

No. 081348

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

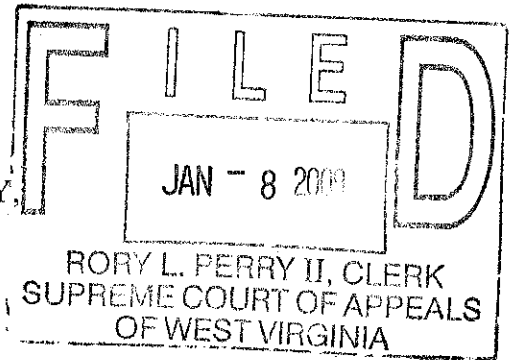
LANGLEY FRANCE, as the Parent and
Next Friend of ROBERT FRANCE, a Minor,

*Appellant and
Petitioner below,*

v.

SOUTHERN EQUIPMENT COMPANY,
a West Virginia Corporation

*Appellee and
Respondent below.*



APPELLEE SOUTHERN EQUIPMENT COMPANY'S AMENDED BRIEF

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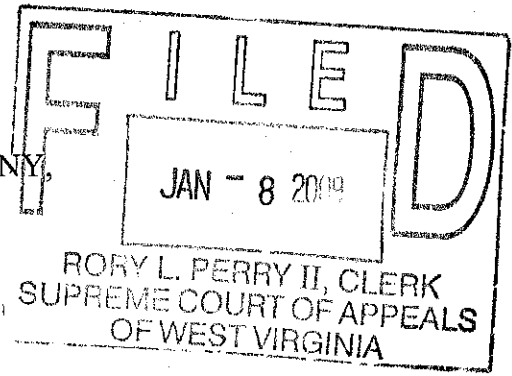
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*Appellant and
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v.

SOUTHERN EQUIPMENT COMPANY,
a West Virginia Corporation

*Appellee and
Respondent below.*



APPELLEE SOUTHERN EQUIPMENT COMPANY'S AMENDED BRIEF

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

**THE KIND OF PROCEEDINGS AND NATURE OF THE RULINGS
IN THE LOWER TRIBUNAL**

Appellee and Respondent below, Southern Equipment Company Inc., by counsel,
Gary E. Pullin, Molly K. Underwood, David A. Holtzapfel, and Pullin, Fowler, Flanagan,
Brown & Poe, PLLC, respectfully represent unto this Court that the Circuit Court of
Logan County, West Virginia ruled appropriately and lawfully, and committed no

reversible error, in the underlying action by granting summary judgment in favor of this Appellee because:

1. In or about March 2006, Appellee, Southern Equipment Company, Inc., (hereinafter "SEC") contacted Quality Metal Roof (hereinafter "Quality Metal") to request and estimate on removing and replacing an existing metal roof.
2. Quality Metal provided an estimate for complete removal and installation. Said estimate was approved by SEC.
3. Unbeknownst to SEC, Quality Metal retained the services of Royalty Builders to remove and install the roof on the SEC facility.
4. Royalty Builders employed Robert France, then sixteen years old, during his 2006 Spring Break from High School.
5. On April 12, 2006, Robert France, was severely injured while working for Royalty Builders when he fell twenty-five feet through the roof of the SEC building onto the concrete floor below. Robert was running across the roof, stepped on a piece of metal roof that was only partially secured by bolts, the metal sheet gave way, and Robert France fell through the roof.
6. On August 11, 2006, Appellant filed this lawsuit against Appellee SEC and Quality Metal. On October 27, 2006, SEC filed a third party complaint against Danny Hensley, d/b/a Royalty Builders.
7. The Appellant alleged that Appellee failed to provide a reasonably safe work environment by negligently failing to provide or requiring Royalty Builders' employees to employ some means of fall protection; negligently allowing a portion of the roof to be removed without providing an alternative means of

fall protection or warning; and negligently failing to guard against Appellant tripping or falling through the roof.

8. Appellant additionally asserted that Appellee SEC was vicariously liable for Robert France's injuries because it "hir[ed] a contractor to perform the inherently dangerous activity of removing and installing roofing . . ." without requiring fall protection.
9. The Appellant asserted that Appellee SEC was strictly liable to Robert France for exposing him to the inherently and abnormally dangerous activity of removing and installing roofing.
10. Throughout discovery, it was undisputed that Appellee SEC did not hire or contract with Royalty Builders, Robert France's employer, to remove and install the roof at its facility.
11. SEC hired Quality Metal to do the work and Quality Metal in turn retained the services of Royalty Builders without ever informing SEC.
12. Appellee SEC was not actively involved in the day-to-day operations or activities of Royalty Builders nor did it continually monitor the work area. Finally roofing is not an inherently dangerous activity so as to subject Appellee SEC to strict liability.
13. On July 23, 2007, a hearing was held regarding Appellee's *Motion for Summary Judgment* in the Circuit Court of Logan County.
14. On November 6, 2007, the Circuit Court of Logan County entered an *Order* granting summary judgment to all claims against the Appellee. The lower Court found that the Appellant failed to carry the burden of disputing or rebutting Appellee's *Motion for Summary Judgment* and stated that "the

record reflects that there are no genuine issues as to any material facts.” See **Order**, ¶¶ 22-23. Therefore, Appellant’s *Brief* should be denied and the *Order* of the Circuit Court of Logan County be **AFFIRMED**.

STATEMENT OF FACTS

SEC is a mining equipment refurbisher located at Peck’s Mill in Logan County, West Virginia. See **Order**, ¶ 1. In or about March of 2006, it was determined that the metal roof on the SEC building needed to be replaced. Having seen Quality Metal’s television ads, Ken Zigmond, vice-president of SEC, contacted Quality Metal and requested an estimate for a new roof. Mr. Zigmond spoke with Kevin Akers, a contractor’s sales representative at Quality Metal who agreed to come to the facility to take measurements and provide an estimate. See **Order**, ¶ 2; see also *Zigmond Deposition*, pp. 8-10; *Akers Deposition*, pp. 10-12.

Mr. Akers went to SEC in early March 2006 and took measurements¹. He had a brief conversation with Mr. Zigmond in which Mr. Zigmond told him on which parts of the facility he wanted a new roof. In or about mid-March, Mr. Akers faxed Mr. Zigmond a “proposal” or “estimate” on Quality Metal’s letterhead which stated the cost for material as \$17,271.64 and complete “installation and removal” as \$17,728.36, with a discount of \$2000, for a total cost of \$33,000. See **Order**, ¶ 3; see also *Proposal/Estimate*.

