

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2021-CP-22-00927

RECEIVED

JUL 19 2023

SC Court of Appeals

Steven Michael Okun, as Personal Representative
of the Estate of Jane Luanne Okun

Respondent,

v.

Pobuckra Properties, LLC and Alliance Commercial
Property Management, Inc.

Appellants.

RECORD ON APPEAL

M. Dawes Cooke, Jr. D.
Summers Clarke, II P.O.
Drawer H
Charleston, SC 29402
(843) 577-7700

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Colleen P. Sorensen (*admitted pro hac vice*)
BatesCarey LLP
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Counsels for Appellant

Gene M. Connell, Jr.
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Counsel for Respondent

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	C/A No. 2021-CP-22-00927
	)	
Steven Michael Okun, as Personal	)	
Representative of the Estate of Jane Luanne	)	
Okun,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CONSENT ORDER
	)	
Pobuckra Properties, LLC,	)	
	)	
Defendant.	)	

WHEREAS prior to the hearing on the Plaintiffs' Motion for Injunctive Relief and to Preserve the Evidence, filed November 11, 2019, attorneys for the Plaintiff and Defendant Pobuckra Properties, LLC came to an agreement to resolve this Motion. At the time of the agreement, counsel for Defendant Pobuckra advised Plaintiff's counsel that the handrail was immediately repaired after the incident which is the subject of Plaintiff's Amended Complaint. The Plaintiff and Defendant have come to an agreement whereby Defendant agrees to not take any further action to replace, repair, or alter the footbridge located at 21 Professional Lane in Pawleys Island, South Carolina, on which Plaintiff fell as alleged in Plaintiff's Amended Complaint.

Defendant further agrees to allow Plaintiff and Plaintiff's experts to view, inspect, examine and/or to perform an agreed upon scope of testing of the footbridge and handrails at a mutually agreeable time when Defendant and/or its experts are able to attend such inspection and testing.

It is therefore, ORDERED, that

- 1) Pobuckra Properties, LLC will not take any further action to replace, repair or alter the footbridge and handrails located at 21 Professional Lane in Pawleys Island, South Carolina until further order of this Court; and
- 2) That Pubuckra Properties, LLC will allow Plaintiff, his counsel, and Plaintiff's experts to view, inspect, examine and/or to perform an agreed upon scope of testing of the footbridge and handrails at a mutually agreeable time when Defendant and/or its experts are able to attend such inspection and testing.

Steven H. John
Chief Administrative Judge, 15th Judicial
Circuit

January_____, 2022
Conway, South Carolina

I consent:

s/Gene M. Connell, Jr.

Gene M. Connell, Jr.
Kelaher Connell & Connor, PC
P.O. Drawer 14547
Surfside Beach, SC 29587-4547
(843) 238-5648
gconnell@classactlaw.net
Counsel for Plaintiff

January 10, 2022
Surfside Beach, South Carolina

We consent:

D. Summers Clarke, II

M. Dawes Cooke, Jr. (S.C. Bar No. 1376)
D. Summers Clarke, II (S.C. Bar No. 74829)
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
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Counsel for Defendant Pobuckra Properties, LLC

January 10, 2022
Charleston, South Carolina



Georgetown Common Pleas

Case Caption: Steven Michael Okun , plaintiff, et al VS Pobuckra Properties Llc ,
defendant, et al
Case Number: 2021CP2200927
Type: Order/Consent Order

So Ordered

s/ Steven H. John, Resident Circuit Judge, #129

Electronically signed on 2022-01-11 11:36:09 page 4 of 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Georgetown
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP2200927

Steven Michael Okun et al
PLAINTIFF(S)

Pobuckra Properties Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Motion to Strike Answers and Affirmative Defenses by Attorney Connell is Granted.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/06/2023 .

