resolution on summary judgment. *See James v. Kelly Trucking Co.*, 377 S.C. 628,

631, 661 S.E.2d 329, 330 (2008) ("In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public."); *Beneficial Fin. I, Inc. v. Windham*, 431 S.C. 256, 278-79, 847 S.E.2d 793, 805 (Ct. App. 2020) (reversing summary judgment on negligent and reckless training and supervision claims, finding genuine issues of material fact existed); *see also Keeter v. Alpine Towers Int'l, Inc.*, No. 2012-UP-692, 2012 WL 11867308, at *5–6 (S.C. Ct. App. June 27, 2012) (recognizing negligent training claim based on employee-wide failure to train).

There is also a fact question as to whether the District created a foreseeable risk to vendors by structuring procurement through unchecked delegation and inadequate training. Multiple officials involved in authorizing large purchases testified they received little or no training on procurement rules or vendor verification. (*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).) At the same time, the District delegated responsibility for a near-$1 million CARES-Act purchase without meaningful oversight. (*See*, *e.g.*, R. at 302-03, 308 (Ham Dep. 28:4-19, 32:11-13, 34:13-35:6, 66:1-19).) The District admitted it "had, in the past, made a number of . . . technology purchases through this company called Level 8 without knowing that one of its employees had some sort of affiliation with that company." (R. at 45:1-5.) This admission proves that the District transacted with an unapproved vendor on multiple occasions, giving rise to a foreseeable risk that transacting with it in the future could harm innocent vendors. A reasonable jury could find these institutional practices created the very risk that injured Owl Labs. *See Edwards v. Lexington Cnty. Sheriff's Dep't*, 386 S.C. 285, 294, 688 S.E.2d 125, 130 (2010); *In re Blackbaud, Inc., Customer Data*

Breach Litig., 567 F. Supp. 3d 667, 682 (D.S.C. 2021).

Further, the fact and scope of Marshall's procurement role and the District's knowledge of that role are likewise disputed. The District seemingly ignores evidence that its managerial-level employee, Eric Ham, the District's then Director of Technology, admitted that he permitted Marshall to communicate with vendors regarding the Devices and described that arrangement as typical. (R. 302-03, 308 (Ham Dep. 28:4-19, 32:11-13, 34:13-35:6, 65:13-67:14).) The District cites to testimony of other employees that they allegedly were unaware of this authorization, but it does not negate Ham's testimony, which creates a genuine issue of material fact sufficient to deny summary judgment. (*See, e.g.*, Resp't's Initial Br. 10.)

Procurement Coordinator Twitty testified that the vendor verification should have been done by Mr. Ham, "or whoever he delegated that to for this purchase before it started coming through the system." (R. at 378 (Twitty Dep. 14:11-17).) Yet, Ham admitted that he delegated that task to Marshall. No employee testified that Ham was not authorized to delegate his authority to his subordinate. (*See, e.g.*, R. at 384 (Twitty Dep. 48:10-21).) Instead, other employees at the District confirmed that Marshall regularly handled procurement-related tasks. (R. at 365 (Sanders Dep. 42:23-43:16); R. at 370 (Walley Dep. 23:8-18).) The District's litigation position that Marshall lacked authority does not eliminate the jury question as to the authority he exercised in practice and whether the District knowingly placed him in a vendor-facing role, or in a position which engagement in procurement was reasonably necessary to accomplish the District's business. *See James*, 377 S.C. at 631, 661 S.E.2d at 330; *Wade v. Berkeley Cnty.*, 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct. App. 1998); 23 S.C. Jur. *Agency* § 63.