Mr. Zigmond agreed to the proposal and provided a \$7000 check to Quality Metal for down payment. See **Order**, ¶ 4. Unbeknownst to SEC, Kevin Akers asked Danny Hensley, owner of Royalty Builders (Quality Metal’s biggest contractor-customer) if he would be interested in the roofing job at SEC. See **Order**, ¶ 5; see also *Akers Deposition*,

¹ Mr. Akers testified that he went to SEC to take measurements with Jason Dempsey, Vice-President of Quality Metal Roof. See *Akers Deposition*, p. 11. However, Ken Zigmond does not recall ever meeting anyone besides Mr. Akers. See *Zigmond Deposition*, pp. 11-13.

pp. 50-57. Akers and Hensley drove to SEC and Hensley went up on the roof to take a look for the purpose of providing an estimate for the labor. Ken Zigmond came out of the building and greeted Mr. Akers, but didn't meet Mr. Hensley because he was ascending the ladder. Mr. Akers did not introduce Mr. Hensley and did not tell Mr. Zigmond that Mr. Akers was from a separate company. *See Order*, ¶ 6; *see also Akers Deposition*, pp. 47-48; *Hensley Deposition*, p. 20. Mr. Hensley informed Mr. Akers that he would perform the labor for \$12,000.00. Neither Mr. Hensley nor Mr. Akers contacted Mr. Zigmond and told him of the \$12,000.00 estimate. Additionally, at no time did Mr. Akers tell Mr. Zigmond that Quality Metal does not perform installation of the roofs; it merely manufactures and sells the material. *See Order*, ¶ 7.

The roofing work commenced on or about April 10, 2006. Royalty Builders had a crew of eight workers, one of whom was sixteen (16) year old Robert France. Robert France had asked Danny Hensley if he could work for him during his Spring Break from High School. This was Robert's first job and he had never done roofing or construction work in the past. *See Order*, ¶ 8.

Ken Zigmond met Danny Hensley of Royalty Builders for the first time on April 10, 2006. Mr. Hensley introduced himself as being from Royalty Builders and then proceeded to talk to Mr. Zigmond about the Bible. *See Hensley Deposition*, pp. 30-31. At no time did Mr. Hensley tell Mr. Zigmond that Royalty Builders was an entirely separate company from Quality Metals. *See Order*, ¶ 9.

On April 12, 2006, Robert France fell approximately twenty-five feet through the roof of the SEC building, landing on the concrete floor. According to Brandon Thompson, a Royalty Builder employee who actually witnessed the accident, Robert was running across the roof and stepped on a piece of metal roof from which Thompson had

just removed some of the bolts. The metal sheet gave way and Robert France fell through the roof. See **Order**, ¶ 10.

On August 11, 2006, the Appellant filed this lawsuit against Southern Equipment Company and Quality Metal Roof. However, the Appellant did not file suit against Royalty Builders, Robert France's employer, because the Appellant stated that "I've knowed Dan [Hensley] all my life, he's just like a brother. I don't want to - - I knew he didn't have insurance after the fall. I don't want to put him out of business." See **Exhibit 1, Langley France Deposition**, p. 39, attached hereto. On October 27, 2006, SEC filed a third-party complaint against Danny Hensley d/b/a Royalty Builders. See **Order**, ¶ 11.

STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo*. Syl. pt. 1, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994). The test for determining the propriety of summary judgment is set forth in Syllabus Point 3 of Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York, 133 S.E.2d 770 (W.Va. 1963), where this Court held, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." The decision in Painter v. Peavy, marked a significant shift in the attitude of this Court toward summary judgment. This shift in judicial attitude was reflected in the following statement:

Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is **"designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial," if in essence there is no real dispute as to salient facts or if only a question of law is involved...**Indeed, it is one of the few safeguards in existence that prevents frivolous lawsuits that have survived a motion to dismiss from being tried. Its principal purpose is to isolate and dispose of meritless litigation...To the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message is hereby modified. **When a motion for summary judgment is mature for**

consideration and is properly documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion.

451 S.E.2d at 758 (emphasis added).

In order to defeat a motion for summary judgment, the Appellant must either: (1) rehabilitate the evidence attacked by the Appellee, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). If the Appellant fails to meet this burden, then as a matter of law, Appellee's motion for summary judgment must be granted. Syl. pt. 5, Gardner v. CSX Transp., Inc., 498 S.E.2d 473 (W.Va. 1997); Syl. pt. 4, Payne's Hardware & Building Supply, Inc. v. Apple Valley Trading Co. of West Virginia, 490 S.E.2d 770 (W.Va. 1997); Syl. pt. 3, McGraw v. St. Joseph's Hospital, 488 S.E.2d 389 (W.Va. 1997); Syl. pt. 3, Farm Family Mut. Ins. Co. v. Bobo, 486 S.E.2d 582 (W.Va. 1997); Syl. pt. 4, Evans v. Mutual Mining, 485 S.E.2d 695 (W.Va. 1997); Syl. pt. 3, Miller v. City Hospital, Inc., 475 S.E.2d 495 (W.Va. 1996); Syl. pt. 3, McKenzie v. Cherry River Coal & Coke Co., 466 S.E.2d 810 (W.Va. 1995); Syl. pt. 6, Gooch v. West Virginia Dept. of Public Safety, 465 S.E.2d 628 (W.Va. 1995); Syl. pt. 3, Cavendar v. Fouty, 464 S.E.2d 736 (W.Va. 1995); Syl. pt. 3, Jividen v. Law, 461 S.E.2d 451 (W.Va. 1995); Syl. pt. 3, Cox v. State, 460 S.E.2d 25 (W.Va. 1995).

Moreover, in Syllabus Point 1 of Jividen v. Law, the Court further articulated that the existence of "factual issues" does not necessarily preclude the award of summary judgment, stating that:

The mere fact that a particular cause of action contains elements which typically raise a factual issue for jury determination does not automatically immunize the case from summary judgment. The plaintiff must still discharge his or her burden under West Virginia Rule of Civil

Procedure 56(c) by demonstrating that a legitimate jury question, i.e., a genuine issue of material fact, is present.

461 S.E.2d 451 (W.Va. 1995)(emphasis added).

Likewise, in Powderidge Unit Owners Ass'n. v. Highland Properties, Ltd., the Court stated:

Summary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine disputed issue of a material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986); Williams, 194 W. Va. at 59 n. 7, 459 S.E.2d at 335-36 n. 7 (“[i]f the nonmoving party does not controvert the proof offered in support of the motion, and the moving party's affidavit shows that it supports a judgment as a matter of law, Rule 56(c) mandates summary judgment be granted”). **Genuineness and materiality are not infinitely elastic euphemisms that may be stretched to fit whatever preferrations catch a litigant's fancy.** A “dispute about a material fact is ‘genuine’ . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson, 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211. **However, “only materials which were included in the pretrial record and that would have been admissible evidence may be considered.”** Stults v. Conoco, Inc., 76 F.3d 651, 654 (5th Cir. 1996). (Citation omitted).

474 S.E.2d 872, 878 (W. Va. 1996) (emphasis added and footnotes omitted).

ARGUMENT

A. Southern Equipment Company owed no duty to Robert France because Robert France was employed by Royalty Builders, an independent contractor, which was *not* hired by Southern Equipment Company and SEC had no knowledge that Royalty's employment of Robert France was illegal.

