

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Roger M. Young, Circuit Court Judge

S.C. Supreme Court

Case No. 09-CP-10-6574

NESHEN MITCHELL, individually and as  
the next friend of her minor child, HAKEEM  
T. M., ..... Petitioners,

vs.

JUAN P. MARRUFFO d/b/a. LIBERTY  
EXPRESS, ADRIAN MORALEZ, RET  
PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, ..... Defendants,

OF WHOM RET PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, are the ..... Respondents.

APPENDIX

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**RESPONDENTS' FINAL BRIEF**

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## STATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly hold that a motor vehicle entering or exiting a private property is not an artificial condition of the type that would create liability on a landowner adjoining the public highway?
2. Did the trial court properly hold that an adjoining landowner is not liable for creating an "artificial condition" where the alleged condition was a truck backing onto the property and the truck driver was not an employee of the landowner, was not a tenant of the landowner, had no permission from the landowner, and the tenant had no permission from the landowner to have trucks on the property?

## FACTS

This case arises from a collision that occurred on March 3, 2009. The collision occurred when the vehicle in which Appellant Hakeem T. Mitchell was an occupant collided with the side of a tractor trailer truck driven by Defendant Adrian Morales and owned by Defendant Juan P. Maruffo d/b/a Liberty Express. (R. at 13-14). Appellants allege that, at the time of the collision, the tractor trailer truck was backed across both lanes of travel on U.S. Highway 17 South in Ravenel, South Carolina at night without adequate lighting on the truck. (R. at 13-14). Respondents RET Partnership, William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham ("Respondents") owned property abutting this portion of Highway 17 at 5858 Savannah Highway, Ravenel, South Carolina (the "Subject Property"). At the time of the accident, Defendant Morales was purportedly attempting to back the tractor trailer truck onto the Subject Property. (R. at 13). It is undisputed that the collision did not occur on any portion of the Subject Property. (R. at 13-14, 101). It is also undisputed that Respondents neither owned nor controlled the public highway on which the accident occurred.

At all relevant times, the Subject Property contained a single family residential home located towards the front of the property and a larger warehouse-type building toward the back of the property. (Supp. R. at 5, 13, 21, 29). On January 30, 2009, Respondents ~~leased~~ the residential portion of the property to tenant J. Jose Valdez pursuant to a residential lease, which was governed by the South Carolina Residential Landlord Tenant Act. (R. at 394-98; Supp. R. at 5, 13, 21, 29). The lease did not include the warehouse at the back of the property. *Id.* Respondents used the warehouse for personal use to house their personal RV's, campers, and the like. (Supp. R. at 5, 13, 21, 29).

The Subject Property was not a "trucking terminal," as has been alleged by Appellants. Respondents did not permit tractor trailer trucks to be parked on the Subject Property because parking such trucks blocked their access to the warehouse on the rear portion of the property. (R. at 238-40). Respondents never gave permission to their tenant to drive or park truck tractors on the Subject Property. (R. at 228, 238-41, 244, 248; Supp R. at 5, 13, 21, 29, 82-84, 87-89, 94, 96-97, 99-102). Every single time Respondents saw a truck tractor on the Subject Property, they explicitly and expressly told Mr. Valdez this was not permitted and ordered him to move the truck. (R. at 238-41, 244; Supp R. at 5, 13, 21, 29, 82-84, 87-89, 99-102). Specifically, Respondent Parham twice saw a truck tractor on the Subject Property prior to this incident. Id. On each occasion, he ordered Mr. Valdez to remove the truck tractor and not park it on the property again. Id. These were the only two occasions that any of the Respondents ever observed truck tractors on the property. Id. Appellants' own expert, Jefferson C. Woodall, testified that the actions taken by Respondents in response to twice seeing truck tractors on the property were "appropriate" and "reasonable." (R. at 104, 105).

Defendant Morales did not have express or implied permission from Respondents to drive a tractor trailer truck onto the Subject Property on the date of the accident or any other date. He was not a tenant under the lease. (R. at 394-98). Respondents did not know Defendant Morales, have never met Defendant Morales, and never gave him permission to enter the property and/or drive trucks on the property. (Supp. R. at 85, 92-93, 96, 100). Likewise, Defendant Morales did not have express or implied permission from Respondents to back the truck tractor onto the Subject Property in such a way as would block Highway 17. Id. To this day, it is not known why Defendant Morales was backing

onto the property.

### **STANDARD OF REVIEW**

"[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). "[T]he evidence and all inferences that can reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." Moore v. Weinberg, 373 S.C. 209, 216, 644 S.E.2d 740, 743 (Ct. App. 2007). "Once the party moving for summary judgment meets the initial burden of showing the absence of a genuine issue as to any material fact, the nonmoving party may not simply rest on the mere allegations contained in the pleadings." Grant v. Mount Vernon Mills, 370 S.C. 138, 142, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 142, 634 S.E.2d at 17-18. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Id.

### **ARGUMENT**

#### **I. THE LAW ESPOUSED IN SKINNER V. S.C.D.O.T. IS THE PROPER STANDARD AS TO WHETHER RESPONDENTS OWED A LEGAL DUTY OF CARE TO APPELLANTS.**

"In order for liability to attach based on a theory of negligence, the parties must have a relationship recognized by law as providing the foundation for a duty to prevent an injury." McCullough v. Goodrich & Pennington Mortg. Fund, Inc., 373 S.C. 43, 47-48, 644 S.E.2d 43, 46 (2007). "An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance." Id. "Generally, there is no common law duty to act." Jensen v. Anderson County Dep't Soc. Servs., 304

S.C. 195, 199, 403 S.E.2d 615, 617 (1991). Foreseeability of injury is not sufficient to support the imposition of a duty in tort. Foster v. Greenville County Med. Soc., 295 S.C. 190, 193, 367 S.E.2d 468, 470 (Ct. App. 1988) ("in the absence of a duty to prevent an injury, foreseeability of that injury is an insufficient basis on which to rest liability."). Whether a duty exists is a question of law for the court. Huggins v. Citibank, N.A., 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). "If there is no duty, the defendant is entitled to judgment as a matter of law." Id.

It is well-settled South Carolina law that the owners of property abutting or adjoining a public highway owe no common law duty to motorists injured on the public highway, where the owners neither possess nor control the highway. Skinner v. S.C. Dep't of Transp., 383 S.C. 520, 681 S.E.2d 871 (2009) (abutting property owners owed no duty to person injured by driver who lost control when he veered onto roadway's shoulder); see also Mahle v. Wilson, 283 S.C. 486, 323 S.E.2d 65 (Ct. App. 1984) (abutting property owners owed no duty where pedestrian was struck while attempting to cross highway from the property at issue); Ford v. S.C. Dep't of Transp., 328 S.C. 481, 492 S.E.2d 811 (Ct. App. 1997) (abutting property owners owed no duty to motorist injured when he struck a tree that had fallen from adjoining property across a public highway). The law "only imposes a duty for highway conditions where an individual or business has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers." Skinner, 383 S.C. at 524, 681 S.E.2d at 873. This rule applies equally to both residential and commercial property, as it does not distinguish between the two. See Skinner, 383 S.C. 520, 681 S.E.2d 871 (residential and commercial property); Mahle, 283 S.C. 486, 323 S.E.2d 65 (commercial property); Ford, 328 S.C. 481, 492 S.E.2d 811 (residential

property). Because it is undisputed that this accident occurred on the public highway and did not occur on any portion of the Subject Property, the rule espoused in Skinner and related cases concerning the duty of adjoining property owners is the proper standard under which to analyze this case and determine whether Respondents owed a legal duty to Appellants.

Appellants' citations of and discussions of cases concerning premises liability and business invitees are both misleading and irrelevant. See, e.g., Dunbar v. Charleston & W.C. Ry. Co., 211 S.C. 209, 44 S.E.2d 314 (1947) (premises liability)<sup>1</sup>; Cook v. Lowe's Home Ctrs., Inc., 2006 WL 3098773 (D.S.C. Oct. 30, 2006) (standard for business invitees); Wintersteen v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728 (2001) (standard for business invitees); Restatement (Second) of Torts § 364 (1965) (not the law in South Carolina). Those cases involve injuries occurring on a premises owned by the defendant or on property over which the defendant has exercised some measure of control (i.e. by making repairs). In this case, there is no allegation Respondents owned or controlled the public highway where the accident occurred. Rather, the allegations concern Respondents' ownership and use of property adjoining the highway where the accident occurred, which brings this case squarely within Skinner. Case law concerning the standard of care owed by a landowner to a business invitee or a licensee is inapplicable. The standard to be applied to a business owner operating a business is vastly different from the care to be

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<sup>1</sup>  
To the extent the Court wishes to consider Dunbar v. Charleston & W.C. Ry. Co., 211 S.C. 209, 44 S.E.2d 314, which was cited by Appellants, the Court should note that the quote cited in Appellant's brief goes on to state, "the liability of a landowner, likewise, is terminated ordinarily when he parts with possession of the premises in question. Thereafter he is not accountable at the suit of one who may sustain injuries while on the property, at least when the cause of the injuries developed after the transfer of possession."

exercised by a landowner as to adjoining property.

It is undisputed that Respondents did not own or control the public highway, as Appellants have not made such allegations and there is no evidence in the record to support such allegations. Therefore, under Skinner, the only relevant inquiry for the Court is whether Respondents caused or created an artificial condition on the public highway, which is dangerous to travelers. If they did not, they cannot be held liable because they owed no legal duty to Appellants. The many other issues raised by Appellants, such as notice and knowledge, are irrelevant because there is no exception under Skinner or related cases that gives rise to such an inquiry.

**II. THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT PROPERLY CONCLUDED THERE WAS NO "ARTIFICIAL CONDITION."**

This incident did not constitute an artificial condition. This was simply a failure to yield accident, whereby the driver of the car in which Appellant Hakeem was a passenger collided with the tractor trailer truck, which was blocking both lanes of traffic and being driven by Defendant Moralez.

Our courts have not defined the term "artificial condition" as used in Skinner, 383 S.C. at 525, 681 S.E.2d at 874, other than to state that "[b]oth smoke and a traffic jam are artificial conditions." Courts across the country have consistently held that a landowner has no duty to protect against the negligent acts of third parties public highways not within the landowner's control. For example, in Naumann v. Windsor Gypsum, 749 S.W.2d 189, 1988 Tex. App. LEXIS 1096 (Ct. App. 1988), the Texas Court of Appeals addressed a case with facts nearly identical to this case. In Naumann, an accident occurred on the public highway when the plaintiff's vehicle collided with a tractor trailer truck that was blocking both lanes

of traffic as it was exiting property owned by Windsor. Id. at 190, 1988 Tex. App. LEXIS at \* 1-3. The plaintiff brought suit against Windsor, the adjoining property owner, under the theory that it designed its plant in a manner that forced tractor-trailers exiting its property to block both lanes of the public highway as they leave the plant. Id. The court of appeals affirmed summary judgment for Windsor, finding it owed no legal duty to the plaintiff. Id. at 190-92, 1988 Tex. App. LEXIS at \* 3-10. In so holding, the court noted that Windsor did not "discharge onto [the highway] an inanimate, incognizant, or inherently dangerous entity." Id. at 191, 1988 Tex. App. LEXIS at \* 7. Rather, Windsor's independent contractor, over whom Windsor had no control, was simply involved in a traffic accident on the adjacent public way. Id. "Although Windsor knew of the propensity of truck drivers to block both lanes when turning east on [the highway], it had every right to expect them to exercise due care and enter the highway safely." Id. at 192, 1988 Tex. App. LEXIS at \* 9. "An owner or occupier of property is not an insurer of the safety of travelers on an adjacent highway and is not required to provide against the acts of third persons. Id. The Naumann case is nearly identical to this case and the Court should follow its reasoning in affirming summary judgment for the Respondents.

The Naumann holding is consistent with other decisions across the country concerning this issue. For example, in Estes v. Peels, 2000 Tenn. App. LEXIS 641, \*1-4 (Ct. App. Sept. 21, 2000), the plaintiff was injured on the public highway when a vehicle exited a manufacturing plant adjacent to the highway and failed to yield to the plaintiff's right-of-way. The plaintiff sued the owner of the manufacturing plant, alleging the driveway was inadequate and caused drivers to unsafely enter the public highway. Id. The Tennessee Court of Appeals affirmed the trial court's order granting summary judgment

in favor of the adjoining landowner. Id. at \*19-22. The court concluded that there was nothing dangerous about the driveway or the parking lot in and of themselves. Id. The dangerous condition was the driver's failure to obey traffic laws and yield to oncoming traffic. Id. Even if such conduct was foreseeable by the landowner, the landowner is still not liable because imposing a duty on the landowner to "prevent a driver from pulling out on a highway without yielding to oncoming traffic would be an onerous burden." Id. at 20. Such responsibility rests with law enforcement, not a private landowner. Id.

The case at hand is factually similar to both Naumann and Estes. Both decisions are consistent with South Carolina law on this issue. Just as in Nauman and Estes, this incident did not constitute an artificial condition on the roadway. This accident was merely a traffic accident caused by Defendant Moralez's failure to yield the right-of-way or otherwise obey traffic laws. See also, e.g., Safeway Stores, Safeway Stores, Inc. v. Musfelt, 1960 Okla. 34, 349 P.2d 756 (Okla. 1960) (landowner not liable where plaintiff alleged its parking spaces were designed in a manner that forced drivers to back their vehicles onto the public roadway, thereby creating a dangerous condition); Chouinard v. N.H. Speedway, 829 F.Supp. 495, 1993 U.S. Dist. LEXIS 11154 (D.N.H. 1993) (no artificial condition where plaintiff alleged use of adjoining property created a dangerous condition on the public roadway); Owens v. Kings Supermarket, 198 Cal. App. 3d 379, 243 Cal. Rptr. 627 (1st Dist. 1988) (supermarket owed no duty to pedestrian struck on adjoining public highway); Holter v. Sheyenne, 480 N.W. 2d 736, 1992 N.D. LEXIS 24 (1992) (no duty where landowner had neither control over vehicle that struck decedent nor authority over traffic regulation on public highway); Rosas v. O'Donoghue, 2005 U.S. Dist. LEXIS 17165 (E.D.Penn. 2005) (no duty to plaintiff struck on highway because landowner did not create

a dangerous condition on highway); Dawson v. Ridgley, 554 So.2d 623, 1989 Fla. App. LEXIS 7270 (Ct. App. 1989) (no duty to passing motorist on public highway where vehicle exiting shopping center collided with motorist because driver's view was obstructed by a telephone pole located off of shopping center property).