Steven Michael Okun PR
Jane Luanne Okun Est
Jane Luanne Okun

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Georgetown Common Pleas

Case Caption: Steven Michael Okun , plaintiff, et al VS Pobuckra Properties Llc ,
defendant, et al
Case Number: 2021CP2200927
Type: Order/Electronic Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2023-01-06 12:20:04 page 3 of 3

From: Seals, William Law Clerk (Margaret Scalise)
To: Gene Connell; D. Summers Clarke, II
Subject: [EXT] Steven Michael Okun, plaintiff, et al VS Pobuckra Properties LLC, defendant, et al: 2021CP2200927
Date: Friday, January 6, 2023 12:50:55 PM

Good Afternoon,

Judge Seals wanted to explain his form 4 Order more thoroughly for the above-referenced matter; therefore, please read the following:

I understand that in South Carolina there is no specific cause of action for spoliation; however, there is a jury charge for spoliation whereby the jury can draw adverse inferences against the Defendant. This is what we would normally do. This case is distinguished by the fact that there is a Circuit Court Order that orders the Defendant specifically to preserve the crucial evidence of the right-hand handrail that broke. The Defendant, or a third party under his control, disposed of the crucial evidence. Despite the Defendant arguing that the left-hand handrail is still there, one can infer that it is intact because the left-side was mounted more securely or there was less rot, etc. Under the present circumstances, I want to avoid the argument that even though there is a Court Order, one can ignore it and blame it on their lawn care management. Moreover, considering the Circuit Court Order, I will grant the Plaintiff's Motion/Strike Answers and Affirmative Defenses.

Sincerely,
Margaret Scalise

Margaret Scalise

Law Clerk to the Honorable William H. Seals, Jr.
Circuit Court Judge At-Large, Seat 6
Chief CP Administrative Judge, 15th Judicial Circuit
103 North Main Street
Marion, South Carolina 29571
Office: (843) 423-0446
Cell: (843) 251-6133
Fax: (843) 423-0535

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STATE OF SOUTH CAROLINA  
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
C/A NO. 2021-CP-22-

Steven Michael Okun, as Personal  
Representative of the Estate of Jane Luanne  
Okun,

Plaintiff,

vs.

Pobuckra Properties, L.L.C. and Alliance  
Property Management, LLC,

Defendants.

SUMMONS

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Post Office Drawer 14547, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

KELAHHER, CONNELL & CONNOR, P.C.

s/ Gene M. Connell, Jr.

Gene M. Connell, Jr. (S.C. Bar No. 1358)  
The Courtyard, Suite 209  
1500 U.S. Highway 17 North  
Post Office Drawer 14547  
Surfside Beach, South Carolina 29587-4547  
(843) 238-5648 (phone)  
(843) 238-5050 (facsimile)  
[gconnell@classactlaw.net](mailto:gconnell@classactlaw.net)  
**Attorney for Plaintiff**

November 4, 2021  
Surfside Beach, South Carolina

R0009

**STATE OF SOUTH CAROLINA**  
**COUNTY OF GEORGETOWN**

**IN THE COURT OF COMMON PLEAS**  
**FIFTEENTH JUDICIAL CIRCUIT**  
**C/A NO. 2021-CP-22-**

Steven Michael Okun, as Personal )  
 Representative of the Estate of Jane Luanne )  
 Okun, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Pobuckra Properties, L.L.C. and Alliance )  
 Property Management, LLC, )  
 )  
 Defendants. )

**COMPLAINT**  
**(Negligence/**  
**Wrongful Death/Survival Action)**  
**JURY TRIAL**

The Plaintiff, above named, complaining of the Defendants herein, would allege:

1. That the Plaintiff, Steven Michael Okun, is a citizen and resident of the County of Georgetown, State of South Carolina.
2. That the Plaintiff, Steven Michael Okun, was appointed by the Probate Court to manage the Estate of his deceased mother, Jane Luanne Okun.
3. That, upon information and belief, the Defendant Pobuckra Properties, L.L.C. is a limited liability company and does business in the County of Georgetown, State of South Carolina and at the time of the occurrence herein mentioned was the owner of property where Jane Luanne Okun fell.
4. That Defendant Alliance Property Management, LLC is a property management corporation organized and existing pursuant to the laws of the state of South Carolina and managed the property owned by Pobuckra Properties, L.L.C.
5. That on or about July 27, 2021, at approximately 9:30 a.m., Jane Luanne Okun was on Defendant Pobuckra's properties to go to her hair stylist. That Okun was crossing a footbridge from the parking lot to the building when she reached for the handrail which gave way because it was not attached correctly to the structure, causing her to fall backwards.