1. **Quality Metals hired Royalty Builders without ever informing SEC.**

Robert France was not an employee of SEC, the owner of the building on which

Robert was working. Moreover, Robert France was not an employee of Quality Metal, the independent contractor with whom SEC had contracted to replace the roof on its facility. It is undisputed that Quality Metal, without the knowledge of permission of SEC, the premises owner, retained Royalty Builders, to replace the work on the SEC facility. Ken Zigmond, president of SEC, testified that it was his understanding that Quality Metal was providing the material as well as the labor for removal and installation:

Q. I understand that ultimately Quality Metal Roof was engaged to perform this contract?

A. **That's correct.**

Q. Tell me about the process by which Quality Metal Roof was hired.

A. **Well, as we've discussed, Tom and myself decided we needed a new roof. So I started looking around to see what we could do. I seen some advertising on TV of Quality Metal. I called and I talked to a gentleman by the name of Kevin Akers. I asked Kevin to – if he would be interested in giving us a price and quote on putting a new roof on. That's where we started.**

Q. Did Quality Metal Roof have any competition?

A. **I don't think for this particular area, no.**

Q. Let me rephrase it. Were any other contractors called?

A. **No.**

Q. Did any other contractors submit any bids?

A. **No.**

Q. So you talked to Kevin Akers?

A. **Correct.**

See Zigmond Deposition, pp. 8-9.

Q. You just needed a new roof?

A. **That's correct.**

Q. You told Kevin that, right?

A. **Right.**

Q. You said I've got a big building –

- A. **Right.**
- Q. – with a leaky roof?
- A. **Right.**
- Q. Kevin, I need you to figure out what I need essentially?
- A. **Yes.**
- Q. And Kevin did that?
- A. **Yes.**
- Q. And at a later date, he came back with this document, Exhibit 1?
- A. **Yes.**
- Q. It looks like the materials were \$17,271.64. Do you see that?
- A. **Yes.**
- Q. Did you consider that a fair price for the materials that were being provided?
- A. **Yes.**
- Q. The second part, the more expensive part was the – I'm quoting, Complete removal and installation. That cost \$17,728.36. Do you see that?
- A. **Yes.**
- Q. Did you consider that a fair price for the labor.
- A. **Yes.**
- Q. Did you understand that to be the labor to get this job done?
- A. **Well, I just looked at the bottom line, \$35,000, and then \$2000 off of 33- was a total turnkey job.**
- Q. Your men weren't going to do the labor, right?
- A. **That's correct.**
- Q. Quality Metal was going to?
- A. **Correct.**
- Q. So did Kevin at any point say to you, and by complete removal and installation we're going to bring in someone you've never heard of? Did he say anything like that to you?
- A. **No.**

Id., pp. 22-23.

- Q. Here is why I ask. At the time this agreement was entered into – we don't know the exact date – was it your understanding Quality Metal Roof was going to do the installation?
- A. **Yes.**
- Q. Did you expect them to perform the installation in a competent manner?
- A. **Yes.**
- Q. Did you expect Quality Metal Roof to comply with laws that pertain to their work?
- A. **Yes.**
- Q. Did you expect Quality Metal Roof to have the expertise to do this job safely?
- A. **Yes.**
- Q. You didn't hire any other outfits, did you?
- A. **No.**
- Q. Quality Metal Roof is who you hired to do the installation?
- A. **Yes.**

In his deposition, Dan Hensley, owner of Royalty Builders testified as follows:

- Q. Tell me, how did you come about – when I say “you,” how did Royalty get the Southern Equipment project.
- A. **Through Kevin.²**
- Q. Acres?
- A. **Acres, yeah.**
- Q. Did Mr. Acres contact you?
- A. **I was up there one day ordering for another house, and he asked me if I wanted to go look at it –if I was interested in doing it.**
- Q. You were up where when you were ordering for another house?
- A. **Up at their factory where they sell the metal at.**
- Q. Whose factory?
- A. **Freddy's.**
- Q. Quality Metal?
- A. **Quality Metal.**

See Hensley Deposition, p. 12.

² Kevin Akers, Contractor Sales Representative for Quality Metal.

* * *

- Q. Kevin called about this project, right – Kevin Acres?
A. **Well, he stopped on one of my jobs and asked if I wanted to go look at it.**
- Q. So contingent upon your acceptance of the job, Kevin selected you to do this job.
A. **I guess.**
- Q. Just so I'm clear, you're not aware of anyone for Southern Equipment selecting you to do this job?
A. ***Southern never called me for an estimate or nothing, no.***
- Q. You weren't selected by someone from Southern to carry out this job?
A. **Not as far as I know.**
- Q. You had no prior experience with Southern Equipment before this job?
A. ***No. I didn't even know they were there.***

See Id., pp. 101-102 (emphasis added).

Kevin Akers, the contractor's sales representative for Quality Metal testified that he never informed anybody at SEC that Royalty Builders would be performing the roofing work nor did he ever tell anybody at SEC that Quality Metal did not do the installation work:

- Q. Just so I'm clear, you didn't call Kenny [Zigmond] and communicate the \$12,000 to him?
A. **No, I did not.**
- Q. You say Dan takes care of his own contracts?
A. **Yes he does . . .**
- Q. You're not aware of any negotiations between Southern Equipment and Royalty?
A. **No, I'm not aware of any.**

See *Akers Deposition*, p. 65.

- Q. When you were talking to Mr. Zigmond over the phone about what this job might cost from an installation standpoint, did you inform him at that time that, while I can give you a number, I don't – we don't do installation?

A. No I did not.

See *Id.*, pp. 47-48.

The only person who testified that SEC contracted with Royalty Builders to do the work is Fred Dempsey, vice-president of Quality Metals, **who had no involvement in any aspect of the SEC project.** The basis of his testimony that SEC hired Royalty Builders, is merely that he knows “we didn’t [select the contractor to be used].” See *Appellee’s Memorandum of Law in Support of Its Motion for Summary Judgment, Dempsey Deposition*, p. 46. Therefore, Appellee SEC was entitled to summary judgment as a matter of law because Robert France was employed by Royalty Builders, an independent contractor that was *not* hired by Appellee SEC.

2. SEC had no knowledge and certainly did not sanction Royalty Builder’s illegal employment of Robert Frame.

At no time in Plaintiff’s Response to Defendant’s Motion for Summary Judgment did Plaintiff/Appellant raise the argument that the independent contractor defense should be deemed unavailable to SEC because Royalty Builders’ employment of sixteen year old Robert France was illegal. Plaintiff’s Response merely addressed Robert’s age in relation to an inherently dangerous activity. See Plaintiff’s Response to Defendant’s Motion for Summary Judgment, pp.13-16. In *Whitlow v. Board of Educ. Of Kanawha County*, this Court stated that “[o]ur general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal.” 438 S.E.2d 15, 18 (W.Va. 1993). Accordingly, as Appellant failed to raise this argument on summary judgment, it should be deemed waived.