Looking to the cases cited by Skinner also provides some guidance in determining what our courts consider as an artificial condition. Specifically, the Skinner Court cited Holiday Rambler Corp. v. Gessinger, 1989 Ind. App. LEXIS 739, 541 N.E.2d 559 (Ind. Ct. App. 1989), on this issue. In Holiday Rambler, a landowner operated a factory on its property, which employed several hundred employees. Id. at 560-61. Each day at 3:00 p.m. at the end of their shifts, these several hundred employees exited the property from four driveways and entered onto the two-lane public highway with no established traffic flow pattern. Id. An accident occurred one day during this process. Id.

The facts of this case are substantially different than the Holiday Rambler situation. The Morales vehicle was not on the Subject Property prior to the accident or exiting the property at the time of the accident. (R. 11-23). There is no allegation Respondents were doing anything to attract, encourage, or promote trucks. Nor were Respondents doing anything to attract, encourage, or promote backing trucks onto the property. Appellant's vehicle simply collided with Defendant Morales, who was negligently blocking traffic while attempting to enter the Subject Property.

One vehicle attempting to enter the property is not a "condition." Vehicles backing into and out of private property are not unusual; it is a daily occurrence. Hundreds of thousands of residential homes in South Carolina are situated such that cars must back either onto or off of the property on a daily basis. Many South Carolina businesses are

situated such that vehicles must slow down on the public highway to turn onto the property. Daily, countless businesses and homes have packages delivered to their premises by trucks that might temporarily block traffic or sight lines. These are not "artificial conditions." Property owners should not be put to the burden of being forced to defend claims for traffic accidents occurring on a public highway while persons are negligently entering or exiting their private property. Such a result would be too broad a reading of Skinner and companion cases. The Oklahoma Supreme Court recognized this principle in Safeway Stores, supra, when it noted that it is a matter of common knowledge that most residences and many businesses have driveways or parking lots such that vehicles must be backed up (or out) in order to leave the premises. 349 P.2d at 758. "Under these circumstances the property owner is not liable because the owner has no control and has no right to control the drivers of the vehicles. However, the property owner has the right to expect the drivers of cars to look before they back out." Id. To hold otherwise could potentially lead to a slippery slope and would impose an undue burden on private property owners who are ill-equipped to remedy the situation.

The Skinner Court also referenced Pitcairn v. Whiteside, 109 Ind. App. 693, 34 N.E.2d 943 (Ct. App. 1941), as constituting an artificial condition. In Pitcairn, a driver was injured when employees of the property owner started a fire on the subject property near the roadway, which caused a substantial amount of thick smoke to gather on the roadway, and obstruct the vision of drivers. Id. at 696-97, 34 N.E.2d at 945. The smoke remained on the highway for several hours and the property owner did nothing to direct traffic or otherwise attempt to minimize the effect of this condition. Id. Such facts are clearly different from the facts of this case where the accident was caused by the manner in which

Defendant Morales chose to maneuver his truck onto the Subject Property, rather than by some inherently dangerous entity, such as smoke, on the roadway. An employee of the landowner started the fire that created the smoke and the smoke was emanating from the landowner's property onto the highway. Here, there was no act on the Subject Property that attracted, encouraged, or promoted trucks to obstruct Highway 17. Defendant Morales's choice to enter the property and his subsequent choice in how to maneuver his vehicle onto the property did not constitute an artificial condition on the roadway.

In Mahle v. Wilson, 283 S.C. 486, 323 S.E.2d 65 (Ct. App. 1984), the South Carolina Supreme Court addressed a similar case and affirmed the trial court's dismissal. In Mahle, the plaintiff was injured when she left a skating rink, crossed the highway in front of the skating rink, and was struck by an automobile. Id. at 487, 323 S.E.2d at 65-66. The skating rink was owned and operated by the defendant. Id. The plaintiff alleged the skating rink was negligent in various ways by essentially allowing activity to take place on its property without providing adequate safety measures. Id. The Court of Appeals affirmed the trial court's dismissal of the suit on the ground that the skating rink was an adjoining property owner that owed no duty to the plaintiff, as one injured on the public highway adjacent to its property. Id. at 487-88, 323 S.E.2d at 66. Here, just as in Mahle, the trial court's Order should be affirmed because Respondents owed no duty to Appellants to control the acts of third parties on the public highway adjacent to their property. Such responsibility lies exclusively with government and law enforcement.

**III. THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT PROPERLY CONCLUDED THAT RESPONDENTS DID NOT "CAUSE OR CREATE" AN ARTIFICIAL CONDITION.**

If an artificial condition existed (which is denied), it was not caused or created by

Respondents. Respondents leased the Subject Property to tenant Jose Valdez. (R. at 394-98; Supp. R. at 5, 13, 21, 29). The truck involved in the accident was driven by Defendant Morales, who was not a tenant under the lease. (R. at 13-14, 394-98). Respondents did not know Defendant Morales, have never met Mr. Morales, and never gave him permission to enter the property and/or drive trucks on the property on the date of the accident or on any other date. (Supp. R. at 85, 92-93, 96, 100). Therefore, Defendant Morales did not have the express or implied permission of Respondents to drive a truck onto the property or to back a truck onto the property in such a way as would obstruct Highway 17. Id. This act is simply too far removed from Respondents to hold that they caused or created the alleged artificial condition.

Likewise, the Respondents never gave Mr. Valdez permission to drive or park tractor trailer trucks on the property. (R. at 228, 238-41, 244, 248; Supp R. at 5, 13, 21, 29, 82-84, 87-89, 94, 96-97, 99-102). In fact, every single time Respondents saw a tractor trailer truck on the property, they explicitly and expressly told Mr. Valdez this was not permitted and directed him to move the truck. (R. at 238-41, 244; Supp R. at 5, 13, 21, 29, 82-84, 87-89, 99-102).

In Naumann v. Windsor Gypsum, supra, the Texas Court of Appeals also discussed whether the defendant landowner caused or created the alleged condition. The court concluded that the dangerous condition (a tractor trailer truck obstructing two lanes of traffic) was not created by Windsor, the defendant landowner. 749 S.W. at 192, 1988 Tex. App. LEXIS at \*9. Windsor had no control over the defendant driver, an independent contractor, when the driver was not on its property. Id. at 192, 1988 Tex. App. LEXIS at \*8. Windsor was not responsible for the narrowness of the roadway, the length of the trailer,

or any other issue that could conceivably be said to have caused this condition. Id. at 192, 1988 Tex. App. LEXIS at \*9. "The same dangerous situation exists every time a tractor-trailer makes a right turn at an intersection of two-laned roads. A mere bystander who did not create the dangerous condition is not required to take action to and prevent injury to others." Id.

In Estes v. Peels, supra, the Tennessee Court of Appeals also focused on this issue. In affirming summary judgment for the landowner, the court noted the defendant landowner "had no control over the instrumentality [the vehicle] that caused [the plaintiff's] injuries; it could not prevent [defendant driver] from failing to yield to oncoming traffic as she entered the highway." 2000 Tenn. App. at \*22. Therefore, even if an artificial condition existed in Naumann and Estes, the landowners were entitled to summary judgment because they did not create the condition that led to the danger. Just as in Naumann and Estes, Respondents did not do anything which can be construed as causing or creating this alleged artificial condition, as it is undisputed that they had no control whatsoever over Defendant Moralez and his choice to obstruct the highway.

The Holiday Rambler decision is instructive on this issue as well. In Holiday Rambler, each day, the owner of the property chose to release several hundred employees from their shift at 3:00 p.m. onto a two-lane road from four driveways on the property. Unlike this case, the property owner was actively involved in creating the purported artificial condition, as it was the property owner that ran the manufacturing company, chose when to release its employees, chose where they should enter and exit the property, and, therefore, created the condition. That is not the situation here, as there is no evidence Respondents attracted, encouraged, or promoted the alleged condition. Rather, the record

demonstrates just the opposite. Respondents never consented to allowing their tenant, Defendant Morales, or anyone else to park a tractor trailer on the property, back a tractor trailer on the property, otherwise engage in acts that can be construed as causing or creating this condition. (R. at 228, 238-41, 244, 248; Supp R. at 5, 13, 21, 29, 82-84, 85, 87-89, 92-94, 96-97, 99-102).

Additionally, in Holiday Rambler, the Indiana Court of Appeals held it was a question of fact for a jury only because it was distinguishable from cases where there was lack of relationship between the landowner and the third person causing the injury. For example, in discussing this issue, the Holiday Rambler Court cited and discussed the case of Blake v. Dunn Farms, 274 Ind. 560, 413 N.E.2d 560 (1980). In Blake, the plaintiff was a passenger in an automobile that struck a horse on a public highway. Id. at 562-64, 413 N.E.2d at 561-62. The plaintiff brought suit against the owner of the horse and the landowner. Id. The landowner was neither the owner nor the custodian of the horse, as the horse belonged to a sub-tenant of the tenant to which the landowner was leasing. Id. The court affirmed granted summary judgment because "the owner of the property had no relationship to the agency causing the problem, and no duty to investigate to determine if there was a problem, emergency, or dangerous condition." Id. at 566-67, 413 N.E.2d at 564. The court expressly distinguished this case from Pitcairn, supra, wherein the landowner itself caused the artificial condition of heavy smoke traveling across the highway. Id. The court noted that to hold the landlord responsible "would place a duty on a property owner to continually inspect the perimeters of his property along an adjacent highway, to make sure that dangerous conditions do not arise for those traveling on the highway." Id. Here, just as in Blake and as recognized by Holiday Rambler, there is a

complete lack of relationship between landowner and the third person causing the injury. As more fully set forth above, Respondents had no relationship whatsoever with Defendant Moralez and no control over him.

Thus, the actions and involvement of Respondents did nothing to cause or create the alleged artificial condition. They did not attract, encourage, or promote trucking activity on the property or the act of backing a tractor trailer truck across the public highway. The record demonstrates that they did just the opposite. This accident was caused and created by the manner in which Defendant Moralez chose to maneuver the tractor trailer truck onto the Subject Property. Respondents' actions were too far removed from Defendant Moralez and the accident itself to be held liable. Property owners are under no duty to predict who will visit their residential tenant. Moreover, they are under no duty to predict or direct the manner in which such visitors will turn their vehicles onto the leased property. To expand Skinner to reach such a result would open up the floodgates of litigation for every accident that occurs on the public highway while someone is entering or exiting private property.

**IV. THE TRIAL COURT PROPERLY CONCLUDED THAT RESPONDENTS DID NOT OPERATE A "TRUCKING TERMINAL" OR UNDERTAKE ANY TRUCKING ACTIVITY ON THE SUBJECT PROPERTY.**

Appellants brought this suit against Respondents on the theory they were operating a commercial "trucking terminal" on the Subject Property. The trial court properly held that the affidavits and depositions of Respondents revealed they did not operate a trucking terminal on the property or otherwise undertake any commercial trucking activity on the property. The Subject Property contained a single family residential home, which was leased to Mr. Valdez, and a warehouse on the back of the property, which was used to house Respondents' personal RV's and campers. (R. at 394-98; Supp. R. at 5, 13, 21, 29).

There is no evidence in the record that Respondents operated a trucking terminal, undertook any trucking activity, or otherwise acquiesced in trucking activity. While there is some testimony in the record demonstrating that people occasionally saw a trailer and/or a truck parked on the property, this does not constitute a commercial trucking terminal. Moreover, the undisputed testimony in the record demonstrates that Respondents themselves did not operate a trucking terminal, engage in trucking activity, or even authorize trucking activity. (R. at 228, 238-41, 244, 248; Supp R. at 5, 13, 21, 29, 82-84, 87-89, 94, 96-97, 99-102). However, Appellants' mistaken belief that the Subject Property was a commercial trucking terminal has no effect on the long-standing rule that owners of property abutting a public highway owe no common law duty to motorists injured on the public highway where the owners neither possess nor control the highway, because this rule applies equally to both residential and commercial property. See, e.g., Skinner, 383 S.C. 520, 681 S.E.2d 871 (residential and commercial property); Mahle, 283 S.C. 486, 323 S.E.2d 65 (commercial property); Ford, 328 S.C. 481, 492 S.E.2d 811 (residential property).

Appellants' Complaint further alleges that Respondents owed a "special duty of care" because of the "commercial nature" of the Subject Property. There is no South Carolina case that imposes a special duty of care on commercial property abutting a public highway. As demonstrated above, the Skinner rule applies equally to both residential and commercial property. There is also no applicable statute, regulation, ordinance, or other law concerning trucking terminals or otherwise that creates a duty flowing from Respondents to Appellants.

Additionally, to the extent Appellants' continue to contend the property was

commercial in nature, Respondents are absolved from liability under Bylerly v. Connor, 307 S.C. 441, 415 S.E.2d 796 (1992). In Byerly, the Supreme Court held, "when land is occupied by a lessee . . . the law of property regards the lease as equivalent to possession and control of the land to the lessee." Id. at 443, 415 S.E.2d at 798. "After the premises is surrendered in good condition, the lessor typically is not responsible for hazardous conditions which thereafter develop or are created by the lessee." Id. In other words, the lease is the equivalent of a sale for the term of the lease. Therefore, if the Subject Property is deemed "commercial property," as has been suggested by Appellants, Respondents are not liable for the accident because it was caused by a condition that developed after the premises was surrendered to Mr. Valdez.