Moreover, Marshall acted using District email and documentation, negotiated terms to meet District objectives, and arranged shipment directly to the District. The District then retained

and used all 875 Devices and accepted the benefits of discounted pricing, waived freight, and expedited delivery. Whether Marshall acted within the scope of employment or with apparent authority and whether the District ratified his conduct by retaining those benefits are classic jury questions. *See Wade*, 330 S.C. at 319, 498 S.E.2d at 688; *Froneberger v. Smith*, 406 S.C. 37, 49-50, 748 S.E.2d 625, 631 (Ct. App. 2013); *Mortg. & Acceptance Corp. v. Stewart*, 142 S.C. 375, 140 S.E. 804, 805 (1927); *Barber v. Carolina Auto Sales*, 236 S.C. 594, 599, 115 S.E.2d 291, 294 (1960); 23 S.C. Jur. *Agency* §§ 63, 93.

In short, the District's attempt to frame duty as a purely legal issue ignores record disputes which are central to its voluntary undertaking, statutory requirements, creation of risk, employer negligence, agency, and ratification. Because the existence and scope of any duty owed by the District to Owl Labs turn on contested facts and competing reasonable inferences, summary judgment on Owl Labs' negligence-based claims was improper.

II. The Circuit Court's Ruling and District's Responsive Brief Rest on a Misapplication of the Economic Loss Rule.

The District's responsive brief highlights that the circuit court's grant of summary judgment on Owl Labs' negligence-based claims rested on a misapplication of the economic loss rule. The District argues "the circuit court correctly dismissed Owl Labs' negligence-based claims where the alleged duties arose solely from a contractual relationship and the claimed damages consisted of purely economic loss." (Resp't's Initial Br. 1.) That premise is incorrect and mirrors the same error underlying the circuit court's Order.

The circuit court concluded that, "[d]ue to the lack of a duty arising independently from a purported contract between the parties, [Owl Labs'] negligence claims cannot be supported under the circumstances and summary judgment must be granted on the two negligence claims." (R. at 7.) In reaching that conclusion, the circuit court relied on cases applying the economic loss rule.

(R. at 6-7 (relying on *Koontz v. Thomas*, 333 S.C. 702, 711, 511 S.E.2d 407, 412 (Ct. App. 1999); *Carroll v. Isle of Palms Pest Control, Inc.*, 441 S.C. 1, 12, 892 S.E.2d 161, 167 (Ct. App. 2023), *rev'd*, 446 S.C. 177, 918 S.E.2d 532 (2025)).) As the Supreme Court has since made clear, that analysis was legally flawed.

In *Carroll v. Isle of Palms Pest Control, Inc.*, 446 S.C. 177, 918 S.E.2d 532 (2025), the Supreme Court clarified the economic loss rule "applies only in the product liability context and when the only injury is to the product itself." *Id.* at 186, 918 S.E.2d at 537. The Supreme Court further emphasized the rule is "not a doctrine that says economic damages may not be recovered in tort." *Id.* at 187, 918 S.E.2d at 537. Although *Carroll* was pending before the Supreme Court when the circuit court issued its Order, it now confirms that the circuit court's reasoning was a misapplication of the law, which should be corrected on appeal.

Notably, the circuit court expressly acknowledged Owl Labs alleged "that [the District] failed to supervise or otherwise train their employees on how to approach the procurement of the Owl devices[.]" (R. at 7.) Those allegations invoke duties independent of contract. Where "the breach of duty alleged arises out of a liability independent[ ] of the personal obligation undertaken by contract, it is a tort." *Carroll*, 446 S.C. at 187, 918 S.E.2d at 537 (quoting *Dixon v. Texas Co.*, 222 S.C. 385, 389, 72 S.E.2d 897, 899 (1952)). The circuit court erred by disregarding independent sources of duty, relying on overruled precedent that misapplied the economic loss rule, and concluding any duty arose solely from a purported contract.