Appellee does not dispute that Robert France was younger than the other roofers on the job nor does it dispute that West Virginia Code §21-6-2(a)(16) prohibits anybody

under the age of eighteen from performing roofing work. However, the facts show that Mr. Zigmond, vice president of SEC noticed that Robert France was young, he did not know how young and moreover, did not know that anybody under the age of sixteen is prohibited from performing roofing work:

Q. Did you render any aid or –

A. **Personally, no.**

Q. You observed him?

A. **Yes.**

Q. He was bleeding?

A. **Yes.**

Q. Did you recognize him from any of the previous days?

A. **No. I seen all of them, but, you know, as far as picking him out from any of the other people, no. I did not.**

Q. You didn't hire Royalty, did you?

A. **No. I did not.**

Q. When we talk about installation, you relied on Quality Metal Roof's representations, correct?

A. **That's correct.**

Q. He didn't stand out that way?

A. **Well, he was young. Younger than the other people that was working, yes.**

Q. Was that apparent to you?

A. **It was pretty apparent, yes.**

Appellant looks to Shaffer v. Acme Limestone, 524 S.E.2d 688, W. Va. 1999 to support his argument that the independent contractor defense is unavailable to SEC because the independent contractor had illegally hired Robert France, a sixteen year old, to work on the roofing project. Yet, the facts of the Shaffer case are clearly

distinguishable from the facts of the case at bar, and Appellant blatantly ignores the test this Court applied in Schaffer to determine that the independent contract defense was unavailable.³

This Court undertook a lengthy analysis of the meaning of “illegal work” in Schaffer, stating, “where ‘the work or service to be performed in itself entails the commission of some illegal ... act, the [independent contractor defense] obviously cannot apply, because in such instance the principal and the independent contractor both play an integral part, are both proximate causes, of whatever harm ensues.” Schaffer at 701 citing Thomas v. Harrah’s Vicksburg Corp., 734 So.2d 312, 317 (Miss. Ct. App. 1999).

In Schaffer, the illegal conduct at issue was that the defendant, Acme, routinely overloaded the independent contractor, Spade Trucking’s trucks. Thus, in Shaffer, the defendant itself, was engaged in and facilitated the illegal conduct of its independent contractor which ultimately led to the injuries at issue in Shaffer. This Court made it clear that “an employer will not be liable for the negligence of an independent contractor where the work is ‘not in itself unlawful.’” The roofing work being performed by Royalty Builders⁴ in the present case was “not in itself unlawful.”

In order to vitiate the independent contractor defense asserted by SEC, Appellant must show SEC (1) caused the unlawful conduct or activity by the independent contractor, or (2) knew of and sanctioned the illegal conduct or activity by the

³ The independent contractor defense is unavailable to a party employing an independent contractor when the party (1) causes unlawful conduct or activity by the independent contractor, or (2) knows of and sanctions the illegal conduct or activity by the independent contractor, and (3) such unlawful conduct or activity is a proximate cause of an injury or harm. Shaffer at 701.

⁴ Again, Royalty Builders was not hired by SEC. SEC contracted with Quality Metals to perform the roofing installation and, unbeknownst to SEC, Quality Metals hired Royalty Builders to do the work.

independent contractor, and (3) such unlawful conduct or activity was the proximate cause of the injury or harm. Shaffer v. Acme Limestone 524 S.E.2d 688.

There are no allegations and absolutely no evidence that SEC in any way caused Royalty Builders unlawful conduct of hiring a sixteen year old to work on this roofing job. In fact, the evidence is quite the opposite. Dan Hensley, the owner of Royalty Builders admitted he hired Robert France during Frances' Spring vacation at the request of Frances' father, a good friend of his. This testimony is undisputed.

Appellant appears to assert that the mere fact that Ken Zigmond knew Robert France was "younger than the other workers" is enough to destroy SEC's independent contractor defense. Yet, the record is devoid of any evidence beyond the fact that Ken Zigmond knew he was "younger." There is no testimony that Ken Zigmond knew how old Robert France actually was or had reason to suspect that Robert France was too young to work on a roof. Moreover, in order to prevail on his argument, Appellant must prove that not only was SEC aware Robert France was too young to perform roofing work but also that they sanctioned his performance of roofing work in spite of knowing his age. Clearly this is not the case.

Finally, the Shaffer test requires by its use of the word, "and", that in addition to meeting the first or second element of the test, the unlawful activity or conduct be the proximate cause of the injuries. Robert France's age was not the cause of his injury. Any Royalty Builders' employee, of any age, who stepped on the unsecured piece of metal roofing would have fallen. The proximate cause of Robert France's injuries was Dan Hensley and Royalty Builders' failure to require that its workers wear fall protection, not Royalty Builders' employment of a worker who was underage for the type of work being performed.

Thus, even if this Court determines Appellant properly raised this argument on summary judgment, Appellants argument must fail. Application of the Shaffer test clearly shows that SEC neither knew nor sanctioned Royalty's illegal conduct and that the illegal activity of employing an underage worker, did not proximately cause Robert France's injury. Therefore, the lower court's granting of summary judgment should not be disturbed..

B. Royalty Builders was an independent contractor hired by Quality Metal Roof and therefore Southern Equipment Company had no right to control its work.

Appellee SEC owed no duty to Robert France because he was employed by Royalty Builders, an independent contractor, hired by Quality Metal and therefore SEC had no right to control its work. *See Order*, ¶ 13. “[I]f the right to control or supervise the work in question is retained by the person for whom the work is being done, the person doing the work is an employee and not an independent contractor, and **the determining factor in connection with this matter is not the use of such right of control or supervision, but the existence thereof in the person for whom the work is being done.**” Syl. pt. 2, Spencer v. Travelers Insurance Company, 133 S.E.2d 735 (W.Va. 1963); Syl. pt. 3, Myers v. Workmen's Compensation Comm'r, 148 S.E.2d 664 (W.Va. 1966)(emphasis added).

The West Virginia Supreme Court of Appeals, in Shaffer v. Acme Limestone Co., Inc., stated that “the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servant.” 524 S.E.2d 688, 695 (W.Va. 1999)(citing Pasquale v. Ohio Power Co., 418 S.E.2d 738, 748 (W.Va. 1992), quoting Peneschi v. National Steel Corp., 295 S.E.2d 1, 11 (W.Va. 1982) (quoting

Restatement (Second) of Torts § 409 (1976))). The Shaffer Court goes on to state that “[t]he seminal case establishing the test for whether an independent contractor relationship exists is Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990). In syllabus point 5 of Paxton, this Court held as follows:

There are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of respondeat superior: (1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) **Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative.**”

524 S.E.2d at 695 (emphasis added).

The depositions of Ken Zigmond of SEC and Danny Hensley, owner of Royalty Builders, make it abundantly clear that nobody at SEC retained the right to control Royalty Builders’ work. Mr. Zigmond testified that he relied solely on Kevin Akers to advise him of the material he would need to replace the roof. Once the work commenced, he occasionally observed what Royalty Builders was doing from the ground but he never told them how to do their work or coordinated with them in any manner in doing their work.

Q. When the metal arrived, did anyone come to you and basically outline what they were going to do for this project, here is how we’re going to do our things?

A. **No, not really. You know, I don’t think anyone ever come in and said anything about, you know, we’re going to do this and do that, no.**

Q. You sat here through the other three depositions. Basically, the day that metal sheeting arrived, they started putting it up on the roof. Is that accurate?

A. **I don’t know. I know they unloaded the sheets and put them on the ground first. Now if they – I don’t know if they unloaded everything that particular day and then came back the next day and then started taking the sheets up there or that afternoon they started to put the sheets up on the roof at that particular time. But it was – I mean, I do know they unloaded them on the ground first.**

Q. Is your office situated such that you can glance out your window and watch them offloading the sheets from time to time?

A. **Yes. My office is next to the – that parking lot, yes.**

Q. Roofing is not your thing, I take it, correct?

A. **That's correct.**

Q. But from time to time, could you peer out your window and kind of see what this crew was up to?

A. **As far as unloading, yes, I could say that.**

Q. Did you step outside just to satisfy your curiosity what these guys were doing?

A. **Yes.**

Q. Would you ever talk to any of the guys and just make small talk?

A. **Small talk yes.**

Q. You had an opportunity from time to time to see the work as it was progressing?

A. **Just from the bottom part.**

Q. You didn't go up on the roof?

A. **That's correct.**

See Zigmond Deposition, pp. 28-30.