**V. NEITHER SOUTH CAROLINA LANDLORD-TENANT LAW NOR THE LEASE AGREEMENT CREATE A LEGAL DUTY OF CARE FLOWING FROM RESPONDENTS TO APPELLANTS.**

Appellants contend the lease agreement between Respondents and their tenant created a legal duty of care owed by Respondents to Appellants. There is nothing in the terms and conditions of the lease to support this allegation. (R. at 394-98). Appellants cite Sections 20 and 25 of the lease in taking this position. Section 20, entitled "Joint Responsibility," states: "Each party who signs this Rental Agreement is responsible for rent and the obligations herein." (R. at 396). This is a standard lease provision, which means that if more than one tenant signs the lease, each are equally responsible for the rent and the terms of the lease. To construe this language as imposing any responsibility or liability on the landlord would amount to a tortured reading of the provision. Section 25 of the lease sets forth rules and regulations that the tenant must follow. (R. at 397). It does not set forth an rules, regulations, or duties that the landlord must follow. No provision of the lease

creates a duty flowing from Respondents to Appellants. Nothing in the South Carolina Residential Landlord Tenant act or accompanying case law creates a duty owed by Respondents to Appellants.

**CONCLUSION**

For the reasons set forth above, the trial court properly held that Respondents owed no legal duty of care to Appellants for injuries sustained in this accident. Respondents respectfully request this Court affirm the trial court's Order granting summary judgment.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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Case No. 09-CP-10-6574

NESHEN MITCHELL, individually and as the  
next friend of her minor child, HAKEEM T.M. .... Appellants,

vs.

JUAN. P. MARUFFO d/b/a LIBERTY EXPRESS,  
ADRIAN MORALEZ, RET PARTNERSHIP, WILLIAM  
T. MCQUEENEY, CARL E. ROBERTS, KARL R.  
HENDERSON, and STEVEN PARHAM, ..... Defendants

OF WHICH RET PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS, KARL R.  
HENDERSON, and STEVEN PARHAM, are the ..... Respondents

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CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that Respondents' Final Brief complies with  
S.C.R.A.P. 211(b).



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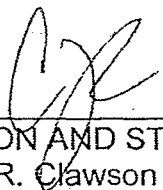
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of Respondents' Final Brief has been served upon opposing counsel by mailing a copy, properly addressed, with sufficient postage affixed thereto this 4<sup>th</sup> day of April, 2012:

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PARHAM, ..... Defendants,

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**APPELLANTS' FINAL BRIEF**

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err as a matter of law by concluding that a tractor trailer obstructing both lanes of travel along a heavily traveled roadway was not an artificial condition?
2. Did the trial court err as a matter of law by holding that Respondents owed no duty of care to Appellant Hakeem T. M. despite the undisputed evidence that Respondents retained ownership, possession, and control of the subject property and knew of a dangerous condition existing thereon?
3. Did the trial court err as a matter of law by holding that Respondents owed no duty of care to Appellant Hakeem T. M. despite the fact that Respondents were jointly liable with the tenant under the terms of a residential lease for such dangerous conditions?

## STATEMENT OF THE CASE

This case arises from of a motor vehicle collision on March 3, 2009, wherein the Appellant Hakeem T. M. ("Hakeem") was injured when the car in which he was a passenger collided with a tractor trailer truck on U.S. Highway 17 South in Ravenel, South Carolina. At the time of the collision, the truck driver was backing onto the adjacent property in order to pick up a semitrailer parked on the property.

On October 19, 2009, Appellant Neshen Mitchell, the natural mother of Hakeem, filed a Complaint alleging negligence against Adrian Morales, the truck driver; Juan P. Marruffo d/b/a Liberty Express, the trucking company which employed Defendant Morales; RET Partnership, the owner of the property leased to J. Jose Valdez and used by Morales and Marruffo; and William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham, the general partners of RET Partnership ("Respondents"). On December 8, 2009, Respondents served their Answer denying any negligence on their part.

On March 8, 2010, Respondents sought summary judgment on the ground that they owed no duty to Hakeem for injuries he sustained while on the public highway. Appellants opposed the motion, and a hearing was held on December 9, 2010. The parties were given the opportunity to conduct additional discovery, and a subsequent hearing was held on May 2, 2011. Thereafter, on June 3, 2011, the trial court issued its Order granting summary judgment to the Respondents. Appellants received written notice of the entry of the Order on June 17, 2011. On June 27, 2011, Appellants filed a Motion to Alter or Amend, which was summarily denied without a hearing by Order dated July 27, 2011, and received by counsel for Appellants on August 4, 2011.

Appellants filed a Notice of Appeal on August 30, 2011.

## FACTS

This case arises from a collision on March 3, 2009, which caused serious and permanent injuries to the minor child, Hakeem. The collision occurred when the vehicle in which Hakeem was an occupant crashed into a tractor trailer truck backing across both lanes of travel on U.S. Highway 17 South in Ravenel, South Carolina, in order to hook up to a semitrailer parked on the property owned by Respondents and known as 5858 Savannah Highway ("subject property"). Appellants brought an action for negligence against Respondents and the driver of the tractor trailer and his employer.

On January 30, 2009, Respondents entered into a Lease Agreement with J. Jose Valdez. (R. pp. 394-98). Valdez was a man who appeared to be of Mexican descent and whose native language was Spanish. (R. p. 243, lines 3-4). Respondents did not conduct any background check or otherwise do any due diligence to ascertain Valdez's intended use of the property. (R. p. 245, lines 7-25). Nor did Respondents ever surrender total possession and control of the property to their tenant. (R. p. 25, ¶ 13; p. 233, lines 12-23).

At the time of the collision, Respondents knew that their property was being used for dangerous activity and acquiesced in such dangerous activity. (R. p. 239, line 8-p. 240, line 22; p. 246, line 10-p. 247, line 16). Tractor trucks were routinely seen by the general public parked on the property and also backing across Savannah Highway onto the Respondents' property to load and unload semitrailers. (R. pp. 38, 41, 56). Semitrailers alone are 53 feet long, without the tractor truck attached. (R. p. 239, lines 13-16). In fact, it appeared to several persons in the area that the property was being used especially for the purpose of dropping tractor trailers. (R. pp. 36-37, 55-57). The

Respondents had notice<sup>1</sup> that there were tractor trucks and trailers on the property on at least four different occasions while Valdez was leasing the home on the property. (R. p. 228, line 16–p. 229, line 9; p. 238, lines 24-25). Moreover, tractor trailers were parked on the property on numerous occasions for nearly six months after the collision. (R. pp. 40-41).

In addition, the Respondents saw tractor trucks and semitrailers on the property on at least two occasions *prior to the collision*. (R. p. 252, lines 12-15). The very first time Respondents saw the tractor truck and semitrailer on the property they knew that Valdez was a trucking operator. (R. p. 244, lines 13-18). On that occasion, they spoke to Valdez and told him to move it. (R. p. 240, lines 11-25). The second time Respondents saw the tractor truck and semitrailer on the property they left a note on the windshield of the truck to move it. (R. p. 241, lines 12-25). When Respondents returned to the property, the truck was still parked there but Valdez was not at home. (R. p. 248, line 19–p. 249, line 10). However, there was another Hispanic man on the property who said he would give Valdez the message. (R. p. 249, lines 2-22). Respondents do not know the identity of this person. (R. p. 249, lines 11-25). There were potentially two separate tractor trucks and semitrailers using the subject property for loading and offloading. (R. p. 250, line 19–p. 251, line 15; p. 399). Respondents knew that the driver was backing the tractor truck across the adjacent highway to get the semitrailers on and off their property, and *admittedly knew that this activity was dangerous*, especially since that portion of the highway is heavily traveled. (R. p. 235, lines 23-25; p. 239, line 8–p. 240, line 22; p. 246, line 10–p. 247, line 4; p. 280). Even though Respondents were aware that the activity of

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<sup>1</sup> Notice to or knowledge of one partner operates as notice to or knowledge of the partnership. S.C. Code Ann. § 33-41-340.

backing onto the property was dangerous, their main objective in prohibiting the parking of the tractor trailers was so that they could have full access to the driveway and rear portion of the property to store their recreational vehicles. (R. p. 239, line 8–p. 240, line 25).

Despite the fact that Respondents knew their property was being used to conduct an admittedly dangerous activity by a third party, they acquiesced in the dangerous use of the property and failed to exercise reasonable care to make it safe. Respondents understood that, as the landlord, they had the right to prohibit Valdez from parking the tractor trucks and semitrailers on the property. (R. p. 247, lines 5-9). Despite their knowledge that they could place prohibitions on the use of the property as a place to park tractor trucks and semitrailers, Respondents did nothing to enforce the prohibition. (R. p. 247, lines 5-22). Even though Respondents were aware that the tenant was conducting a dangerous activity on their property, they did not ask the tenant to vacate the premises nor did they bring any action for ejection. (R. p. 247, lines 10-22).

Under the terms of the Lease, the tenant was to “occupy the premises only as a dwelling unit and [was] not to create or permit any nuisance” on the property. (R. p. 397, ¶ 25). The Lease further provided: “Tenant agrees to observe faithfully all rules and regulations that the Landlord now has, or may hereafter adopt for the uses of the premises....” (R. p. 397, ¶ 25) Although the Lease allowed the Landlord to terminate the Lease if Tenant failed to remedy any breach “affecting health, safety, or the physical condition of the property,”<sup>2</sup> Respondents failed to avail themselves of this default provision and statutory right. (R. p. 396, ¶ 22) Furthermore, according to the lease

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<sup>2</sup> This lease incorporates the remedies available to a landlord under the Residential Landlord and Tenant Act, S.C. Code Ann. § 27-40-710 (2007).

agreement, both the Respondents and their tenant are jointly responsible for all obligations set forth in the lease, which by its terms, includes the nature of the use of the premises. (R. pp. 396-97, ¶¶ 20, 25).

At all times relevant hereto, Respondents had ownership, possession, and control of 5858 Savannah Highway. (R. p. 25, ¶ 13). Respondents purchased the subject property as an investment. (R. p. 225, lines 5-16). Soon after the purchase, Respondents constructed a warehouse on the rear portion of the premises to store their recreational vehicles and other personal property of the individual partners. (R. p. 226, lines 4-15). The property was one single parcel and was never subdivided. (R. p. 232, lines 16-19). The rear portion of the premises was commercial, and the front part consisted of a small building which could be used as a home or an office. (R. p. 231, lines 9-20). At the time of the Respondents' depositions, the property was listed for sale as commercial property. (R. p. 231, lines 11-20).

Despite entering into a lease agreement with Valdez, Respondents maintained both possession and control of the subject property. Throughout the lease term, Respondents retained possession of the large majority of the property, including the driveway, and could come onto the property at any time without notice to the tenant. (R. p. 233, lines 12-23). In fact, the only portion of the property subject to the lease was the small home/office located toward the front of the property. (R. p. 237, lines 3-11). Respondents continued to occupy and use the warehouse on the rear of the property for their own benefit. (R. p. 236, lines 12-19). In addition, the tenant was allowed only a small portion of the driveway to park his vehicle because Respondents needed most of the driveway to drive their recreational vehicles on and off the rear of the property. (R. p.

238, line 18–p. 239, line 7). Respondents also continued to maintain the general physical condition of the land by performing such tasks as cutting the grass and weed eating. (R. p. 227, lines 10-23).

The area in which the property is located is zoned Neighborhood Commercial. (Supp. R. p. 1, ¶ 2). Under this zoning provision, both the parking of tractor trailers and recreational vehicles on the property would be non-conforming uses. (Supp. R. pp. 1 ¶ 2, 41 ¶ 5). Because there is insufficient space on the property to accommodate the loading and unloading of these tractor trailers, the operator(s) would have to back across the highway, which is highly dangerous. (Supp. R. pp. 37-38 ¶ 8). The highway adjacent to the property experiences heavy vehicular traffic. (R. p. 235, lines 23-25; p. 280).

On March 3, 2009, Hakeem was in a vehicle which was traveling down U.S. Highway 17 South when the vehicle collided with the tractor truck backing onto Respondents' property. At the time of the collision, Hakeem was only eleven years old. (R. p. 191). He sustained permanent brain damage during the collision. As a result, he is wheelchair bound and unable to care for his personal hygiene. (R. pp. 191-92). He also needs assistance to eat. (R. p. 191). He is able to say some words, but cannot talk conversationally. (R. p. 192). His injuries and impairments are permanent. (R. p. 192). Hakeem's medical expenses already exceed \$550,000; however, that does not include a recent back surgery. (R. p. 192). That figure also does not account for the ongoing care that he will need for the rest of his life. (R. p. 192).

## ARGUMENT

### **I. APPLICABLE STANDARD OF REVIEW**

The appellate court must review a grant of summary judgment under the same standard of review applied by the trial judge. Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 496-97, 662 S.E.2d 606, 607-08 (Ct. App. 2008) aff'd, 387 S.C. 280, 692 S.E.2d 523 (2010) (citing Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005)). “Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law.” Id. (citing S.C.R. Civ. P. 56(c)) When determining whether a material issue of fact exists, the appellate court must view all evidence and the inferences to be drawn in a light most favorable to the non-moving party. Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009), reh'g denied (Aug. 25, 2009) (citing Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003)). If more than one inference can be drawn, then the task is one for the jury, and summary judgment should not be granted. Id. (citing Vaughan v. Town of Lyman, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006)).

### **II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT RESPONDENTS OWED NO DUTY OF CARE TO APPELLANT HAKEEM T. M.**

The trial court committed reversible error in granting summary judgment to the Respondents based on its clearly erroneous conclusion that Respondents owed no duty of care to Hakeem as a result of permitting an artificial and dangerous condition to exist on Respondents' property. Under the relevant facts of this case and a proper application of the law, the duty owed by Respondents is clear, and the question of their negligence is solely for the jury to determine.