6. That at the time and place mentioned above, the Defendants were negligent, reckless, willful and wanton, in one or more of the following particulars, to wit:

- a. In leaving a dangerous condition of Defendant's property;
- b. In failing to warn Okun of the dangerous condition;
- c. In failing to manage the property;
- d. In failing to repair the footbridge/handrail;
- e. In failing properly to inspect the footbridge;
- f. In failing to post warning signs;
- g. In failing to immediately repair a dangerous condition;
- h. In failing to affix the handrail so it would not come loose;
- i. In failing to manage the property and discover dangerous conditions;
- j. In failing to repair rotten or defective wood;
- k. In failing to repair known defects;
- l. In allowing the property to stay in a dangerous condition;

any or all of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiffs herein, said acts being in violation of the statutory laws of the City of Pawleys Island, State of South Carolina.

7. That as a direct and proximate result of the Defendants' negligence, recklessness, willfulness and wantonness, as aforesaid, Okun fell backwards suffering serious injury and was taken to a hospital where she underwent lifesaving surgery.

8. That further, Okun remained in the hospital until she eventually died from her injuries. That Okun was aware during her hospitalization that her injuries were serious. That

Okun's care was extremely expensive and Okun was in the hospital after the fall for almost two weeks before her death.

9. That Plaintiff is informed and believes that he is entitled to judgment against the Defendants on this cause of action for actual damages, for punitive damages and for the costs of this action.

FOR A SECOND CAUSE OF ACTION  
(Wrongful Death)

10. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

11. That this cause of action is brought for the wrongful death of Jane Luanne Okun pursuant to S.C. Code §15-51-10 and for sorrow, grief, wounded feelings, loss of society and companionship, and for medical and funeral bills.

FOR A THIRD CAUSE OF ACTION  
(Survival Action)

12. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

13. The Plaintiff brings this cause of action for survival for the deceased Jane Luanne Okun.

14. That Plaintiff's action for survival is pursuant to South Carolina law and provides that there is an action for any person who has conscious pain and suffering prior to their death.

15. That Okun died after about two weeks in the hospital and was conscious of her situation prior to her death.

16. That Okun died as a result of injuries from the accident.

17. That Plaintiff brings this cause of action for survival for conscious pain and suffering, for funeral expenses, and for medical expenses.

18. That Plaintiff requests actual damages.

WHEREFORE, Plaintiff prays for judgment as follows:

- A. On the First Cause of Action for actual damages, punitive damages and costs.
- B. On the Second Cause of Action for wrongful death for actual damages, for punitive damages as to the deceased Jane Luanne Okun.
- C. On the Third Cause of Action for survival for the deceased Jane Luanne Okun for actual damages.

KELAHHER, CONNELL & CONNOR, P.C.

s/ Gene M. Connell, Jr.

Gene M. Connell, Jr. (S.C. Bar No. 1358)  
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1500 U.S. Highway 17 North  
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(843) 238-5648 (phone)  
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[gconnell@classactlaw.net](mailto:gconnell@classactlaw.net)  
**Attorney for Plaintiff**

November 4, 2021  
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
C/A NO. 2021-CP-22-00927

Steven Michael Okun, as Personal  
Representative of the Estate of Jane Luanne  
Okun,

Plaintiff,

vs.

Pobuckra Properties, L.L.C.,

Defendants.

AMENDED SUMMONS

TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Post Office Drawer 14547, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

KELAHHER, CONNELL & CONNOR, P.C.

s/ Gene M. Connell, Jr.