Danny Hensley also testified that he barely even talked to Ken Zigmond or any other employees of SEC:

Q. Now, you mentioned that the gentleman from Southern Equipment came out on that first morning. Tell me about that., About what time was it that the Southern Equipment – lets call him a supervisor for lack of a --

A. **I couldn't tell you what time it was. We were there for a while. I come back off from the roof and he came out the door and we just stood there and talked for a few minutes.**

Q. What did you talk about?

A. **The Bible. That's about all I talk about with people when I go out on a job...**

Q. Did the gentleman from Southern Equipment ask any questions of you, like how long are you going to take, or do you need some water?

A. **He asked me how long I think it would take. I said probably about ten days or something.**

Q. Did you talk about how the work was going to progress or --

- A. ***Not to him, no. I just told my guys how to do it. You know, take the sheet off and put a sheet on, take a sheet off and put a sheet on.***

See *Hensley Deposition*, pp. 31-33 (emphasis added).

“The power of control factor refers to control over the means and method of performing the work.” *Shaffer*, 524 S.E.2d at 696 (citing *McDonald v. Hampton Training Sch. For Nurses*, 486 S.E.2d 299 301 (Va. 1997)). The *Shaffer* Court elaborated on the meaning of “power of control,” as well as provided examples from other jurisdictions by stating,

[W]e follow the lead of numerous other courts in holding that “an owner who engages an independent contractor to perform a job for him or her **may retain broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the contract**—including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work—**without changing the relationship from that of owner and independent contractor, or [changing] the duties arising from that relationship.** *Indian River Foods Inc. v. Braswell*, 660 So.2d 1093, 1098 (Fla.App. 4 Dist.1995) (emphasis omitted), quoting *City of Miami v. Perez*, 509 So.2d 343, 346 (Fla.App. 3 Dist.1987). See also *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 193 (5th Cir.1991) (finding that the fact that a principal took an active interest in the safety of the employees of the independent contractor did not itself constitute the direct operational control to subject principal to liability); *Hines v. British Steel Corp.*, 907 F.2d 726, 729-32 (7th Cir.1990) (concluding that advisory suggestions to independent contractor not sufficient exercise of the degree and type of control over those operations necessary to impose a duty of care on the corporation); *Boutwell v. Chevron U.S.A., Inc.*, 864 F.2d 406, 408 (5th Cir.1989) (determining that the presence of, and inspection by, owner's engineer was insufficient to establish owner's control during repair of an oil platform); *Grammer v. Patterson Serv., Inc.*, 860 F.2d 639, 644 (5th Cir.1988) (holding evidence of operational control over a testing procedure was insufficient to create jury question where principal's instructions to the independent contractor were to maximize torque and remove weepholes); *Fireman's Fund Ins. Co. v. Davis*, 37 Cal.App.4th 1432, 1442, 44 Cal.Rptr.2d 546, 551 (1995) (recognizing that an owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract); *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 813-15 (Iowa 1994) (affirming summary judgment where franchisor's authority was no more than authority to insure uniformity in standardization of products and

services offered by restaurant); *Schoenbeck v. Du Page Water Comm'n*, 240 Ill.App.3d 1045, 180 Ill.Dec. 624, 607 N.E.2d 693, 697 (1993) (**finding evidence did not demonstrate the level of control that warranted imposition of a duty on defendant, since its involvement in the work existed only to ensure compatibility with its own system and to verify costs, not to oversee or direct the actual construction or the safety of the work site**); *Ashby v. Northwestern Pub. Svc. Co.*, 490 N.W.2d 286, 288-89 (S.D.1992) (**affirming summary judgment where defendant had retained only general supervisory control to ensure work's completion**).

Id. at 696-697; See **Order ¶ 14** (emphasis added).

The above testimony by the alleged “owner” and the “independent contractor” who performed the work, clearly demonstrates that SEC did not have the “power to control” Royalty Builders’ work. Therefore, Appellee SEC was entitled to summary judgment as a matter of law with regard to Appellant’s allegations of negligently failing to provide a safe workplace and vicarious liability.

C. Southern Equipment Company is not strictly liable for Robert France’s injuries because roofing work is *not* an “inherently dangerous” activity, regardless of the lower court’s harmless error in applying, and meeting, the higher standard of “abnormally dangerous.”

Generally, as discussed above, an owner is not vicariously liable for the actions of an independent contractor. However, West Virginia law recognizes an exception to this general rule whereby an owner of a worksite is liable for the negligence of the contractor hired by the owner where the work being performed by the contractor is inherently dangerous. This exception is based upon the concept that:

[I]f the employer of the independent contractor knows the work is hazardous or dangerous, he cannot escape liability . . . this exception to non-liability emerges from the principal’s non-delegable duty to exercise reasonable care when performing the inherently dangerous activity; a duty that the principal cannot discharge by hiring an independent contractor to undertake the activity . . . the exception is grounded in the recognition that the possibility of harm to others is so great when the work activity is inherently dangerous that the law tolerates it only on terms of insuring the public against injury. We impose vicarious liability under these

circumstances to insure that the public has legal access to a financially responsible party.

Shaffer, 524 S.E.2d at 698.

In the present case, the Appellant claimed that SEC is strictly liable because roofing is an “inherently dangerous” activity. Even if Appellant can get by the hurdle that Royalty Builders was not hired by the owner of this worksite, the Appellant cannot show that roofing is an inherently dangerous activity such as would impose strict liability upon SEC. The concept that a premises owner is vicariously liable for the actions of a contractor when work is inherently dangerous is set forth in the Restatement (Second) of Torts, which provides:

[O]ne who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in the normal in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor’s failure to take reasonable precautions against such danger. . .

Rest 2d Torts § 427 (1965). Under West Virginia law, work is “inherently dangerous” where the work is “dangerous in and of itself and not dangerous simply because of the negligent performance of the work, and that danger must be naturally apprehended by the parties when they contract.” Shaffer, 524 S.E.2d at 698. The West Virginia Supreme Court in Shaffer defined “inherently dangerous” work by stating:

It has been recognized that in defining “inherently dangerous,” is it not necessary that the work should involve a major hazard. Rather, “[I]t is sufficient if there is a recognizable and substantial danger collaterally created by the independent negligence of the contractor, which latter might take place on a job itself involving no inherent danger.” . . . Courts have indicated that “[I]nherent danger will be found if an activity or the manner in which an activity is necessarily conducted, poses an unusual and high risk of harm to those involved in the activity or to other persons . . . **Moreover, inherently dangerous activity must be “of such a nature that in the ordinary course of events its performance would probably and not merely possibly, cause injury if proper precautions were not taken . . .**

Id. at 699; *See Order*, ¶ 16 (internal citations omitted)(emphasis added).

The Appellee agrees with the Appellant that the lower court incorrectly applied the standard for an “abnormally dangerous” activity, using the six factors of the Restatement (Second) of Torts, § 520 (1977), in reaching its conclusion that roofing is not an “inherently dangerous” activity. *See Order*, ¶ 17. However, this constitutes “harmless error” on the part of the lower court and does not affect the outcome of the Court’s Order granting summary judgment to the Appellee.