**A. The trial court erred as a matter of law in concluding that there was no artificial condition.**

Appellants' cause of action against Respondents seeks compensation for injuries sustained by Hakeem as a result of Respondents' negligence. Generally, in a negligence action, a plaintiff must show that the (1) defendant owed a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. Steinke v. South Carolina Dep't of Labor, Licensing and Reg., 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). The duty of care is that standard of conduct the law requires of an actor in order to protect others against the risk of harm from his actions. Snow v. City of Columbia, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). It embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable and which can be avoided by the defendant's exercise of reasonable care. Id.

In Skinner v. S.C. Dep't of Transp., 383 S.C. 520, 524, 681 S.E.2d 871, 873 (2009), the South Carolina Supreme Court held that an owner of land adjacent to a public highway owes a duty of care to the travelers thereon for individual and business activity which creates an artificial and dangerous condition on the highway. A landowner may avoid liability *only* where the alleged conditions are normally and naturally occurring. Id. The common law in South Carolina *will* impose a duty of care on a landowner who "has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers." Id. The Skinner court, adopting the view of other jurisdictions, observed that allowing smoke to drift from one's property onto the adjacent roadway, or

creating a traffic jam on the highway are both examples of artificial conditions for which a landowner may be liable to motorists. Id. at 525, 681 S.E. 2d at 874.

This case arises out of the harm suffered by Hakeem as a passenger in a vehicle that collided with a tractor truck backing across Highway 17 South onto Respondents' property to hook up to a trailer parked on the premises. The trial court's finding that such activity does not create an artificial and dangerous condition is incorrect. (R. p. 6) The trial court refused to acknowledge that a large tractor truck backing across a highway could be an artificial condition simply because it was factually distinguishable from the examples mentioned in Skinner. (R. p. 7) The Skinner case certainly does not preclude a finding that an artificial condition was also created under the facts of this case. The two examples referenced in Skinner are merely that, examples. They are by no means an exhaustive list of possible artificial conditions that may be created by a landowner.

In reaching its decision, the Skinner court examined the case of Holiday Rambler Corp. v. Gessinger, 541 N.E.2d 559, 562 (Ind. Ct. App. 1989), which is instructive. Similar to this case, the plaintiff in Holiday Rambler was injured in a collision with a motorcycle that was trying to avoid hitting two other vehicles leaving the subject property. However, the Rambler court did not dismiss the collision as simply a traffic accident on the adjacent highway, nor did it ever refer to the condition as a "traffic jam." Instead, in denying the landowner's motion for summary judgment, the court ruled that

the owner of land adjacent to a highway owes the duty to the traveling public to prevent injury to travelers upon the highway from any unreasonable risks created by the property's dangerous condition which the landowner knew or should have known about. Whether this duty was discharged is a question of fact for the jury.

Holiday Rambler, 541 N.E.2d at 562.

The Skinner court also relied on the case of Pitcairn v. Whiteside, 34 N.E.2d 943, 949-50 (Ind. Ct. App. 1941). In Pitcairn, the court imposed a duty of care on a landowner adjacent to the highway for allowing smoke to be blown from its property across the nearby highway, obscuring the vision of motorists. The court in Pitcairn held that a landowner had a duty of care not to create or maintain a condition on his right of way which created a risk of harm to the traveling public, particularly where the resulting harm is foreseeable, and the landowner could have easily prevented the danger. Id. at 946-47, 949-50. Under those circumstances, the issue of the landlord's negligence is properly submitted to the jury. Id.

The Skinner court concluded that "the owner of land which abuts a highway is not liable to the traveler for conditions occurring on that highway which are normal and natural...." 383 S.C. at 575, 681 S.E.2d at 874. Here, the trial court did not make a finding that a tractor-truck obstructing both lanes of travel was a normal and natural condition, which is necessary for the Respondents to avoid liability to Hakeem. Rather, the court came to the unsupported conclusion that "[t]his was simply a traffic accident whereby one vehicle blocked the lane of another and a collision resulted." (R. pp. 6-7). The actual facts establish that this activity was not an isolated event. In this case, the property was routinely used, with the Respondents' knowledge, to load and unload tractor trailers, which by necessity resulted in regular obstruction of the adjacent roadway. (R. p. 38; pp. 40-41; pp. 55-56; p. 239, line 8-p. 240, line 22; p. 246, line 10-p. 247, line 4). If any inference is to be made, it must be made in the light most favorable to Appellants. Murphy, 384 S.C. at 54, 681 S.E.2d at 30. Under the applicable standard, the proper conclusion for the court to draw is that the activity knowingly conducted on

Respondents' property created an artificial and dangerous condition for which Respondents can be held liable under the well settled law of this state.

Moreover, the trial court erred by concluding as a matter of law that there was no artificial condition created by backing a tractor truck across a heavily traveled highway to pick up and drop off semitrailers. Generally, the question of whether or not a condition is artificial is one for the jury, particularly where the resolution of the issue is fact specific. E.g., Cultee v. City of Tacoma, 977 P.2d 15, 24-25 (Wash. Ct. App. 1999); Keith v. Beard, 464 S.E.2d 633, 637 (Ga. Ct. App. 1995); Harris v. Woolworth, 824 S.W.2d 31, 34 (Mo. Ct. App. 1991); Clarke v. Edging, 512 P.2d 30, 34 (Ariz. Ct. App. 1973); Ritgers v. City of Gillespie, 113 N.E.2d 215, 218-19 (Ill. Ct. App. 1953); Carlton v. Pac. Coast Gasoline Co., 242 P.2d 391, 395 (Cal. Ct. App. 1952).

**B. The trial court erred in finding Respondents owed no legal duty of care to Appellant Hakeem T. M. where Respondents retained possession, ownership, and control of the subject property and had actual notice of a dangerous condition on it.**

Although Skinner is applicable to the determination of whether a duty exists in this case, it is not the sole legal standard that must be considered by the Court. The Skinner decision does not and should not foreclose the application of other law governing a landowner's duty of care in the use of his property.<sup>3</sup>

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<sup>3</sup> In addition to Skinner, the trial court cited only two other cases to support its sweeping conclusion that Respondents are absolved of any liability to Hakeem. However, neither of those cases lends support to the argument that these Respondents owe no duty here. The holding in Mahle v. Wilson, 283 S.C. 486, 487, 323 S.E.2d 65, 66 (Ct. App. 1984), was limited to the conclusion that the defendants "owed no duty to the plaintiff with respect to the parking of cars on the shoulder of the road opposite its place of business or to request the Highway Department to post speed limit signs or furnish a pedestrian crosswalk in front of its place of business...." In Ford v. S.C. Department of Transportation, 328 S.C. 481, 486, 492 S.E.2d 811, 814 (Ct. App. 1997), this Court recognized "the rule that a landowner in a residential or urban area has a duty to others outside the property to prevent an unreasonable risk of harm," but refused to extend the duty to rural landowners.

In South Carolina, “[o]ne who controls the use of property has a duty of care not to harm others by its use.” Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (citing Dunbar v. Charleston & W.C. Ry. Co., 211 S.C. 209, 44 S.E.2d 314 (1947); Peden v. Furman University, 155 S.C. 1, 151 S.E. 907 (1930)). ““The liability of an owner or occupant of real estate in reference to injuries caused by a dangerous or defective condition of the premises depends in general upon his having control of the property. In fact, such liability depends upon control, rather than ownership, of the premises.”” Dunbar v. Charleston & W. C. Ry. Co., 211 S.C. 209, 216, 44 S.E.2d 314, 317 (1947) (quoting 38 Am. Jur. Negligence § 94). Even where the landowner is not a full-time occupant of the property, he nonetheless has a duty to insure that the use of his property is not injurious to others. “In determining whether an individual has sufficient control of premises so as to impose a duty to inspect the premises, a court generally will look to factors such as whether the individual has authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee the management of the property. Cook v. Lowe's Home Centers, Inc., 2006 WL 3098773 (D.S.C. Oct. 30, 2006) (citing Benjamin v. Wal-Mart Stores, Inc., 413 F. Supp. 2d 652 (2006)). A person in control of property will also be liable for a dangerous condition created by a third party if he knew of the dangerous condition and failed to remedy it. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001); Restatement (Second) of Torts § 364 (1965). In short, a landowner who retains control of his leased property, and has notice of a dangerous condition thereon, will be liable to those who suffer injuries as a result of the dangerous condition.

Accordingly, a landowner is not exempt from this duty merely because a third party allegedly caused the harm. Restatement (Second) of Torts § 364 (1965). Even where there is evidence a landowner did not himself create a dangerous condition on the highway, he may nonetheless be liable to a motorist for acquiescing in the activity or failing to remedy the danger. *Id.*; *Clark v. Blue Circle, Inc.*, 514 S.E.2d 473, 476 (Ga. Ct. App. 1999) (cited in *Skinner*, 383 S.C. at 525, 681 S.E.2d at 874). The dangerous activity need not be for the benefit of the landowner or conducted with his express consent. Restatement (Second) of Torts § 364, cmt. h. Rather, liability will attach where “he knows that *the other* is creating or is about to create it, and could prevent its creation by asserting his authority as possessor, as where he knows that he could cause the third party to desist by ordering him to do so or to leave the land.” *Id.* (emphasis added). This duty is in keeping with the duty of care traditionally imposed in negligence actions in this state.

Furthermore, a landowner may not necessarily seek the protection of a rental agreement to avoid his liability to third parties where he fails to surrender full possession and control to the tenant. Although this court has not yet considered a case which is factually analogous to the present one, Respondents’ duty of care is inescapable under the well settled law of liability for persons who control real property and are aware of the existence of a dangerous condition on that property.

Other jurisdictions which have considered similar factual scenarios have relied on the same principles espoused in South Carolina jurisprudence in holding a landlord liable for the dangerous activity of the tenant where the landlord maintained control of the premises, knew of the danger, and failed to remedy it. “An owner cannot escape his duty

of exercising reasonable care to maintain his property adjoining a highway in reasonably safe condition unless he parts with the entire possession and control of the premises.” Klepper v. Seymour House Corp. of Ogdensburg, Inc., 158 N.E. 29 (N.Y. Ct. App. 1927). “The legal concepts concerning a landlord’s liability for a tenant’s activities have been expanded to the point where a landlord may be responsible for the wrongdoing of a tenant when the landlord continues to exercise control over the premises.” Muhammad v. Bucknor, 228 A.D.2d 333, 335 (N.Y. 1996). Therefore, the common law will impose a duty on a landowner who maintains control of his property, even though it is subject to a lease, in order to provide a full remedy to a plaintiff who is injured while traveling on the adjoining roadway.

The rationale underlying the imposition of a duty of care on a landlord is best explained in the case of Bober v. New Mexico State Fair, 808 P.2d 614 (N. Mex. 1991). There, the defendant leased a portion of its property to organizers for a rock concert. Id. at 616. The plaintiff was injured by an attendee who was attempting to make a left turn onto the highway where the plaintiff was traveling. Id. The plaintiff alleged that the defendant landowner was negligent in permitting an activity on its property which would obviously result in a large volume of traffic attempting to enter onto the roadway from a single location, thereby creating a danger to the motoring public. Id. at 618. Defendant sought summary judgment on the basis that it owed plaintiff no duty. Id. at 616. The court, however, was quick to find that the defendant does in fact have a duty of care based on the basic principles of negligence, which is: “Every person has a duty to exercise ordinary care for the safety of the person and the property of others.” Id. at 618 (quoting SCRA 1986, 13–1604 (Uniform Jury Instruction (UJI)—Civil 1604)). This rule

alone is sufficient to formulate "the duty of a landowner to exercise ordinary care to avoid creating, or permitting, an unreasonable risk of harm to others...." Id. It arises independently of any other factors unique to the case including: the character of the landowner's property interest; whether the property is subject to a lease; the legal identity of the plaintiff; or the mere happenstance that the collision and resulting injury occurred off the property. Id. at 618-19. The Bober court recognized that the duty was clear as a matter of law and the question of defendant's breach of the duty was a proper one for the jury. Id. at 620-21.

Likewise, in another case factually similar to the one at bar, the Rhode Island Supreme Court imposed a duty of care on a landlord to oversee the use of his property for the protection of those who are rightfully traveling on nearby roadways. In Moretti v. C.S. Realty, Co., 82 A.2d 608 (R.I. 1951), the court ruled that a landowner could be held liable for injuries sustained by a nearby pedestrian who was injured because of a hazardous condition on the property. The tenant in Moretti, without the consent of the landowner, partitioned the first floor of the building which he leased and then sublet the additional space to a commercial tenant. Id. at 610. In subdividing the property, he left an old, rusty fan exposed, and a blade of the fan detached, flew out of the opening which the tenant had created, and hit and injured a passerby. Id. There, the duty of care owed by the landlord to travelers on the highway originated from the rule of law in the Fourth Circuit:

The public has the right to the unobstructed use of the highway free of unnecessary hazards, and it is the duty of owners and occupiers of property abutting thereon to use it so as not to endanger members of the public while they are exercising such right. Weilbacher v. J. W. Putts Co., 123 Md. 249, 91 A. 343; King v. Hartung, 123 Va. 185, 96 S.E. 202.

Id. at 611. When a person traveling on the highway is injured as a result of a dangerous condition existing on the property, then there is a presumption that the landlord breached his duty. Id. (citing Pindell v. Rubinstein, 115 A. 859 (Md. Ct. App. 1921)). An important factor to consider is whether the landlord, prior to the accident, had the opportunity to control the premises and remedy the danger. Id. at 612-13.