Gene M. Connell, Jr. (S.C. Bar No. 1358)  
The Courtyard, Suite 209  
1500 U.S. Highway 17 North  
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(843) 238-5648 (phone)  
(843) 238-5050 (facsimile)  
[gconnell@classactlaw.net](mailto:gconnell@classactlaw.net)  
**Attorney for Plaintiff**

November 11, 2021  
Surfside Beach, South Carolina

R0014

**STATE OF SOUTH CAROLINA**  
**COUNTY OF GEORGETOWN**

**IN THE COURT OF COMMON PLEAS**  
**FIFTEENTH JUDICIAL CIRCUIT**  
**C/A NO. 2021-CP-22-00927**

Steven Michael Okun, as Personal )  
 Representative of the Estate of Jane Luanne )  
 Okun, )  
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 Plaintiff, )  
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 vs. )  
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 Pobuckra Properties, L.L.C., )  
 )  
 Defendant. )

**AMENDED COMPLAINT**  
 (Negligence/  
 Wrongful Death/Survival Action)  
**JURY TRIAL**

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1. That the Plaintiff, Steven Michael Okun, is a citizen and resident of the County of Georgetown, State of South Carolina.
2. That the Plaintiff, Steven Michael Okun, was appointed by the Probate Court to manage the Estate of his deceased mother, Jane Luanne Okun.
3. That, upon information and belief, the Defendant Pobuckra Properties, L.L.C. is a limited liability company and does business in the County of Georgetown, State of South Carolina and at the time of the occurrence herein mentioned was the owner of property where Jane Luanne Okun fell.
4. That on or about July 27, 2021, at approximately 9:30 a.m., Jane Luanne Okun was on Defendant Pobuckra's properties to go to her hair stylist. That Okun was crossing a footbridge from the parking lot to the building when she reached for the handrail which gave way because it was not attached correctly to the structure, causing her to fall backwards.
5. That at the time and place mentioned above, the Defendant was negligent, reckless, willful and wanton, in one or more of the following particulars, to wit:
  - a. In leaving a dangerous condition of Defendant's property;

- b. In failing to warn Okun of the dangerous condition;
- c. In failing to manage the property;
- d. In failing to repair the footbridge/handrail;
- e. In failing properly to inspect the footbridge;
- f. In failing to post warning signs;
- g. In failing to immediately repair a dangerous condition;
- h. In failing to affix the handrail so it would not come loose;
- i. In failing to manage the property and discover dangerous conditions;
- j. In failing to repair rotten or defective wood;
- k. In failing to repair known defects;
- l. In allowing the property to stay in a dangerous condition;

any or all of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiff herein, said acts being in violation of the statutory laws of the City of Pawleys Island, State of South Carolina.

6. That as a direct and proximate result of the Defendant's negligence, recklessness, willfulness and wantonness, as aforesaid, Okun fell backwards suffering serious injury and was taken to a hospital where she underwent lifesaving surgery.

7. That further, Okun remained in the hospital until she eventually died from her injuries. That Okun was aware during her hospitalization that her injuries were serious. That Okun's care was extremely expensive and Okun was in the hospital after the fall for almost two weeks before her death.

8. That Plaintiff is informed and believes that he is entitled to judgment against the Defendant on this cause of action for actual damages, for punitive damages and for the costs of this action.

FOR A SECOND CAUSE OF ACTION  
(Wrongful Death)

9. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

10. That this cause of action is brought for the wrongful death of Jane Luanne Okun pursuant to S.C. Code §15-51-10 and for sorrow, grief, wounded feelings, loss of society and companionship, and for medical and funeral bills.

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(Survival Action)

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12. The Plaintiff brings this cause of action for survival for the deceased Jane Luanne Okun.

13. That Plaintiff's action for survival is pursuant to South Carolina law and provides that there is an action for any person who has conscious pain and suffering prior to their death.

14. That Okun died after about two weeks in the hospital and was conscious of her situation prior to her death.

15. That Okun died as a result of injuries from the accident.

16. That Plaintiff brings this cause of action for survival for conscious pain and suffering, for funeral expenses, and for medical expenses.

17. That Plaintiff requests actual damages.

WHEREFORE, Plaintiff prays for judgment as follows:

A. On the First Cause of Action for actual damages, punitive damages and costs.

B. On the Second Cause of Action for wrongful death for actual damages, for punitive damages as to the deceased Jane Luanne Okun.

C. On the Third Cause of Action for survival for the deceased Jane Luanne Okun for actual damages.

KELAHHER, CONNELL & CONNOR, P.C.

s/ Gene M. Connell, Jr.