Here, the District attempts to wield the existence of a contract as both a sword and shield, arguing Owl Labs' claims are barred by contract principles while simultaneously insisting no contract exists because Marshall lacked authority. That position collapses under *Carroll*, as there are genuine issues of material fact for trial on *both* Owl Labs' contract claim and negligence

claims. Owl Labs has consistently alleged duties arising from the District's own conduct, including its training, supervision, procurement practices, agency relationships, and ratification of the transaction, not merely from any alleged contract. The circuit court erred by failing to analyze those independent duties, disregarding genuine issues of material fact, and granting summary judgment based on a misapplication of the economic loss rule.

A. The District's argument that the circuit court correctly applied *Koontz* and *Johnson* is misplaced.

The District contends the circuit court correctly "applied" *Koontz,* 333 S.C. 702, 511 S.E.2d 407, and *Johnson*, 401 S.C. 152, 735 S.E.2d 664, in granting summary judgment on Owl Labs' negligence-based claims. (Resp't's Initial Br.12-14.) A review of the circuit court's Order reveals it did not meaningfully apply either decision; it cited them only once, merely for a general recitation of negligence principles. (*See* R. at 6.) Properly understood, both cases support reversal here.

In *Johnson*, this Court reversed summary judgment where conflicting testimony created a factual dispute over whether the defendant had assumed responsibility for directing where individuals parked and thereby created a duty of care to ensure safety. 401 S.C. at 159-61, 735 S.E.2d at 667-68. The Court held that whether a duty existed under those circumstances was a question of fact for the jury, not a matter to be resolved as a matter of law. *Id.* at 159; 735 S.E.2d at 667. That principle directly undermines, rather than supports, the District's position in this case, where Owl Labs likewise presented evidence that the District undertook and controlled procurement functions in a manner giving rise to a duty. Accordingly, a correct application of *Johnson* should result in an order in favor of Owl Labs, not the District.

The District's (and circuit court's) reliance on *Koontz* is equally misplaced. The circuit court cited to *Koontz* for the proposition that "[a] breach of a duty which arises under the provisions

of a contract between the parties must be redressed under contract, and a tort action will not lie." 333 S.C. at 711, 511 S.E.2d at 412. (R. at 6.) This statement appears in *Koontz*'s discussion and now-rejected application of the economic loss rule. *Id.* at 711-12, 511 S.E.2d at 412. As explained above, the Supreme Court has since clarified the economic loss rule applies only in the products-liability context and does not bar tort claims seeking purely economic damages where the duty arises independently of contract. *Carroll*, 446 S.C. at 186-87; 918 S.E.2d at 537. Thus, *Koontz* does not foreclose Owl Labs' claims and cannot sustain the circuit court's ruling.

B. Independent duties exist, and the District failed to address them.

In its responsive brief, the District largely ignores Owl Labs' arguments concerning the multiple, independent sources of duty at issue in this case. Rather than engaging those arguments, the District briefly addresses negligent hiring and negligent supervision, asserting without meaningful analysis that South Carolina law does not "impose duties on public entities to protect vendors from economic loss arising from employee misconduct." (Resp't's Initial Br. 15.) That assertion misstates the law and sidesteps the record.

First, the District's position reflects a continued misapplication of the economic loss rule. The absence of physical injury does not bar claims for negligent hiring, training, or supervision. South Carolina courts have recognized such claims where the alleged harm is purely economic. *See, e.g.*, *Beneficial Fin. I, Inc.*, 431 S.C. at 276, 847 S.E.2d at 804 (reversing summary judgment on negligent and reckless training and supervision claims involving economic loss); *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 644–46, 598 S.E.2d 717, 722–23 (Ct. App. 2004) (recognizing negligent supervision claim where harm was economic).

Second, the District ignores record evidence supporting the existence of a duty or, at a

minimum, a jury question as to duty under theories of negligent hiring, training, and supervision. The District focuses narrowly on Marshall's conduct, but Owl Labs' claims extend well beyond Marshall individually. The evidence supports a finding that the District's systematic failures created the environment that enabled the harm to occur. (*See* Appellant's Br. 26-27.)