The Rhode Island court, like the courts of South Carolina, was concerned with the general principle of tort law that the plaintiff should not suffer a harm which is foreseeable and which can be avoided by the defendant's exercise of reasonable care. Snow, 305 S.C. at 554, 409 S.E.2d at 803; accord, Moretti, 82 A.2d at 611 ("The justice of this rule lies in the circumstance that the principal evidence of the cause of the accident is accessible to the party in control of the premises and inaccessible to the victim of the accident.")

The facts of the within action demand a proper application of the law. The relevant and undisputed evidence is that Respondents never surrendered ownership, possession, or control of 5858 Savannah Highway to their tenant; that they knew prior to the collision the property was being used to park tractors and trailers; that the use of the property necessarily involved backing those tractors and trailers across both southbound lanes of the adjacent highway; that this activity created an artificial condition which was dangerous to travelers on the highway; that the Respondents knew, prior to the collision, that this activity was dangerous; that the Respondents had, and knew they had, the authority to prohibit the dangerous use of the property; that the tenant continued to use the property to park tractors and trailers after the serious collision which injured Hakeem; and that Respondents made no meaningful effort to make the tenant stop the dangerous

use of their property or to make him leave the premises. Under these facts and the applicable law discussed above, the Respondents indisputably owed Hakeem a legal duty of care and may be held liable for the injuries he sustained.

The trial court ignored these relevant facts which necessitate the imposition of a legal duty on the Respondents. In excusing the Respondents from any culpability whatsoever, the Court relied primarily on the following facts: Respondents did not operate a trucking terminal on the subject property (R. p. 2); the activity was not for the benefit of Respondents (R. p. 6); Defendant Morales was not a tenant under the lease (R. p. 2); Respondents did not control the manner in which Defendant Morales chose to maneuver his tractor trailers onto the property (R. p. 6); and Respondents never gave Defendant Morales or anyone else permission to drive tractor trailers on and off the property. (R. p. 6) These factual findings are irrelevant to the duty owed by Respondents. Instead, the only questions to be answered are whether the Respondents had control of the use of the property and whether they had notice of the dangerous activity. The Respondents readily concede that they did. (R. p. 25 ¶ 13; p. 233, lines 12-18; p. 239, line 8–p. 240, line 22). Moreover, the conclusion that the Respondents failed to remedy the danger is unavoidable given the fact that Hakeem sustained grievous injuries as a result.

It is also irrelevant that the Respondents did not possess or control the highway adjacent to their property, as Skinner does not establish that possession or control of the highway is a necessary requirement for landowner liability to attach. Rather, it was the use of their own property that caused an artificial and dangerous condition on the highway. Respondents concede that Skinner “imposes a duty for highway conditions

where an individual or business has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers." 383 S.C. at 3, 681 S.E.2d at 873. (R. pp. 5, 190). The trial court failed to impose that duty on Respondents here after having concluded that Respondents did not undertake or permit the dangerous activity. (R. pp. 5-6). That conclusion fails to correctly apply the law of this state.

Finally, the trial court held that landowners are under no duty "to predict who will visit their residential tenant" or "to predict or direct the manner in which such visitors will maneuver their vehicles onto the leased property." (R. p. 6) According to the trial court, such a requirement "would create an undue burden and an impractical result." (R. p. 6). However, that is not the duty which the Appellants seek to impose. Instead, Respondents' duty here is simple: to use due care to ensure that the property under their control is not used in such a way that it could harm others. The concerns of the trial court are misplaced. There is no undue burden on a landowner who retains control of the property to remedy a dangerous condition of which he is aware, particularly here where the only potential cost would be lost rental income. Further, the holding of the trial court would yield the impractical result that landowners in control of their property could turn a blind eye to dangerous, or even criminal, activity on their land, continue to enjoy the benefits of ownership while collecting rent, and yet claim immunity when a third party suffers injury because of dangers the landowner chose to ignore. The trial court's conclusion effectively invalidates the well settled law in South Carolina regarding the duties of property owners.

**C. Because the lease also creates a duty of care, the trial court erred in granting summary judgment to the Respondents.**

In addition to the duty imposed by law, Respondents have contractually agreed to share liability with their tenant for any dangerous condition existing on their property. (R. pp. 396, 397, ¶¶ 20, 25). By their own admission, permitting tractor trucks to routinely back across a heavily traveled highway to pick up and drop off semitrailers creates a clear danger to motorists on Highway 17 South. (R. p. 235, lines 23-25; p. 239 line 8—p. 240, line 22; p. 246, line 10—p. 247, line 4). Accordingly, the trial court erred in granting summary judgment to the Respondents where the lease itself created a duty upon Respondents.

**CONCLUSION**

For the reasons stated, this Court should reverse the trial court's Order granting summary judgment to the Respondents.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 09-CP-10-6574

NESHEN MITCHELL, individually and as  
the next friend of her minor child, HAKEEM

T. M. .... Plaintiffs-Appellants,

vs.

JUAN P. MARRUFFO d/b/a LIBERTY  
EXPRESS, ADRIAN MORALEZ, RET  
PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, .....

Defendants.


Of whom

RET PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, are .....

Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellants' Final Brief complies with Rule 211(b),  
SCACR.

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EXPRESS, ADRIAN MORALEZ, RET  
PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, ..... Defendants,

OF WHOM RET PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, are the ..... Respondents.

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APPELLANTS' FINAL REPLY BRIEF

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## ARGUMENT

Appellants' cause of action against Respondents is for negligence, which arises out of the well-founded principle of tort law that all persons have a duty to act reasonably so as to avoid harm to third parties. Snow v. City of Columbia, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). The duty of landowners to exercise due care in the use of their property arises out of this very basic rule of law. Id.; Bober v. New Mexico State Fair, 808 P.2d 614, 618 (N. Mex. 1991). Whether the duty is espoused in the more narrow context of premises liability, or even nuisance law, the duty remains the same. The law of South Carolina is clear: where a landowner retains possession and control of his property, he will be liable to third parties injured as a result of the dangerous use of that property. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001); Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (citing Dunbar v. Charleston & W.C. Ry. Co., 211 S.C. 209, 44 S.E.2d 314 (1947)); Peden v. Furman University, 155 S.C. 1, 151 S.E. 907 (1930); Cook v. Lowe's Home Centers, Inc., 2006 WL 3098773 (D.S.C. Oct. 30, 2006) (citing Benjamin v. Wal-Mart Stores, Inc., 413 F. Supp. 2d 652 (2006)); Restatement (Second) of Torts § 364 (1965).

The critical facts in this case, which are admitted to by the Respondents, are that: (1) the Respondents retained ownership, possession, and control of the property known as 5858 Savannah Highway; (2) the property was being used for a dangerous activity, namely, backing across both lanes of the heavily traveled highway adjacent to the property to load and unload large tractor trailers onto the property; (3) the Respondents knew how their property was being used and knew that such activity constituted a danger to the traveling public; and (4) the Respondents failed to remedy the danger. (R. p. 25, ¶

13; p. 228, line 16-p. 229, line 23; p. 233, lines 12-23; p. 235, lines 23-25; p. 238, line 1-p. 240, line 13; p. 246, line 10-p. 247, line 16; p. 280). These facts alone are sufficient to impose a duty of reasonable care on Respondents.

Respondents' arguments are based on facts that are irrelevant to the duty of care owed by them. The crux of the Respondents' argument derives from the mistaken notion that landowners have no duty to ensure the safety of others on public highways for the negligence of third parties that is beyond the control of the landowner. However, the facts of this case are distinguishable in that these Respondents had control over *both* the third party and the dangerous use of the Respondents' property. As Respondents correctly point out and as the case law supports, a landowner's duty of care ends only after he parts with possession of the property. (Initial Brief of Respondents, p. 6, n.1 (citing Dunbar, 211 S.C. 209, 44 S.E.2d 314)).

The cases relied on by the Respondents to avoid liability are inapposite to this litigation. In Naumann v. Windsor Gypsum, 749 S.W.2d 189, 190 (Tex. Ct. App. 1988), the plaintiff was injured by a truck driver, an independent contractor, who had completely left the defendant's property and traveled 264 feet down the highway before colliding with another vehicle. There, the court likened the defendant to a mere bystander which, because it had no control over the driver and did not create the danger, had no affirmative duty to act. Id. at 192. The facts in Naumann stand in great contrast to the evidence established in this case, which is that the Respondents had control over the subject property and the dangerous condition created by its improper use. Accordingly, Naumann provides no reasonable basis to excuse the Respondents from their legal duty as a landowner. In addition, the wreck at issue here occurred right in front of the

Respondents' property. In fact, two of the tractor truck wheels were already on the curb between Respondents' property line and the highway at the time the collision took place. (R. pp. 400-01).

Moreover, the case of Estes v. Peels, 2000 WL 1424808 (Tenn. Ct. App. 2000) is also unavailing and fails to yield any sound line of reasoning for this Court to absolve Respondents. In that case, the plaintiff was injured when an employee, leaving her job with the defendant plant, pulled onto the highway into the path of an oncoming car. Id. at \*1. That court recognized the general rule that "[a] duty to act with due care arises when a risk is unreasonable." Id. at \*3. However, there was no evidence that anything, whether another vehicle or a structure on the property, had obstructed the vision of the defendant driver, and the wrongdoing lay solely on the driver. Id. at \*6. Accordingly, the court held that summary judgment was properly granted to the defendant plant. Id. at \*7. Again, these facts are contrary to the evidence in this case. Here, it was the very use of the property, that the Respondents controlled, that caused injury to the minor Appellant. Furthermore, both Naumann and Estes were based primarily on a theory of negligent design. Of course, that claim has not been made here. The subject property was not intended for use by tractor trucks and semi trailers. Such activity was in violation of local zoning ordinances and would knowingly create a danger on the adjacent highway. (R. p. 34; p. 62; p. 235, lines 23-25; p. 239, line 6-p. 240, line 10; p. 246, line 10-p. 247, line 4; p. 280; Supp. R. pp. 40-58).

Respondents have incorrectly framed the issues on appeal. This collision was not the result of a mere happenstance beyond the control of Respondents. This litigation is not, as Respondents' contend, a "failure to yield" case. (Initial Brief of Respondents, p.

7). Rather, the cognizable claims against these Respondents are based on the fact that these landowners allowed an ongoing dangerous use of their property, which they possessed and controlled, without regard to the safety of motorists on the adjacent highway. Tractor trucks were routinely seen by the general public parked on the property and also backing across Savannah Highway onto the Respondents' property to load and unload semitrailers. (R. pp. 38, 41, 56). In addition, the very first time Respondents saw the tractor truck and semitrailer on the property they knew that Valdez was a trucking operator. (R. p. 244, lines 13-18). Coupled with these facts, the added detail that a party unknown to the Respondents was also using the property to load and unload tractor trailer is evidence that the *jury* should be permitted to consider in determining whether Respondents breached their duty of reasonable care.

The Respondents misconstrue the duty that is owed, and Respondents' slippery slope argument must fail. The Appellants do not seek to impose a duty on landowners "to predict or direct the manner in which . . . visitors will turn their vehicles onto the leased property." (Initial Brief of Respondents, p. 16). Likewise, Appellants are not asking the court to create a new duty, but merely to impose the long recognized responsibility that landowners have to exercise reasonable care in the use of their property to avoid harm to others, including persons on the premises, adjacent landowners, and the traveling public.

#### CONCLUSION

For the reasons stated, this Court should reverse the trial court's Order granting summary judgment to the Respondents.

Respectfully submitted,



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ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Roger M. Young, Circuit Court Judge

---

Case No. 09-CP-10-6574

---

NESHEN MITCHELL, individually and as  
the next friend of her minor child, HAKEEM  
T. M., ..... Plaintiffs-Appellants,

vs.

JUAN P. MARRUFFO d/b/a LIBERTY  
EXPRESS, ADRIAN MORALEZ, RET  
PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, ..... Defendants,

Of whom


RET PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, are ..... Respondents.

---

CERTIFICATE OF COUNSEL

---

The undersigned hereby certifies that Appellants' Final Reply Brief complies with Rule  
211(b), SCACR.

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PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, ..... Defendants,

OF WHOM RET PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, are the ..... Respondents.

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**PROOF OF SERVICE**

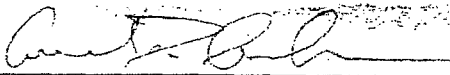
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I certify that I have served the Appellants' Final Brief and Appellants' Final Reply Brief on Respondents RET Partnership, William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham by U.S. Mail, postage prepaid, on March 23, 2012, addressed to their attorney of record as follows:

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ATTORNEYS FOR APPELLANTS

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

Neshen Mitchell, individually and as the next friend of  
her minor child Hakeem T.M., Appellants,

v.

Juan P. Marruffo d/b/a Liberty Express, Adrian Morales,  
RET Partnership, William T. McQueeney, Carl E.  
Roberts, Karl R. Henderson, and Steven Parham,  
Defendants;

Of whom RET Partnership, William T. McQueeney, Carl  
E. Roberts, Karl R. Henderson, and Steven Parham, are  
the Respondents.

Appellate Case No. 2011-198047

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Appeal From Charleston County  
Roger M. Young, Circuit Court Judge

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Unpublished Opinion No. 2013-UP-010  
Heard December 13, 2012 – Filed January 9, 2013

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**AFFIRMED**

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Richard S. Rosen and Andrew D. Gowdown, both of  
Rosen, Rosen & Hagood, LLC, of Charleston, and J.  
Joseph Condon, Jr., of North Charleston, for Appellants.

Samuel R. Clawson, Timothy A. Domin, and Christina R. Fagnoli, all of Clawson & Staubes, L.L.C, of Charleston, for Respondents.