According to American Jurisprudence, Second Edition:

[a] court may distinguish the term ‘inherently dangerous activity’ from the term ‘abnormally dangerous activity,’ noting the terms are not synonymous or interchangeable concepts. **The likelihood of serious harm arising from inherently dangerous activities is less than that associated with ultrahazardous activities⁵. This is because in this case of inherently dangerous activities, unlike ultrahazardous activities, the person undertaking the activity may take precautionary steps to minimize the risk of injury or may take proper safety procedures to substantially eliminate the danger.** Accordingly, liability for injuries proximately caused by inherently dangerous activities is based on negligence rather than strict liability.

See Laura Hunter Dietz, J.D., et al., *Inherently Dangerous Activities Creating a Nondelegable Duty of Care*, 57A Am. Jur. 2d Negligence § 375 (March 2008)(emphasis added). When applying these six factors to the case at bar, one must reach the conclusion that roofing is not an inherently dangerous activity and absent some overriding negligence in the activity of roofing, there does not appear to be a high degree of risk of harm. While the harm to a person may be great, such as in this case, that harm can be eliminated by using reasonable care. In other words, the risk could have been eliminated had Dan Hensley, owner of Royalty Builders, required his employees to use fall

⁵ Also termed “abnormally dangerous activity.” *See* Black’s Law Dictionary, Abridged 7th Ed. (2000).

protection. Roofing is clearly a common activity. Every building has a roof and more often than not, that roof has to be replaced at some point. Clearly, in the case at bar, the roofing was taking place in an appropriate place. Finally, roofing has great value to the community in that almost everybody “has a roof over their heads” and at some point, that roof will likely need to be repaired replaced. *See Order*, ¶ 17.

As discussed above, SEC is not liable to Robert France for his injuries because SEC’s *Motion for Summary Judgment* proved that SEC did not owe a duty to Robert France. *See Order*, ¶ 13. SEC hired Quality Metal to replace the roof and it was Quality Metal that hired Royalty Builders (who, in turn, hired Robert France) as an independent sub-contractor in order to perform the work to replace the roof. SEC *did not* contract with Royalty Builders *nor* did it have any power over Royalty Builders to control the work.

Additionally, the lower court’s use of the “abnormally dangerous” standard is harmless error in that it is actually a higher standard to meet than the “inherently dangerous” standard. Besides the fact that Appellee SEC did not hire Royalty Builders and had no duty to Robert France, *the lower court applied all the facts of the higher standard of “abnormally dangerous” and still came to the conclusion that roofing is not an “inherently dangerous” activity absent some overriding negligence.* The Appellant had his chance to rebut this principle in his *Response in Opposition to Southern Equipment Company’s Motion for Summary Judgment* but in the end could not overcome that burden. Therefore, the lower court did not commit reversible error and properly granted summary judgment for the Appellee.

D. The Circuit Court did not err by relying on case law the West Virginia Supreme Court of Appeals and from other

**jurisdictions in determining that roofing work is not
“inherently dangerous.”**

Activities that have been recognized as “inherently dangerous activities” in West Virginia are activities such as “blasting.” Although this Court has not addressed the issue of whether replacing the roof of a building is an inherently dangerous activity, other jurisdictions, including North Carolina have held that roofing, like other construction activities, is not an inherently dangerous activity. See **Order**, ¶ 17; See Olympic Products Co. v. Roof Systems, Inc., 363 S.E.2d 367 (N.C. 1988); Canady v. McCleod, 446 S.E.2d 879 (N.C. 1994); Brown v. Friday Services, Inc., 460 S.E.2d 356 (N.C. 1995).

The West Virginia Supreme Court of Appeals offered some guidance into what is an inherently dangerous activity in King v. Lens Creek Limited Partnership, 483 S.E.2d 265 (W.Va. 1996). In King, the Court acknowledged that it had not had the opportunity to address what constitutes an inherently dangerous activity as part of our negligence jurisprudence, and though not fully defining what an inherently dangerous activity is, the Court did rely on a number of cases to give it guidance as to what is “inherently dangerous.” One particular case the Court pointed to is the North Carolina case of Deitz v. Jackson where the Court attempted to help define what an inherently dangerous activity by stating:

The difficulty . . . lies in making the not altogether obvious distinction between work done by an independent contractor which is intrinsically dangerous in that harm will likely result if precautions are not taken, and work which is not intrinsically dangerous in that it is merely the sort of work which could produce injury if carelessly performed.

291 S.E.2d 282 (N.C. 1982)(citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71 at 514-515 (5th ed. 1984)). Under the Deitz definition, *roofing a building should fall into the category of an activity that would not typically result in injury unless the work was performed in a negligent manner*; and therefore, should not be considered

inherently dangerous. Danny Hensley, d/b/a Royalty Builders, testified that he has been performing roofing and siding work for forty years and never had any of his employees fall or be injured. *See Hensley Deposition*, pp. 66; 69-70.

The West Virginia Supreme Court of Appeals decided a case directly on point in Robertson v. Morris, 546 S.E.2d 770 (W.Va. 2001). In Robertson, a homeowner, Susan Morris, the defendant/appellee, contacted a Herbert Clifton Adkins about removing a tree from her property. Adkins did not want to do the work, but, after speaking with Morris, he contacted the plaintiff/appellant, James Lawrence Robertson, to see if he might be interested in removing the tree for Morris. Adkins and Robertson went to Morris' home to look at the tree and determine what needed to be done to remove the tree.

Subsequent to that visit, Adkins told Robertson to cut the tree, and Robertson and his son subsequently went to Morris' home to cut the tree. As they were cutting the tree, the wind blew a limb against Robertson, who was in the tree, and knocked him to the ground. Robertson was not wearing a safety harness or any type of safety equipment, and as a consequence, when he hit the ground he suffered severe injuries.

Robertson then sued Morris and Adkins for the injuries he sustained. With regard to the claims against Morris, the plaintiff claimed that he was acting as her agent or employee at the time the accident occurred. He also claimed that Morris owed him a duty of reasonable care, which was breached when she failed to say anything about his lack of safety equipment. The plaintiff appealed and one of the arguments raised by the appellant was that there was a question of material fact as to whether he was acting as an agent of Morris at the time he was injured, and the trial court should, therefore, not have granted summary judgment.

The West Virginia Supreme Court of Appeals in Robertson addressed the plaintiff/appellant's argument as follows:

The question of whether the appellant was an agent or an employee or an independent contractor of Ms. Morris is significant because this Court has recognized how one may be responsible for physical harm caused to his or her agent or employee, **the Court has also recognized that, as a general proposition, one who hires an independent contractor is not responsible for injuries resulting from an act or omission of the contractor or the contractor's servant.** Pasquale v. Ohio Power Company, 187 W. Va. 292, 418 S.E.2d 738 (1992). **And in the present case, it appears that the injury to the appellant was caused by his failure to use safety equipment.**

Robertson, 546 at 772-773 (emphasis added); *See also Order*, ¶ 18.