Finally, the District does not address Owl Labs' additional duty theories at all. The record raises genuine factual questions as to whether the District voluntarily undertook procurement obligations, negligently created the risk of harm, ratified the acts in question, and is liable under principles of agency and *respondeat superior*. Owl Labs articulated each of these independent bases for duty below and on appeal. The District neither rebuts those arguments nor cites any authority foreclosing them.

The District's refusal to address, much less meaningfully dispute, the factual issues in the record or respond to entire sections of Owl Labs' Appeal Brief[3] is properly treated as a concession of these issues. *Dixon v. Pattee*, 442 S.C. 233, 259, 898 S.E.2d 158, 171-72 (Ct. App. 2023) (treating the respondents' failure to address issues in their brief as a concession that the appellant's position is correct). [4]

[3] Principally, the District does not address Sections I(A)(i), I(A)(ii), (B)(ii), or I(B)(iii) of Owl Labs' Appeal Brief, which assert that the District's duties to train and supervise extended beyond Marshall to multiple levels of District employees and that the District's failure to enforce its Procurement Code foreseeably endangered innocent vendors, like Owl Labs. Nor does the District respond to Sections I(C) or I(D), which set forth independent bases for liability under principles of agency, *respondeat superior*, and ratification.

[4] Likewise, "[i]n the Fourth Circuit, 'an appellee's wholesale failure to respond to a conspicuous, nonfrivolous argument in the appellant's brief ordinarily constitutes a forfeiture.'" *In re Infinity Bus. Grp., Inc.*, 628 B.R. 213, 231-32 (D.S.C. 2021) (quoting *W. Virginia Coal Workers' Pneumoconiosis Fund v. Bell*, 781 F. App'x. 214, 226 (4th Cir. 2019) (unpublished) (Richardson, J., writing separately and announcing the judgment)), *aff'd*, 31 F.4th 294 (4th Cir. 2022); *see also Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016) (recognizing forfeiture rule); *Hammock v. Watts*, 146 F.4th 349, 363 n.4 (4th Cir. 2025) (same).

Although not binding on this Court, the Fourth Circuit's rationale for applying such a rule is persuasive: "The first is basic fairness. Appellants have an obligation to clearly present their

In sum, Owl Labs has consistently alleged duties arising from the District's own conduct, independent of any alleged contractual relationship, and the record presents genuine issues of material fact as to the existence of those duties. The circuit court erred by failing to consider those independent duties and by granting summary judgment based on a misapplication of the economic loss rule.

III. Questions of Fact Remain on the Issue of Attorneys' Fees.

Finally, the District asserts Owl Labs has identified no contract authorizing attorneys' fees. (Resp't's Initial Br. 16.) That is incorrect. Owl Labs has repeatedly pointed to the December 3, 2020 agreement executed by the District, which incorporated Owl Labs' terms of service providing for recovery of attorneys' fees. (Appellant's Br. 34; R. at 468, 470.) The circuit court itself found a genuine issue of material fact exists as to the existence and terms of the parties' contract. (R. at 5.) Summary judgment on attorneys' fees was therefore premature and should be reversed.

CONCLUSION

For the foregoing reasons, Owl Labs respectfully requests that this Court reverse the circuit court's grant of summary judgment.

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arguments for appeal in their opening brief, on penalty of forfeiture. When the appellant has done that, we reasonably can and should expect the appellee to respond in kind. Next, this rule helps instill respect for the adversarial process. . . . If we always undertook a complete review of the appellant's argument when the appellee had declined to respond, we would dull appellees' incentives to participate in the process. [Moreover,] our capacity to err is higher when deciding issues without the benefit of argument from both sides. Finally, an appellee's failure to address an issue conspicuously presented in the appellant's brief might well reflect a conscious choice, and we should not lightly wade into issues a party has voluntarily chosen to concede." *Bell*, 781 F. App'x. at 226-27.

Respectfully submitted,

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