**PER CURIAM:** This appeal arises out of Appellants Neshen Mitchell and Hakeem T.M.'s claim of negligence against Respondents RET Partnership, William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham. The trial court granted Respondents' motion for summary judgment, finding Respondents owed no duty of care to Appellants. On appeal, Appellants argue the trial court erred as a matter of law in finding Respondents owed Appellants no duty of care because: (1) Respondents created an artificial condition on the highway; (2) Respondents retained possession, control, and ownership of the property; and (3) the lease created a duty of care. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: Rule 56(c), SCRPC (noting summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); *Bailey v. Segars*, 346 S.C. 359, 366, 550 S.E.2d 910, 913 (Ct. App. 2001) ("To establish a cause of action for negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damages proximately resulting from the breach of duty."); *Skinner v. S.C. Dep't of Transp.*, 383 S.C. 520, 524, 681 S.E.2d 871, 873 (2009) ("South Carolina common law only imposes a duty for highway conditions where an individual or business has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers."). Here, Appellants make several arguments that Respondents engaged in activity that created an artificial and dangerous condition on the highway. However, after careful consideration of their arguments and a thorough examination of the record, we find no evidence that Respondents did anything that gave rise to a duty. Therefore, the trial court correctly granted summary judgment to Respondents.

**AFFIRMED.**

**FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.**



1-10-13

## The South Carolina Court of Appeals

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Re: Mitchell, Neshen-v. Marruffo, Juan  
Appellate Case No. 2011-198047

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
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Roger M. Young, Circuit Court Judge

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NESHEN MITCHELL, individually and as  
the next friend of her minor child, HAKEEM  
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PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, ..... Defendants.

Of whom

RET PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, are ..... Respondents.

---

**PETITION FOR REHEARING OR REHEARING *EN BANC***

---

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ATTORNEYS FOR APPELLANTS

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The Appellants petition this Court for a rehearing of its decision filed January 9, 2013. In upholding the Order of the Circuit Court, this Court likewise overlooked and misapprehended both the facts and the law, which require the imposition of a duty of care on the Respondents.

### FACTUAL BACKGROUND

This case arises from a collision on March 3, 2009, which caused serious and permanent injuries to the minor child, Hakeem. The collision occurred when the vehicle in which Hakeem was an occupant crashed into a tractor trailer truck backing across both lanes of travel on U.S. Highway 17 South in Ravenel, South Carolina, in order to hook up to a semitrailer parked on the property owned by Respondents and known as 5858 Savannah Highway ("subject property"). Appellants brought an action for negligence against Respondents and the driver of the tractor trailer and his employer.

On January 30, 2009, Respondents entered into a Lease Agreement with J. Jose Valdez. (R. pp. 394-98). Valdez was a man who appeared to be of Mexican descent and whose native language was Spanish. (R. p. 243, lines 3-4). Respondents did not conduct any background check or otherwise do any due diligence to ascertain Valdez's intended use of the property. (R. p. 245, lines 7-25). Nor did Respondents ever surrender total possession and control of the property to their tenant. (R. p. 25, ¶ 13; p. 233, lines 12-23).

At the time of the collision, Respondents knew that their property was being used for dangerous activity and acquiesced in such dangerous activity. (R. p. 239, line 8-p. 240, line 22; p. 246, line 10-p. 247, line 16). Tractor trucks were routinely seen by the general public parked on the property and also backing across Savannah Highway onto the Respondents' property to load and unload semitrailers. (R. pp. 38, 41, 56). Semitrailers alone are 53 feet long, without the tractor truck attached. (R. p. 239, lines 13-16). In fact, it appeared to several persons in the area

that the property was being used especially for the purpose of dropping tractor trailers. (R. pp. 36-37, 55-57). The Respondents had notice<sup>1</sup> that there were tractor trucks and trailers on the property on at least four different occasions while Valdez was leasing the home on the property. (R. p. 228, line 16–p. 229, line 9; p. 238, lines 24-25). Moreover, tractor trailers were parked on the property on numerous occasions for nearly six months after the collision. (R. pp. 40-41).

In addition, the Respondents saw tractor trucks and semitrailers on the property on at least two occasions *prior to the collision*. (R. p. 252, lines 12-15). The very first time Respondents saw the tractor truck and semitrailer on the property they knew that Valdez was a trucking operator. (R. p. 244, lines 13-18). On that occasion, they spoke to Valdez and told him to move it. (R. p. 240, lines 11-25). The second time Respondents saw the tractor truck and semitrailer on the property they left a note on the windshield of the truck to move it. (R. p. 241, lines 12-25). When Respondents returned to the property, the truck was still parked there but Valdez was not at home. (R. p. 248, line 19–p. 249, line 10). However, there was another Hispanic man on the property who said he would give Valdez the message. (R. p. 249, lines 2-22). Respondents do not know the identity of this person. (R. p. 249, lines 11-25). There were potentially two separate tractor trucks and semitrailers using the subject property for loading and offloading. (R. p. 250, line 19–p. 251, line 15; p. 399). Respondents knew that the driver was backing the tractor truck across the adjacent highway to get the semitrailers on and off their property, and *admittedly knew that this activity was dangerous*, especially since that portion of the highway is heavily traveled. (R. p. 235, lines 23-25; p. 239, line 8–p. 240, line 22; p. 246, line 10–p. 247, line 4; p. 280). Even though Respondents were aware that the activity of backing onto the property was dangerous, their main objective in prohibiting the parking of the tractor

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<sup>1</sup> Notice to or knowledge of one partner operates as notice to or knowledge of the partnership. S.C. Code Ann. § 33-41-340.

trailers was so that they could have full access to the driveway and rear portion of the property to store their recreational vehicles. (R. p. 239, line 8–p. 240, line 25).

Despite the fact that Respondents knew their property was being used to conduct an admittedly dangerous activity by a third party, they acquiesced in the dangerous use of the property and failed to exercise reasonable care to make it safe. Respondents understood that, as the landlord, they had the right to prohibit Valdez from parking the tractor trucks and semitrailers on the property. (R. p. 247, lines 5-9). Despite their knowledge that they could place prohibitions on the use of the property as a place to park tractor trucks and semitrailers, Respondents did nothing to enforce the prohibition. (R. p. 247, lines 5-22). Even though Respondents were aware that the tenant was conducting a dangerous activity on their property, they did not ask the tenant to vacate the premises nor did they bring any action for ejectment. (R. p. 247, lines 10-22).

Under the terms of the Lease, the tenant was to “occupy the premises only as a dwelling unit and [was] not to create or permit any nuisance” on the property. (R. p. 397, ¶ 25). The Lease further provided: “Tenant agrees to observe faithfully all rules and regulations that the Landlord now has, or may hereafter adopt for the uses of the premises...” (R. p. 397, ¶ 25). Although the Lease allowed the Landlord to terminate the Lease if Tenant failed to remedy any breach “affecting health, safety, or the physical condition of the property,”<sup>2</sup> Respondents failed to avail themselves of this default provision and statutory right. (R. p. 396, ¶ 22). Furthermore, according to the lease agreement, both the Respondents and their tenant are jointly responsible for all obligations set forth in the lease, which by its terms, includes the nature of the use of the premises. (R. pp. 396-97, ¶¶ 20, 25).

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<sup>2</sup> This lease incorporates the remedies available to a landlord under the Residential Landlord and Tenant Act, S.C. Code Ann. § 27-40-710 (2007).

At all times relevant hereto, Respondents had ownership, possession, and control of 5858 Savannah Highway. (R. p. 25, ¶ 13). Respondents purchased the subject property as an investment. (R. p. 225, lines 5-16). Soon after the purchase, Respondents constructed a warehouse on the rear portion of the premises to store their recreational vehicles and other personal property of the individual partners. (R. p. 226, lines 4-15). The property was one single parcel and was never subdivided. (R. p. 232, lines 16-19). The rear portion of the premises was commercial, and the front part consisted of a small building which could be used as a home or an office. (R. p. 231, lines 9-20). At the time of the Respondents' depositions, the property was listed for sale as commercial property. (R. p. 231, lines 11-20).

Despite entering into a lease agreement with Valdez, Respondents maintained both possession and control of the subject property. Throughout the lease term, Respondents retained possession of the large majority of the property, including the driveway, and could come onto the property at any time without notice to the tenant. (R. p. 233, lines 12-23). In fact, the only portion of the property subject to the lease was the small home/office located toward the front of the property. (R. p. 237, lines 3-11). Respondents continued to occupy and use the warehouse on the rear of the property for their own benefit. (R. p. 236, lines 12-19). In addition, the tenant was allowed only a small portion of the driveway to park his vehicle because Respondents needed most of the driveway to drive their recreational vehicles on and off the rear of the property. (R. p. 238, line 18–p. 239, line 7). Respondents also continued to maintain the general physical condition of the land by performing such tasks as cutting the grass and weed eating. (R. p. 227, lines 10-23).

The area in which the property is located is zoned Neighborhood Commercial. (Supp. R. p. 1, ¶ 2). Under this zoning provision, both the parking of tractor trailers and recreational

vehicles on the property would be non-conforming uses. (Supp. R. pp. 1 ¶ 2, 41 ¶ 5). Because there is insufficient space on the property to accommodate the loading and unloading of these tractor trailers, the operator(s) would have to back across the highway, which is highly dangerous. (Supp. R. pp. 37-38 ¶ 8). The highway adjacent to the property experiences heavy vehicular traffic. (R. p. 235, lines 23-25; p. 280).

On March 3, 2009, Hakeem was in a vehicle which was traveling down U.S. Highway 17 South when the vehicle collided with the tractor truck backing onto Respondents' property. At the time of the collision, Hakeem was only eleven years old. (R. p. 191). He sustained permanent brain damage during the collision. As a result, he is wheelchair bound and unable to care for his personal hygiene. (R. pp. 191-92). He also needs assistance to eat. (R. p. 191). He is able to say some words, but cannot talk conversationally. (R. p. 192). His injuries and impairments are permanent. (R. p. 192). Hakeem's medical expenses already exceed \$550,000; however, that does not include a recent back surgery. (R. p. 192). That figure also does not account for the ongoing care that he will need for the rest of his life. (R. p. 192).

### LEGAL ANALYSIS

#### I. **THIS COURT IGNORED KEY FACTS AND MISAPPREHENDED THE LAW OF THIS STATE IN HOLDING THAT RESPONDENTS OWED NO DUTY OF CARE TO APPELLANT HAKEEM T. M.**

This Court's sole basis for excusing the Respondents from any liability for Hakeem's injuries was its rejection of Appellants' alleged arguments "that Respondents *engaged in* activity that created an artificial and dangerous condition on the highway" and its failure to find any "evidence that Respondents *did* anything that gave rise to a duty." It is evident from these conclusory findings that this Court misunderstood Appellants' arguments and failed to consider both the facts of the case and the basic legal duty owed by these Respondents. Appellants do not

contend that Respondents were actively engaged in wrongful conduct, as this Court misunderstood, but rather that the Respondents neglected to exercise their duty to protect Hakeem from harm when they had knowledge of a dangerous activity on their property, which they owned and controlled, and refused to abate it.

Appellants' cause of action against Respondents is for negligence, which arises out of the well-founded principle of tort law that all persons have a duty to act reasonably so as to avoid harm to third parties. Snow v. City of Columbia, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). The duty of landowners to exercise due care in the use of their property arises out of this very basic rule of law. Id.; Bober v. New Mexico State Fair, 808 P.2d 614, 618 (N. Mex. 1991). Whether the duty is espoused in the more narrow context of premises liability, or even nuisance law, the duty remains the same. The law of South Carolina is clear: where a landowner retains possession and control of his property, he will be liable to third parties injured as a result of the dangerous use of that property. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001); Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (citing Dunbar v. Charleston & W.C. Ry. Co., 211 S.C. 209, 44 S.E.2d 314 (1947)); Peden v. Furman University, 155 S.C. 1, 151 S.E. 907 (1930); Cook v. Lowe's Home Centers, Inc., 2006 WL 3098773 (D.S.C. Oct. 30, 2006) (citing Benjamin v. Wal-Mart Stores, Inc., 413 F. Supp. 2d 652 (2006)); Restatement (Second) of Torts § 364 (1965).

The critical facts in this case, which are admitted to by the Respondents, are that: (1) the Respondents retained ownership, possession, and control of the property known as 5858 Savannah Highway; (2) the property was being used for a dangerous activity, namely, backing across both lanes of the heavily traveled highway adjacent to the property to load and unload large tractor trailers onto the property; (3) the Respondents knew how their property was being

used and knew that such activity constituted a danger to the traveling public; and (4) the Respondents failed to remedy the danger. (R. p. 25, ¶ 13; p. 228, line 16-p. 229, line 23; p. 233, lines 12-23; p. 235, lines 23-25; p. 238, line 1-p. 240, line 13; p. 246, line 10-p. 247, line 16; p. 280). These facts alone are sufficient to impose a duty of reasonable care on Respondents.

**A. This Court erred in ignoring the fact that there was a dangerous activity on Respondents' property which created an artificial condition as a matter of law or that the facts of the case, at the very least, created a question for the factfinder.**

Appellants' cause of action against Respondents seeks compensation for injuries sustained by Hakeem as a result of Respondents' negligence. Generally, in a negligence action, a plaintiff must show that the (1) defendant owed a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. Steinke v. South Carolina Dep't of Labor, Licensing and Reg., 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). The duty of care is that standard of conduct the law requires of an actor in order to protect others against the risk of harm from his actions. Snow v. City of Columbia, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). It embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable and which can be avoided by the defendant's exercise of reasonable care. Id.

Under South Carolina law, a duty will arise for dangerous activity that creates an artificial condition on or around a landowner's property. In Skinner v. S.C. Dep't of Transp., 383 S.C. 520, 524, 681 S.E.2d 871, 873 (2009), the South Carolina Supreme Court held that an owner of land adjacent to a public highway owes a duty of care to the travelers thereon for individual and business activity which creates an artificial and dangerous condition on the highway. A landowner may avoid liability *only* where the alleged conditions are normally and

naturally occurring. Id. The common law in South Carolina *will* impose a duty of care on a landowner who “has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers.” Id. The Skinner court, adopting the view of other jurisdictions, observed that allowing smoke to drift from one’s property onto the adjacent roadway, or creating a traffic jam on the highway are both examples of artificial conditions for which a landowner may be liable to motorists. Id. at 525, 681 S.E. 2d at 874. It is the duty imposed by Skinner that this Court overlooked.