The Court also addressed the issue of whether tree cutting was inherently dangerous and constituted an exception to the rule set forth in Shafer. In addressing the inherently dangerous issue raised by the appellant, the Court held as follows:

The Court notes that in Shafer v. Acme Limestone Company, Inc., id., an exception to the general rule applies where one employs an independent contractor to do inherently dangerous work. Under that exception, the employing party may be liable for a workers' injury even if the employing party does not exercise control sufficient to convert the relationship to an employment or agency relationship – **but this is true only if the risk involved cannot be eliminated or significantly reduced by taking proper precautions.**

The evidence adduced in the present case indicates that the risk of cutting the tree on Ms. Morris' property, **the risk which ultimately gave rise to the appellant's injury, could have been significantly eliminated or reduced by using safety ropes or safety equipment.** Under such circumstances, the work was not so inherently dangerous as to bring into play the exception relating to inherently dangerous work discussed in Shafer v. Acme Limestone Company, Inc., id.

Id. at 773-774 (emphasis added); *See also Order*, ¶ 18.

As shown above, the Circuit Court of Logan County did not err because it relied upon cases decided by the West Virginia Supreme Court of Appeals for the main issue of what process to use to determine what constitutes an "inherently dangerous" working

condition. The Appellant's assertions that the Circuit Court ignored a "robust body of law in North Carolina and elsewhere" are superfluous at best.

Again, Appellee represents to this Court that Appellant *did not raise the "inherently dangerous" issue at any time during the summary judgment proceedings and therefore the Appellant should be barred from arguing these issues for the first time.* See, Whitlow v. Board of Educ. Of Kanawha County, *infra.* at 18.

In the alternative, the Appellee will address the Appellant's claims. For example, in the Lane v. R.N. Rouse & Co., cited in the *Appellant's Brief*⁶ and extensively discussed, defendant Rouse "was the **general contractor** on the Wellman building construction project on N.C. Highway 53 East near Fayetteville, North Carolina. Bill Howell and Sons Construction, Inc., ("**Howell**") was one of many subcontractors working at the construction site. **Decedent [Lane] was a foreman with Howell.**" 521 S.E.2d 137, 138 (N.C.App. 1999)(emphasis added). The Lane Court stated:

The record before us shows that the nature of the concrete finishing work required decedent to walk backwards while performing a task requiring intense attention. **The record also reflects that Rouse was aware of the floor openings and of the need to cover them for the safety of workers.** A job requiring a worker to walk backwards while paying close attention to the work in front of him might well be construed to be inherently dangerous, and the jury in this case so found.

Id. at 139 (emphasis added).

Lane dealt with a general contractor that claimed the trial court refused to find, as a matter of law, that concrete finishing is not "inherently dangerous" and that, therefore, Rouse had no duty to the deceased sub contractor. In the case at bar, Appellee SEC *was not* and *is not* a general contractor. *SEC was the owner of a building that needed a new*

⁶ Appellee would like to note that this is a North Carolina case decided by an "intermediate level appellate tribunal," the very authority that the Appellant chastises the Circuit Court of Logan County for citing.

roof. SEC had no expertise in roofing and in turn relied upon Quality Metals, as the general contractor, to make sure the work was performed safely and properly.

As to the other nineteen (19) “robust body of law” cases cited by the Appellant, the Appellee represents to this Court that all the cited cases *do not hold* “that a question of whether an activity is ‘inherently dangerous’ is a question for the jury.” Therefore, since the Appellant does not attempt to cite to, discuss, or convey any specific point(s) of law from any of the nineteen (19) cases, the Appellee will not address them at this point either.

In the alternative, the Appellee will respond to all of the Appellant’s cited *and* discussed cases within his *Brief*. Interestingly, in the Louisiana case of Touchstone v. G.B.Q. Corp., the Appellant contradicts his previous argument by stating that “while the question of the activity in that case, referred to as ‘ultrahazardous,’⁷ is a question of law, the answer to that question turns on the factual question of whether the activity can be made safe.” *See Appellant’s Brief*, p. 28. In Touchstone, the Court stated that “[w]hether an activity is ultrahazardous is a question of law. **The identifying feature of an ultrahazardous activity is one in which there is a risk of harm that cannot be eliminated through the exercise of due care.**” 596 F.Supp. 805, 814 (E.D.La. 1984)(emphasis added). After chastising the Circuit Court’s *Order* for applying the wrong standard of “abnormally dangerous” to an “inherently dangerous” cause of action, the Appellant turns around and makes the same argument as the Appellee did in its *Motion for Summary Judgment*. It even appears that the Appellant is now *agreeing* with the Circuit Court’s *Order* in discussing the “abnormally dangerous” standard, which has the exact same meaning as “ultrahazardous.” *See Order*, ¶ 17.

⁷ See footnote 4 above: “ultrahazardous” and “abnormally dangerous activity” are synonymous terms. Black’s Law Dictionary, Abridged 7th Ed. (2000).

Appellant's reliance on the Donovan v. General Motors case is misplaced as well. First, the Eighth Circuit stated that "[t]he Missouri inherent danger cases do not look to general categories of work but to the specific work involved in the case." 762 F.2d 701, 703 (8th Cir. 1985). The Donovan Court was utilizing Missouri law, *not West Virginia law*, in its fact analysis. The Appellee has already shown, and the Circuit Court has adopted, in its *Order*, the rule of law from the West Virginia Supreme Court of Appeals' cases of Shaffer v. Acme Limestone Co., Inc.; Paxton v. Crabtree; Spencer v. Travelers Insurance Company; King v. Lens Creek Limited Partnership; and Robertson v. Morris.

Second, the Appellant states that "Donovan is frequently cited and followed in cases such as the one at hand." *See Appellant's Brief*, p. 29. However, the Appellant does not list any cases that rely upon Donovan. In fact, the Appellee represents to the Court that a Westlaw KeyCite search yields **no** (zero) cases that have cited to the principles established by the Donovan Court and for that reason alone the Appellant's argument should fail.

Finally, the Appellant cites to Brown v. Carvill and states that "this Court has addressed the issue of what is 'inherently dangerous' activity **in a context so closely related to the present case** that the same result must apply here." *See Appellant's Brief*, p. 30. However, the Brown Court dealt with an issue of a *trespasser on a landowner's property* and properly stated:

it is clear that whether or not a condition on property is dangerous is based on a determination of whether the condition "constitutes a hidden danger or trap." Syllabus Point 2, in part, Hatten v. Mason Realty Co., 148 W.Va. 380, 135 S.E.2d 236 (1964). **Whether an instrument or condition is a hidden danger or trap to a trespasser requires that the instrument or condition be viewed in its context.** More often than not, the determination of whether something is "dangerous" is a **question of fact rather than law.**

527 S.E.2d 149, 154 (W.Va. 1998)(emphasis added). Robert France was not a trespasser and therefore Brown is definitely not a case “in a context so closely related to the present case” as the Appellant states.

In the final note to this issue, the Circuit Court of Logan County, in its *Order* of November 6, 2007, states that:

The Court notes that the Plaintiff’s expert would apparently extend strict liability to a great many common construction and industrial activities. It is not appropriate to basically eliminate the court’s ability to analyze [*sic*] and classify many activities as not being subject to strict liability. **The implications of “lowering the bar” on classification of activities as subject to strict liability from a few activities to virtually any commercial or industrial activity having a component [*sic*] of hazard on the ability to conduct business in this state would be substantial.**

See Order, ¶ 19 (emphasis added).