Gene M. Connell, Jr. (S.C. Bar No. 1358)

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1500 U.S. Highway 17 North

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**Attorney for Plaintiff**

November 11, 2021  
Surfside Beach, South Carolina

**STATE OF SOUTH CAROLINA**  
**COUNTY OF GEORGETOWN**

**IN THE COURT OF COMMON PLEAS**  
**FIFTEENTH JUDICIAL CIRCUIT**  
**C/A NO. 2021-CP-22-00927**

Steven Michael Okun, as Personal )  
 Representative of the Estate of Jane Luanne )  
 Okun, )

Plaintiff, )

vs. )

Pobuckra Properties, L.L.C., )

Defendant. )

**NOTICE OF MOTION AND MOTION**  
**FOR INJUNCTIVE RELIEF AND TO**  
**PRESERVE THE EVIDENCE**

TO: DEFENDANT:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the Plaintiff, will move the Court for an order enjoining the Defendant from taking any action to destroy, damage, replace, repair or alter the footbridge on which the Plaintiff fell. The basis of this Motion is that on or about July 27, 2021 at approximately 9:30 a.m., the Plaintiff went to the Defendant's properties to go to a hair stylist. As she was traversing a footbridge to the hair stylist, the handrail gave way, causing Plaintiff to fall.

Plaintiff seeks an order of this Court enjoining the Defendant from making changes to the handrail on the footbridge and further for an order of this Court allowing Plaintiff's experts to inspect and or test the footbridge and handrail and to allow Plaintiff to go onto Defendant's property to view, inspect and examine the footbridge handrails.

WHEREFORE, Plaintiff requests the Court issues its order enjoining the Defendant from taking any action which would destroy or alter the footbridge and the handrails, until further order of this Court.

KELAHHER, CONNELL & CONNOR, P.C.

s/ Gene M. Connell, Jr.

Gene M. Connell, Jr. (S.C. Bar No. 1358)  
The Courtyard, Suite 209  
1500 U.S. Highway 17 North  
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[gconnell@classactlaw.net](mailto:gconnell@classactlaw.net)  
**Attorney for Plaintiff**

November 11, 2021  
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
C/A NO. 2021-CP-22-00927

Steven Michael Okun, as Personal  
Representative of the Estate of Jane Luanne  
Okun,

Plaintiff,

vs.

Pobuckra Properties, L.L.C.,  
Defendant.

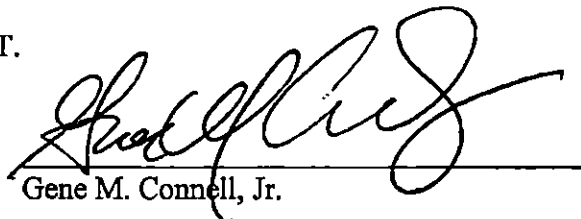
AFFIDAVIT OF  
GENE M. CONNELL, JR.

Personally appeared before me Gene M. Connell, Jr. who swears and states as follows:

1. My name is Gene M. Connell, Jr. I am counsel for the Plaintiff, and I am requesting that the Court not allow the Defendant to change, alter, repair or destroy the footbridge on which the Plaintiff fell. The basis of this Motion is this is crucial evidence which needs to be preserved so that Plaintiff's experts can inspect the footbridge and handrail.

2. The Plaintiff also seeks an order of the Court allowing Plaintiff to come onto Defendant's property and to carry out various non-destructive testing and inspections of the footbridge and handrail.

FURTHER AFFIANT SAYETH NAUGHT.

  
Gene M. Connell, Jr.

Subscribed and sworn to before me this

~~14th~~ day of November, 2021.

  
Notary Public for South Carolina  
My Commission Expires: 3/12-24

STATE OF SOUTH CAROLINA  
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
C/A NO. 2021-CP-22-00927

Steven Michael Okun, as Personal  
Representative of the Estate of Jane Luanne  
Okun,

Plaintiff,

vs.

Pobuckra Properties, L.L.C. and Alliance  
Commercial Property Management, Inc.,

Defendants.

SECOND  
AMENDED SUMMONS

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Post Office Drawer 14547, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

KELAHHER, CONNELL & CONNOR, P.C.

s/ Gene M. Connell, Jr.