In reaching its decision, the Skinner court examined the case of Holiday Rambler Corp. v. Gessinger, 541 N.E.2d 559, 562 (Ind. Ct. App. 1989), which is instructive. Similar to this case, the plaintiff in Holiday Rambler was injured in a collision with a motorcycle that was trying to avoid hitting two other vehicles leaving the subject property. However, the Rambler court did not dismiss the collision as simply a traffic accident on the adjacent highway, nor did it ever refer to the condition as a “traffic jam.” Instead, in denying the landowner’s motion for summary judgment, the court ruled that

the owner of land adjacent to a highway owes the duty to the traveling public to prevent injury to travelers upon the highway from any unreasonable risks created by the property’s dangerous condition which the landowner knew or should have known about. Whether this duty was discharged is a question of fact for the jury.

Holiday Rambler, 541 N.E.2d at 562.

The Skinner court also relied on the case of Pitcairn v. Whiteside, 34 N.E.2d 943, 949-50 (Ind. Ct. App. 1941). In Pitcairn, the court imposed a duty of care on a landowner adjacent to the highway for allowing smoke to be blown from its property across the nearby highway, obscuring the vision of motorists. The court in Pitcairn held that a landowner had a duty of care not to create or maintain a condition on his right of way which created a risk of harm to the traveling public, particularly where the resulting harm is foreseeable, and the landowner could have easily

prevented the danger. Id. at 946-47, 949-50. Under those circumstances, the issue of the landlord's negligence is properly submitted to the jury. Id.

The Skinner court concluded that "the owner of land which abuts a highway is not liable to the traveler for conditions occurring on that highway which are normal and natural...." 383 S.C. at 575, 681 S.E.2d at 874. Here, this Court did not make a finding that a tractor truck obstructing both lanes of travel was a normal and natural condition, which is necessary for the Respondents to avoid liability to Hakeem.

The actual facts establish that this activity was not an isolated event. In this case, the property was routinely used, with the Respondents' knowledge, to load and unload tractor trailers, which by necessity resulted in regular obstruction of the adjacent roadway. (R. p. 38; pp. 40-41; pp. 55-56; p. 239, line 8–p. 240, line 22; p. 246, line 10–p. 247, line 4). The Skinner case certainly does not preclude a finding that an artificial condition was also created under the facts of this case. The two examples referenced in Skinner are merely that, examples. They are by no means an exhaustive list of possible artificial conditions that may be created by a landowner.

If any inference is to be made, it must be made in the light most favorable to Appellants. Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009). Under the applicable standard, the proper conclusion for the Court to draw is that the activity knowingly conducted on Respondents' property created an artificial and dangerous condition for which Respondents can be held liable under the well settled law of this state. If there is any question of whether or not a condition is artificial, then the determination is one for a jury to make. E.g., Cultee v. City of Tacoma, 977 P.2d 15, 24-25 (Wash. Ct. App. 1999); Keith v. Beard, 464 S.E.2d 633, 637 (Ga. Ct. App. 1995); Harris v. Woolworth, 824 S.W.2d 31, 34 (Mo. Ct. App. 1991); Clarke v. Edging,

512 P.2d 30, 34 (Ariz. Ct. App. 1973); Ritgers v. City of Gillespie, 113 N.E.2d 215, 218-19 (Ill. Ct. App. 1953); Carlton v. Pac. Coast Gasoline Co., 242 P.2d 391, 395 (Cal. Ct. App. 1952).

However, this Court ignored the duty imposed by Skinner and summarily concluded there was “no evidence that Respondents did anything that gave rise to a duty.” As such, this Court should grant Appellants’ Petition for Rehearing.

**B. The Court erred in finding Respondents owed no legal duty of care to Appellant Hakeem T. M. where Respondents retained possession, ownership, and control of the subject property and had actual notice of a dangerous condition on it.**

Although Skinner is applicable to the determination of whether a duty exists in this case, it is not the sole legal standard that must be considered by the Court. The Skinner decision does not and should not foreclose the application of other law governing a landowner’s duty of care in the use of his property.

In South Carolina, “[o]ne who controls the use of property has a duty of care not to harm others by its use.” Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (citing Dunbar v. Charleston & W.C. Ry. Co., 211 S.C. 209, 44 S.E.2d 314 (1947); Peden v. Furman University, 155 S.C. 1, 151 S.E. 907 (1930)). “The liability of an owner or occupant of real estate in reference to injuries caused by a dangerous or defective condition of the premises depends in general upon his having control of the property. In fact, such liability depends upon control, rather than ownership, of the premises.” Dunbar v. Charleston & W. C. Ry. Co., 211 S.C. 209, 216, 44 S.E.2d 314, 317 (1947) (quoting 38 Am. Jur. Negligence § 94). Even where the landowner is not a full-time occupant of the property, he nonetheless has a duty to insure that the use of his property is not injurious to others. “In determining whether an individual has sufficient control of premises so as to impose a duty to inspect the premises, a court generally will look to factors such as whether the individual has authority to manage, direct, superintend,

restrict, regulate, govern, administer, or oversee the management of the property. Cook v. Lowe's Home Centers, Inc., 2006 WL 3098773 (D.S.C. Oct. 30, 2006) (citing Benjamin v. Wal-Mart Stores, Inc., 413 F. Supp. 2d 652 (2006)). A person in control of property will also be liable for a dangerous condition created by a third party if he knew of the dangerous condition and failed to remedy it. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001); Restatement (Second) of Torts § 364 (1965). In short, a landowner who retains control of his leased property, and has notice of a dangerous condition thereon, will be liable to those who suffer injuries as a result of the dangerous condition.

Accordingly, a landowner is not exempt from this duty merely because a third party allegedly caused the harm. Restatement (Second) of Torts § 364 (1965). Even where there is evidence a landowner did not himself create a dangerous condition on the highway, he may nonetheless be liable to a motorist for acquiescing in the activity or failing to remedy the danger. Id.; Clark v. Blue Circle, Inc., 514 S.E.2d 473, 476 (Ga. Ct. App. 1999) (cited in Skinner, 383 S.C. at 525, 681 S.E.2d at 874). The dangerous activity need not be for the benefit of the landowner or conducted with his express consent. Restatement (Second) of Torts § 364, cmt. h. Rather, liability will attach where “he knows that *the other* is creating or is about to create it, and could prevent its creation by asserting his authority as possessor, as where he knows that he could cause the third party to desist by ordering him to do so or to leave the land.” Id. (emphasis added). This duty is in keeping with the duty of care traditionally imposed in negligence actions in this state.

Furthermore, a landowner may not necessarily seek the protection of a rental agreement to avoid his liability to third parties where he fails to surrender full possession and control to the tenant. Although this Court has not yet considered a case which is factually analogous to the

present one, Respondents' duty of care is inescapable under the well settled law of liability for persons who control real property and are aware of the existence of a dangerous condition on that property.

Other jurisdictions which have considered similar factual scenarios have relied on the same principles espoused in South Carolina jurisprudence in holding a landlord liable for the dangerous activity of the tenant where the landlord maintained control of the premises, knew of the danger, and failed to remedy it. "An owner cannot escape his duty of exercising reasonable care to maintain his property adjoining a highway in reasonably safe condition unless he parts with the entire possession and control of the premises." Klepper v. Seymour House Corp. of Ogdensburg, Inc., 158 N.E. 29 (N.Y. Ct. App. 1927). "The legal concepts concerning a landlord's liability for a tenant's activities have been expanded to the point where a landlord may be responsible for the wrongdoing of a tenant when the landlord continues to exercise control over the premises." Muhammad v. Bucknor, 228 A.D.2d 333, 335 (N.Y. 1996). Therefore, the common law will impose a duty on a landowner who maintains control of his property, even though it is subject to a lease, in order to provide a full remedy to a plaintiff who is injured while traveling on the adjoining roadway.

The rationale underlying the imposition of a duty of care on a landlord is best explained in the case of Bober v. New Mexico State Fair, 808 P.2d 614 (N. Mex. 1991). There, the defendant leased a portion of its property to organizers for a rock concert. Id. at 616. The plaintiff was injured by an attendee who was attempting to make a left turn onto the highway where the plaintiff was traveling. Id. The plaintiff alleged that the defendant landowner was negligent in permitting an activity on its property which would obviously result in a large volume of traffic attempting to enter onto the roadway from a single location, thereby creating a

danger to the motoring public. Id. at 618. Defendant sought summary judgment on the basis that it owed plaintiff no duty. Id. at 616. The court, however, was quick to find that the defendant does in fact have a duty of care based on the basic principles of negligence, which is: “Every person has a duty to exercise ordinary care for the safety of the person and the property of others.” Id. at 618 (quoting SCRA 1986, 13–1604 (Uniform Jury Instruction (UJI)—Civil 1604)). This rule alone is sufficient to formulate “the duty of a landowner to exercise ordinary care to avoid creating, or permitting, an unreasonable risk of harm to others....” Id. It arises independently of any other factors unique to the case including: the character of the landowner's property interest; whether the property is subject to a lease; the legal identity of the plaintiff; or the mere happenstance that the collision and resulting injury occurred off the property. Id. at 618-19. The Bober court recognized that the duty was clear as a matter of law and the question of defendant's breach of the duty was a proper one for the jury. Id. at 620-21.

Likewise, in another case factually similar to the one at bar, the Rhode Island Supreme Court imposed a duty of care on a landlord to oversee the use of his property for the protection of those who are rightfully traveling on nearby roadways. In Moretti v. C.S. Realty. Co., 82 A.2d 608 (R.I. 1951), the court ruled that a landowner could be held liable for injuries sustained by a nearby pedestrian who was injured because of a hazardous condition on the property. The tenant in Moretti, without the consent of the landowner, partitioned the first floor of the building which he leased and then sublet the additional space to a commercial tenant. Id. at 610. In subdividing the property, he left an old, rusty fan exposed, and a blade of the fan detached, flew out of the opening which the tenant had created, and hit and injured a passerby. Id. There, the duty of care owed by the landlord to travelers on the highway originated from the rule of law in the Fourth Circuit:

The public has the right to the unobstructed use of the highway free of unnecessary hazards, and it is the duty of owners and occupiers of property abutting thereon to use it so as not to endanger members of the public while they are exercising such right. Weilbacher v. J. W. Putts Co., 123 Md. 249, 91 A. 343; King v. Hartung, 123 Va. 185, 96 S.E. 202.

Id. at 611. When a person traveling on the highway is injured as a result of a dangerous condition existing on the property, then there is a presumption that the landlord breached his duty. Id. (citing Pindell v. Rubinstein, 115 A. 859 (Md. Ct. App. 1921)). An important factor to consider is whether the landlord, prior to the accident, had the opportunity to control the premises and remedy the danger. Id. at 612-13.

The Rhode Island court, like the courts of South Carolina, was concerned with the general principle of tort law that the plaintiff should not suffer a harm which is foreseeable and which can be avoided by the defendant's exercise of reasonable care. Snow, 305 S.C. at 554, 409 S.E.2d at 803; accord, Moretti, 82 A.2d at 611 ("The justice of this rule lies in the circumstance that the principal evidence of the cause of the accident is accessible to the party in control of the premises and inaccessible to the victim of the accident.")

The facts of the within action demand a proper application of the law. The relevant and undisputed evidence is that Respondents never surrendered ownership, possession, or control of 5858 Savannah Highway to their tenant; that they knew prior to the collision the property was being used to park tractors and trailers; that the use of the property necessarily involved backing those tractors and trailers across both southbound lanes of the adjacent highway; that this activity created an artificial condition which was dangerous to travelers on the highway; that the Respondents knew, prior to the collision, that this activity was dangerous; that the Respondents had, and knew they had, the authority to prohibit the dangerous use of the property; that the tenant continued to use the property to park tractors and trailers after the serious collision which

injured Hakeem; and that Respondents made no meaningful effort to make the tenant stop the dangerous use of their property or to make him leave the premises. Under these facts and the applicable law discussed above, the Respondents indisputably owed Hakeem a legal duty of care and may be held liable for the injuries he sustained.

This Court ignored these relevant facts which necessitate the imposition of a legal duty on the Respondents. Moreover, the conclusion that the Respondents failed to remedy the danger is unavoidable given the fact that Hakeem sustained grievous injuries as a result.

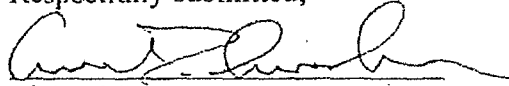
**C. This Court overlooked the fact that Respondents have a duty of care under the lease.**

In addition to the duty imposed by law, Respondents have contractually agreed to share liability with their tenant for any dangerous condition existing on their property. (R. pp. 396, 397, ¶¶ 20, 25). By their own admission, permitting tractor trucks to routinely back across a heavily traveled highway to pick up and drop off semitrailers creates a clear danger to motorists on Highway 17 South. (R. p. 235, lines 23-25; p. 239 line 8–p. 240, line 22; p. 246, line 10–p. 247, line 4). Accordingly, this Court erred in failing to impose a duty on Respondents where the lease itself created a duty upon Respondents.

**CONCLUSION**

This Court erroneously disregarded the facts of this case and the well-established precedents in holding that Respondents owed no duty to Respondent Hakeem. For the reasons stated, Respondents respectfully request this Court to grant a rehearing on the issues set forth herein or, in the alternative, to issue a revised opinion reversing the Circuit Court's Order granting the Respondents' Motion for Summary Judgment and to remand this action for further proceedings accordingly.