Therefore, because the Circuit Court of Logan County did not err by relying on case law from the West Virginia Supreme Court of Appeals and from other jurisdictions in determining that roofing work is not “inherently dangerous,” this Court must **DENY** Appellant’s *Brief* and **AFFIRM** the *Order* of the Circuit Court of Logan County.

E. The Circuit Court did not err by failing to rule that Robert France was injured at a multi-employer site as mandated by OSHA, because Southern Equipment Company was not a contractor and owed no duty to Robert France.

First and foremost, Southern Equipment Company owed no duty to Robert France because Robert France was employed by Royalty Builders, an independent contractor, which was not hired by SEC. *See Order*, ¶ 13. Second, “the Federal Occupational Safety and Health Act does not apply to the owner of a premises where the worker is an independent contractor and not an employee of the owner.” Occupational Safety and Health Act of 1970 § 2 et seq., 29 U.S.C.A. § 651 et seq.; Cochran v. International Harvester Co., 408 F.Supp. 598 (W.D.Ky. 1976); *See Order*, ¶ 15.

In Kane v. J.R. Simplot Co., the Tenth Circuit held that a property owner whose grain silo and other buildings were being painted by an independent contractor at the time the painting contractor's employee was injured was not an employer subject to OSHA safety regulations at the time, so as to establish a negligence claim against the owner based on alleged violation of those regulations. The court said there was no evidence that the property owner violated a general duty to protect the employee from recognized hazards, and the owner could not be held accountable for any duty relating to the scaffolding from which the worker fell, since the **"contractor was in complete charge of the painting and scaffolding work and had complete control of the work place with the opportunity and duty to comply with OSHA regulations relating to scaffolding.** 60 F.3d 688 (10th Cir. 1995)(emphasis added).

The Kane case is directly on point with the case at bar. SEC was the owner of a building that needed a new roof. SEC contracted with Quality Metal to put a new roof on their building. Quality Metal, through their sub-contractor Royalty Builders, were in complete control of the roofing work and had complete control of the work place with the opportunity and duty to comply with OSHA regulation relating to having fall protection when performing roofing work.

In its opinion in Robertson, the West Virginia Supreme Court of Appeals discussed another point from Shafer v. Acme Limestone Company, Inc. and noted that in Shafer, the Court discussed the distinction between an agency relationship and an independent contractor relationship. The Court noted that in Shafer there was a significant discussion as to what constitutes the power to control and supervise the work to be done. Therefore, the Court in Robertson stated:

The Court also discussed at length what constitutes the power to control and supervise the work to be done. **The Court concluded that a hiring**

party could retain a broad general right of control over a party who did work for him without establishing an agency relationship. For instance, a hiring party could inspect the work, or stop it, or make suggestions or recommendations without changing the relationship from that of independent contractor to that of agent. Specifically, the Court stated in *Syllabus Pt. 4* of Shafer v. Acme Limestone Company, Inc., *supra*, that: **an owner who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to ensure satisfactory performance of the contract-including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work-without changing the relationship from that of owner and independent contractor or changing the duties arising from that relationship.**

Robertson, 546 S.E.2d at 773 (emphasis added); *See Order*, ¶ 18.

The Court in Robertson then noted that there was no evidence that Ms. Morris exercised control over the process of cutting the tree on her premises. The Court then held as follows:

This Court believes that *Syllabus Pt. 4* of Shafer v. Acme Limestone Company, Inc., *id.*, indicates that Ms. Morris did not engage in the types of acts which would convert her relationship, and that the Circuit Court properly concluded that no such relationship was established or could be established under the facts of this case.

Id. at 773; *See Order*, ¶ 18. In the case at bar, property owner SEC did not have any control of the installation of the new roof. They relied on the expertise of independent contractor Quality Metal, through their sub-contractor Royalty Builders, to do the job safely and correctly. SEC is not, in any way shape or form, involved in the roofing business.

All of the code violations of OSHA cited by the Appellant fall under *Safety and Health Regulations for Construction – Subpart M: Fall Protection*, 29 C.F.R. §§ 1926.500 through 1926.503. **These code sections apply only to the employer of the**

workers utilizing “fall protection.” Additionally, looking at the OSHA regulation 29 C.F.R. § 1926.10 entitled *General Interpretations*, the section states that:

This subpart contains the general rules of the Secretary of Labor interpreting and applying the construction safety and health provisions of section 107 of the Contract Work Hours and Safety Standards Act (83 Stat. 96). Section 107 requires as a condition of each contract which is entered into under legislation subject to Reorganization Plan Number 14 of 1950 (64 Stat. 1267), and which is for construction, alteration, and/or repair, including painting and decorating, **that no contractor or subcontractor contracting for any part of the contract work** shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety, as determined under construction safety and health standards promulgated by the Secretary by regulation.

29 C.F.R. § 1926.10 (2002) (emphasis added). The “contract work,” as stated above, refers to SEC, as owner of the building, contracting with Quality Metals to replace the roof on said building. The SEC building is *not* a “multi-employer site” in that SEC is *not* a general contractor that had a job to hire multiple other sub-contractors to do work that they, SEC, were contracted to perform. SEC is the property owner, nothing more.

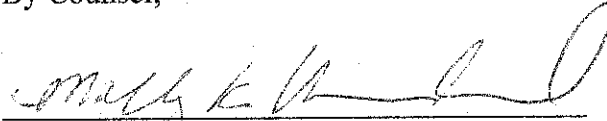
Nowhere in OSHA, code sections 29 C.F.R. §§ 1900 et seq., will you find a definition or even a mention of the term “property owner.” The only terms that are well defined are that of “contractor” and “subcontractor,” neither of which apply to SEC. Therefore, the code sections relied upon by the Appellant only applies to the actual contractors and subcontractors of an employment agreement/contract and not to a property owner, like SEC, who just wanted a new roof on their building.

CONCLUSION AND PRAYER FOR RELIEF

Based upon the foregoing, the Appellee, Southern Equipment Company, respectfully requests that the Court **DENY** the *Appellant’s Brief* and **AFFIRM** the *Order* of the Circuit Court of Logan County.

Respectfully submitted,

Southern Equipment Company,
Appellee and Respondent below,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LANGLEY FRANCE, as the Parent and
Next Friend of ROBERT FRANCE, a Minor,

*Appellant and
Petitioner below,*

v.

SOUTHERN EQUIPMENT COMPANY,
a West Virginia Corporation

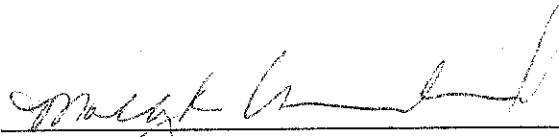
*Appellee and
Respondent below.*

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee Southern Equipment Company, does hereby certify that a true copy of the foregoing "***APPELLEE SOUTHERN EQUIPMENT COMPANY'S RESPONSE TO APPELLANT'S AMENDED BRIEF***" was served upon all counsel of record by placing the same in an envelope, properly addressed with postage fully paid and depositing the same in the U.S. mail, on this **8th** day of **January, 2009** as follows:

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