Gene M. Connell, Jr. (S.C. Bar No. 1358)  
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1500 U.S. Highway 17 North  
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(843) 238-5648 (phone)  
(843) 238-5050 (facsimile)

[gconnell@classactlaw.net](mailto:gconnell@classactlaw.net)

Attorney for Plaintiff

January 31, 2022  
Surfside Beach, South Carolina

**STATE OF SOUTH CAROLINA**  
**COUNTY OF GEORGETOWN**

**IN THE COURT OF COMMON PLEAS**  
**FIFTEENTH JUDICIAL CIRCUIT**  
**C/A NO. 2021-CP-22-00927**

Steven Michael Okun, as Personal  
 Representative of the Estate of Jane Luanne  
 Okun,

Plaintiff,

vs.

Pobuckra Properties, L.L.C. and Alliance  
 Commercial Property Management, Inc.,

Defendants.

**SECOND**  
**AMENDED COMPLAINT**  
 (Negligence/  
 Wrongful Death/Survival Action)  
**JURY TRIAL**

The Plaintiff, above named, complaining of the Defendants herein, would allege:

1. That the Plaintiff, Steven Michael Okun, is a citizen and resident of the County of Georgetown, State of South Carolina.

2. That the Plaintiff, Steven Michael Okun, was appointed by the Probate Court to manage the Estate of his deceased mother, Jane Luanne Okun.

3. That, upon information and belief, the Defendant Pobuckra Properties, L.L.C. is a limited liability company and does business in the County of Georgetown, State of South Carolina and at the time of the occurrence herein mentioned was the owner of property where Jane Luanne Okun fell.

4. That Defendant Alliance Commercial Property Management, Inc. is a property management corporation organized and existing pursuant to the laws of the state of South Carolina and managed the property owned by Pobuckra Properties, L.L.C.

5. That on or about July 27, 2021, at approximately 9:30 a.m., Jane Luanne Okun was on Defendant Pobuckra's properties to go to her hair stylist. That Okun was crossing a

footbridge from the parking lot to the building when she reached for the handrail which gave way because it was not attached correctly to the structure, causing her to fall backwards.

6. That at the time and place mentioned above, the Defendant was negligent, reckless, willful and wanton, in one or more of the following particulars, to wit:

- a. In leaving a dangerous condition of Defendant's property;
- b. In failing to warn Okun of the dangerous condition;
- c. In failing to manage the property;
- d. In failing to repair the footbridge/handrail;
- e. In failing properly to inspect the footbridge;
- f. In failing to post warning signs;
- g. In failing to immediately repair a dangerous condition;
- h. In failing to affix the handrail so it would not come loose;
- i. In failing to manage the property and discover dangerous conditions;
- j. In failing to repair rotten or defective wood;
- k. In failing to repair known defects;
- l. In allowing the property to stay in a dangerous condition;

any or all of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiff herein, said acts being in violation of the statutory laws of the City of Pawleys Island, State of South Carolina.

7. That as a direct and proximate result of the Defendant's negligence, recklessness, willfulness and wantonness, as aforesaid, Okun fell backwards suffering serious injury and was taken to a hospital where she underwent lifesaving surgery.

8. That further, Okun remained in the hospital until she eventually died from her injuries. That Okun was aware during her hospitalization that her injuries were serious. That Okun's care was extremely expensive and Okun was in the hospital after the fall for almost two weeks before her death.

9. That Plaintiff is informed and believes that he is entitled to judgment against the Defendant on this cause of action for actual damages, for punitive damages and for the costs of this action.

FOR A SECOND CAUSE OF ACTION  
(Wrongful Death)

10. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

11. That this cause of action is brought for the wrongful death of Jane Luanne Okun pursuant to S.C. Code §15-51-10 and for sorrow, grief, wounded feelings, loss of society and companionship, and for medical and funeral bills.

FOR A THIRD CAUSE OF ACTION  
(Survival Action)

12. The Plaintiff realleges and reiterates each and every allegation as fully as if repeated verbatim herein.

13. The Plaintiff brings this cause of action for survival for the deceased Jane Luanne Okun.

14. That Plaintiff's action for survival is pursuant to South Carolina law and provides that there is an action for any person who has conscious pain and suffering prior to their death.