Respectfully submitted,



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ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Roger M. Young, Circuit Court Judge

---

Case No. 09-CP-10-6574

---

NESHEN MITCHELL, individually and as  
the next friend of her minor child, HAKEEM  
T. M., ..... Appellants,

vs.

JUAN P. MARRUFFO d/b/a LIBERTY  
EXPRESS, ADRIAN MORALEZ, RET  
PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, ..... Defendants,

OF WHOM RET PARTNERSHIP, WILLIAM T.  
MCQUEENEY, CARL E. ROBERTS,  
KARL R. HENDERSON, and STEVEN  
PARHAM, are the ..... Respondents.

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**PROOF OF SERVICE**

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I certify that I have served the Appellants' Petition for Rehearing or Rehearing *En Banc* on Respondents RET Partnership, William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham by FedEx and regular U.S. Mail, postage prepaid, on January 22, 2013, addressed to their attorney of record as follows:

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January 22, 2013

By: 

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NESHEN MITCHELL, individually and as the  
next friend of her minor child, HAKEEM T.M. .... Appellants,

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JUAN. P. MARUFFO d/b/a LIBERTY EXPRESS,  
ADRIAN MORALES, RET PARTNERSHIP, WILLIAM  
T. MCQUEENEY, CARL E. ROBERTS, KARL R.  
HENDERSON, and STEVEN PARHAM, ..... Defendants

OF WHICH RET PARTNERSHIP, WILLIAM T.  
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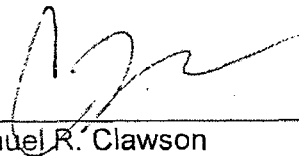
**RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR  
REHEARING OR REHEARING *EN BANC***

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Appellant's Petition for Rehearing should be denied. The Court did not misunderstand or misapprehend the facts of this case or applicable precedential case law. The arguments contained in Appellant's Petition were fully briefed and argued in both the lower court and in the Court of Appeals. In support of this Return to Appellant's Petition, Respondents incorporate and rely upon all arguments and analysis contained in all prior briefs and memoranda they have filed in this matter.

Respectfully submitted,



---

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ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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NESHEN MITCHELL, individually and as the  
next friend of her minor child, HAKEEM T.M. .... Appellants,

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OF WHICH RET PARTNERSHIP, WILLIAM T.  
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**PROOF OF SERVICE**

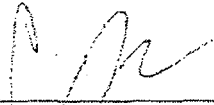
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The undersigned hereby certifies that a true copy of Respondents' Return to Appellant's Petition for Rehearing or Rehearing *En Banc* has been served upon opposing counsel by mailing a copy, properly addressed, with sufficient postage affixed thereto this 28<sup>th</sup> day of January, 2013:

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ATTORNEYS FOR RESPONDENTS



this portion of Highway 17 at 5858 Savannah Highway, Ravenel, South Carolina (the "Subject Property"). At the time of the accident, Defendant Morales was purportedly attempting to back the tractor trailer truck onto the Subject Property. The collision did not occur on any portion of the Subject Property.<sup>1</sup>

Plaintiff brought suit against the RET Defendants on the theory that they were operating a "trucking terminal" on the Subject Property and that they owed a special duty of care to Plaintiff as owners of property abutting a public highway. The depositions of the RET partners revealed that the RET Defendants did not operate a "trucking terminal" or undertake any trucking activity on the Subject Property. At all times relevant hereto, the Subject Property contained a single family residential home located towards the front of the property and a larger warehouse-type building toward the back of the property. The RET Defendants leased the residential property to tenant J. Jose Valdez pursuant to a residential lease. The lease did not include the warehouse. The RET partners used the warehouse to house their personal RV's, campers, and the like. Defendant Morales was not a tenant under the lease. The RET Defendants did not know Defendant Morales and never gave him or anyone else permission to enter the property and/or drive tractor trailer trucks on the property on the date of the accident or any other date.

Plaintiff submitted witness affidavits documenting trucks and trailers on the Subject Property and documenting observations of tractor trailer trucks backed across

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<sup>1</sup> The plaintiff conceded this fact in its Supplemental Memorandum, stating that the fact that the accident did not occur on the RET defendants' property is "undisputed." Plaintiffs' Supplemental memorandum of Law in Opposition to Defendant RET Partnership, McQueeney, Roberts, Henderson,



Highway 17. The RET Defendants never gave their tenant permission to drive or park tractor trailer

By trucks on the property. The RET Defendants twice saw a truck tractor on the property and both times expressly communicated to their tenant this was not permitted and ordered him to move the truck. The RET Defendants did not permit tractor trailer trucks to be parked on the property because parking tractor trailer trucks blocked their access to the warehouse on the rear portion of the property, as there was simply insufficient space on the property.

On or about March 10, 2010, the RET Defendants filed a Motion for Summary Judgment on the theory they did not owe a duty to Plaintiff for injuries arising from this accident. On December 9, 2010, this matter came before the Court. The Court ordered the parties to complete all discovery and submit all supplemental memoranda to be considered on this issue by January 31, 2011. The Court held another hearing on this issue on May 2, 2011.

### LEGAL STANDARD

"[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pittman v. Grand Strand Entm't, Inc., 611 S.E.2d 922, 925 (S.C. 2005). "[T]he evidence and all inferences that can reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." Moore v. Weinberg, 644 S.E.2d 740, 743 (S.C. Ct. App. 2007). "Once the party moving for summary judgment meets the initial burden of

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and Parham's Motion for Summary Judgment, pg. 2.

showing the absence of a genuine issue as to any material fact, the nonmoving party may not simply rest on the mere allegations contained in the pleadings." Grant v. Mount Vernon Mills, 634 S.E.2d 15, 17 (S.C. Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 17-18.

### LEGAL ANALYSIS

The issue before the Court is whether the RET Defendants owed a legal duty of care to Plaintiff for injuries sustained in the March 3, 2009 accident. For a plaintiff to establish a cause of action for negligence, he or she must prove the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by negligent act or omission; (3) resulting damages to the plaintiff; and (4) damages proximately resulting from the breach of duty. Thomasko v. Poole, 561 S.E.2d 597, 599 (S.C. 2002). "In order for liability to attached based on a theory of negligence, the parties must have a relationship recognized by law as proving the foundation for a duty to prevent injury." McCullough v. Goodrich & Pennington Mortg. Fund, Inc., 644 S.E.2d 43, 47-48 (S.C. 2007). "Whether a duty exists is a question of law for the Court." Doe v. Greenville County Sch. Distr., 651 S.E.2d 305 (S.C. 2007). "If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." Underwood v. Coponen, 625 S.E.2d 236 (S.C. Ct. App. 2006).

It is well-settled South Carolina law that the owners of property abutting or adjoining a public highway owe no common law duty to motorists injured on the public highway, where the owners neither possess nor control the highway. Skinner v. S.C.



Dep't of Transp., 681 S.E.2d 871 (S.C. 2009); see also Mahle v. Wilson, 323 S.E.2d 65 (S.C. Ct. App. 1984); Ford v. S.C. Dep't of Transp., 492 S.E.2d 811 (S.C. Ct. App. 1997). "South Carolina common law only imposes a duty for highway conditions where an individual or business has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers." Skinner, 681 S.E.2d at 873.<sup>2</sup>

It is undisputed that this accident did not occur on any portion of the Subject Property. The accident occurred in the southbound lanes of Highway 17 (a/k/a Savannah Highway). No evidence indicates the RET Defendants owned or controlled any portion of Highway 17. Therefore, the inquiry here is whether the RET Defendants, as abutting property owners, undertook an activity that created an artificial condition on the highway which was dangerous to travelers. See Skinner, 681 S.E.2d at 873. Plaintiff asserts the activity of backing tractor trailers onto the Subject Property created a traffic obstruction, which constituted an artificial condition for which the RET Defendants are liable.

For liability to be imposed upon an abutting property owner, Skinner requires that the defendant "undertake an activity that creates an artificial condition on the highway[.]" Here, the only activity undertaken by the RET Defendants was the ownership of the Subject Property and the leasing of a portion of that property to a residential tenant. These actions are insufficient to impose liability on the RET Defendants. The RET

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<sup>2</sup> Plaintiff cites Restatement (Second) of Torts § 364 (1965) as the controlling legal standard. However, no South Carolina case has adopted this Section of the Restatement and the Skinner rule is the standard for determining whether an abutting property owner owes a legal duty of care to travelers on a public highway.

Defendants themselves did not engage in any trucking activity, direct any trucking activity, permit any trucking activity, or otherwise authorize any trucking activity on the Subject Property. Any trucking activity that may have taken place on the Subject Property was undertaken by the tenant or guests of the tenant. Each time the RET Defendants saw a tractor trailer truck parked on the Subject Property, they explicitly communicated to the tenant that this was not permitted, as it tended to block the use of the rear of the property and the personal warehouse of the owners, and ordered him to remove the truck.

Additionally, the RET Defendants had no contact with the driver of the tractor trailer truck involved in this accident, Defendant Morales. He was not a tenant under the lease. It is not alleged Defendant Morales was engaged in any activity for the benefit of RET. The RET Defendants had no control over the manner in which Defendant Morales chose to maneuver his vehicle onto the Subject Property and did not authorize him to back his tractor trailer truck onto the property. Property owners are under no duty to predict who will visit their residential tenant. Likewise, they are under no duty to predict or direct the manner in which such visitors will maneuver their vehicles onto the leased property. To impose such a duty on landowners and/or landlords would create an undue burden and an impractical result. Defendant Morales's choice to maneuver his truck in such a way as to block Highway 17 is simply too far removed from the RET Defendants' ownership and leasing of the Subject Property to impose liability upon them.

Not only did the RET Defendants not undertake an activity that caused or created an artificial condition, the Court finds that there was no artificial condition. This was

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simply a traffic accident whereby one vehicle blocked the lane of travel of another vehicle and a collision resulted. Skinner cites examples of artificial conditions, such as a plant emitting smoke that drifts over the highway and a factory that floods a two-lane highway with a massive traffic jam each day when it releases several hundred employees from their shift at the same time. These examples are wholly different from the facts of this case. This case involves allegations of a driver who was negligently attempting to enter the Subject Property. Sometimes accidents occur when vehicles are entering or exiting private property. To suggest that property owners are liable for traffic accidents while persons are entering or exiting private property is too broad a reading of Skinner. Moreover, for the reasons discussed above, even if this situation did constitute an artificial condition, the RET Defendants did nothing to cause or create the condition.

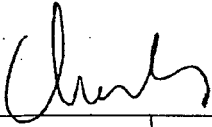
For the reasons stated herein, the Court finds the RET Defendants did not owe Plaintiff a legal duty of care for injuries arising from this accident. The RET Defendants did not undertake any activities which caused or created an artificial condition and, therefore, owed no duty to Plaintiff as owners of property abutting a public highway.

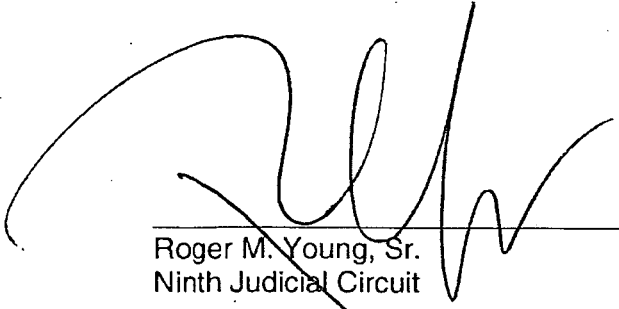
The Court is mindful Plaintiff presented several witness affidavits which documented trucks and trailers parked on the property and other instances of trucks blocking Highway 17. The Court notes that these affidavits, with the exception of the affidavit of Willie Gordon, were submitted past the January 31, 2011 Court-imposed deadline. I conclude that the Court should not allow those affidavits. However, if the Court considered those affidavits in the light most favorable to Plaintiff, none would change the result. Plaintiff asserted several additional issues in his memorandum and at



the hearing, such as the RET Defendants' failure to conduct a background check on their tenant, allegations of non-conforming use of the property under Town zoning ordinances, and the RET Defendants' right to eject their tenant from the property. The Court finds these issues irrelevant to the ultimate inquiry under Skinner. The owner of property certainly has no duty to do a background check for the purposes of protecting motorists on the adjacent roadway. Nor do zoning ordinances impose civil liability for bodily injuries that might happen for conduct in violation of zoning ordinances.

Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment filed by defendants RET Partnership, William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham is GRANTED.

  
\_\_\_\_\_, South Carolina  
6/3, 2011

  
\_\_\_\_\_  
Roger M. Young, Sr.  
Ninth Judicial Circuit

# The South Carolina Court of Appeals

Neshen Mitchell, individually and as the next friend of  
her minor child Hakeem T.M., Appellants,

v.

Juan P. Marruffo d/b/a Liberty Express, Adrian Moralez,  
RET Partnership, William T. McQueeney, Carl E.  
Roberts, Karl R. Henderson, and Steven Parham,  
Defendants,

Of whom RET Partnership, William T. McQueeney, Carl  
E. Roberts, Karl R. Henderson, and Steven Parham, are  
the Respondents.

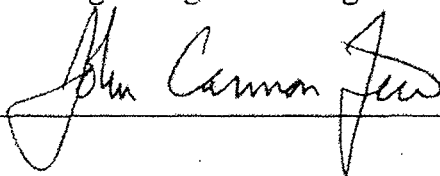
Appellate Case No. 2011-198047

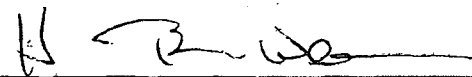
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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
\_\_\_\_\_ C.J.

  
\_\_\_\_\_ J.

  
\_\_\_\_\_ J.

Columbia, South Carolina

cc:

Christina Rae Fagnoli  
J. Joseph Condon, Jr.  
Andrew D. Gowdown  
Samuel R. Clawson  
Richard S. Rosen  
Timothy Alan Domin  
Roger M. Young

**FILED**

27 Jul 2013