15. That Okun died after about two weeks in the hospital and was conscious of her situation prior to her death.

16. That Okun died as a result of injuries from the accident.

17. That Plaintiff brings this cause of action for survival for conscious pain and suffering, for funeral expenses, and for medical expenses.

18. That Plaintiff requests actual damages.

WHEREFORE, Plaintiff prays for judgment as follows:

A. On the First Cause of Action for actual damages, punitive damages and costs.

B. On the Second Cause of Action for wrongful death for actual damages, for punitive damages as to the deceased Jane Luanne Okun.

C. On the Third Cause of Action for survival for the deceased Jane Luanne Okun for actual damages.

KELAHHER, CONNELL & CONNOR, P.C.

s/ Gene M. Connell, Jr.

Gene M. Connell, Jr. (S.C. Bar No. 1358)  
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(843) 238-5648 (phone)  
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[gconnell@classactlaw.net](mailto:gconnell@classactlaw.net)  
**Attorney for Plaintiff**

January 31, 2022  
Surfside Beach, South Carolina

|                                             |   |                                    |
|---------------------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS       |
|                                             | ) |                                    |
| COUNTY OF GEORGETOWN                        | ) | C/A No. 2021-CP-22-00927           |
| Steven Michael Okun, as Personal            | ) |                                    |
| Representative of the Estate of Jane Luanne | ) |                                    |
| Okun,                                       | ) |                                    |
|                                             | ) |                                    |
|                                             | ) | <b>DEFENDANT POBUCKRA</b>          |
|                                             | ) | <b>PROPERTIES, LLC'S ANSWER TO</b> |
| vs.                                         | ) | <b>PLAINTIFF'S SECOND AMENDED</b>  |
|                                             | ) | <b>COMPLAINT</b>                   |
| Pobuckra Properties, LLC and Alliance       | ) |                                    |
| Commercial Property Management, Inc.,       | ) |                                    |
|                                             | ) |                                    |
| Defendants.                                 | ) |                                    |

Defendant PoBuckra Properties, LLC ("Defendant"), by and through its undersigned counsel, hereby answers Plaintiff's Amended Complaint as follows:

**FOR A FIRST DEFENSE**

1. All allegations of the Plaintiff's Amended Complaint not specifically admitted herein are hereby denied.

2. Defendant lacks sufficient information to admit or deny the allegations of Paragraph 1 and Paragraph 2. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

3. Defendant admits the allegations in Paragraph 3 and Paragraph 4 of the Second Amended Complaint.

4. Defendant lacks sufficient information to respond to the allegations of Paragraph 5 of the Second Amended Complaint. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

5. Paragraph 6 (and its subparts) and Paragraph 7 of the Second Amended Complaint contain conclusions of law, to which no response is required. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

6. Defendant lacks sufficient information to admit or deny the allegations of Paragraph 8. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

7. Paragraph 9 contains conclusions of law, and thus no response is required. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

8. In response to Paragraph 10, Defendant repeats and realleges each and every allegation of the preceding paragraphs as if fully set forth verbatim herein.

9. Paragraph 11 states conclusions of law to which no response is required. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

10. In response to Paragraph 12, Defendant repeats and realleges each and every allegation of the preceding paragraphs as if fully set forth verbatim herein.

11. Paragraph 13 and Paragraph 14 state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

12. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 15 and Paragraph 16. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

13. Paragraph 17, Paragraph 18, and the WHEREFORE clause (and its subparts), which contains the remaining allegations in the Amended Complaint, contain conclusions of law

to which no response is required. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

#### **AFFIRMATIVE DEFENSES**

14. Plaintiff's Amended Complaint fails to state facts sufficient to state a cause of action against this Defendant and should therefore be dismissed.

15. The injuries allegedly suffered by Plaintiff are the direct and proximate result of her comparative negligence, and Plaintiff's recovery should be barred or, alternatively, reduced proportionately to Plaintiff's comparative negligence.

16. Plaintiff has failed to mitigate her damages as required by law.

17. Plaintiff's damages, if any, are the direct and proximate result of the sole negligence of third parties not under the direction or control of this Defendant.

18. Any damages alleged by Plaintiff were due to intervening and superseding causes, and any act or omission on the part of this Defendant was not the proximate cause of Plaintiff's alleged damages.

19. Plaintiff's claims are barred, in whole or in part, by assumption of the risk.

20. Plaintiff's claims should be dismissed pursuant to the equitable doctrines of unclean hands, waiver and estoppel.

21. Plaintiff's claims are barred by the applicable statute of limitations, and/or by the equitable doctrine of laches, and should therefore be dismissed.

22. To the extent Plaintiff is seeking punitive damages, Plaintiff has not pled the punitive damages claim with the required particularity.

23. Any award of punitive damages as prayed for by Plaintiff would violate this Defendant's constitutional rights under the United States Constitution and under the South Carolina Constitution.

24. Defendant would show that any award of punitive damages is subject to the limitations set forth in S.C. Code §15-32-530.

25. Defendant reserves the right to assert any additional defenses as may become available through investigation, discovery, or introduction of evidence at trial.

WHEREFORE, having fully answered the Plaintiff's Second Amended Complaint, Defendant prays that the same be dismissed with attorneys' fees, costs and for such other relief as this Honorable Court deems just and proper.

Barnwell Whaley Patterson & Helms, LLC

s/D. Summers Clarke, II

M. Dawes Cooke, Jr. (S.C. Bar No. 1376)

D. Summers Clarke, II (S.C. Bar No. 74829)

P.O. Drawer H

Charleston, SC 29402

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***Counsel for Defendant PoBuckra Properties, LLC***

February 18, 2022  
Charleston, South Carolina

|                                             |   |                                     |
|---------------------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS        |
|                                             | ) |                                     |
| COUNTY OF GEORGETOWN                        | ) | C/A No. 2021-CP-22-00927            |
|                                             | ) |                                     |
| Steven Michael Okun, as Personal            | ) |                                     |
| Representative of the Estate of Jane Luanne | ) |                                     |
| Okun,                                       | ) |                                     |
|                                             | ) |                                     |
|                                             | ) | <b>DEFENDANT ALLIANCE</b>           |
|                                             | ) | <b>COMMERCIAL PROPERTY</b>          |
| vs.                                         | ) | <b>MANAGEMENT, INC.'S ANSWER TO</b> |
|                                             | ) | <b>PLAINTIFF'S SECOND AMENDED</b>   |
|                                             | ) | <b>COMPLAINT</b>                    |
| Pobuckra Properties, LLC and Alliance       | ) |                                     |
| Commercial Property Management, Inc.,       | ) |                                     |
|                                             | ) |                                     |
| Defendants.                                 | ) |                                     |

Defendant Alliance Commercial Property Management, Inc. ("Defendant"), by and through its undersigned counsel, hereby answers Plaintiff's Second Amended Complaint as follows:

**FOR A FIRST DEFENSE**

1. All allegations of the Plaintiff's Second Amended Complaint not specifically admitted herein are hereby denied.
2. Defendant lacks sufficient information to admit or deny the allegations of Paragraph 1 and Paragraph 2. To the extent a response is required, Defendant denies the same and demands strict proof thereof.
3. Defendant admits the allegations in Paragraph 3 of Plaintiff's Second Amended Complaint.
4. In response to Paragraph 4 of Plaintiff's Second Amended Complaint, Defendant admits only that it is a North Carolina entity that managed the property on which Plaintiff's fall is alleged to have taken place. By way of further response, to the extent that Paragraph 4

attempts to allege or does allege any cause of action, claim, act, error or omission as to Defendant, those allegations are denied, and strict proof thereof is demanded.

5. Defendant lacks sufficient information to respond to the allegations of Paragraph 5 of Plaintiff's Second Amended Complaint. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

6. Paragraph 6 (and its subparts) and Paragraph 7 of Plaintiff's Second Amended Complaint contain conclusions of law, to which no response is required. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

7. Defendant lacks sufficient information to admit or deny the allegations of Paragraph 8 of Plaintiff's Second Amended Complaint. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

8. Paragraph 9 of Plaintiff's Second Amended Complaint contains conclusions of law, and thus no response is required. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

9. In response to Paragraph 10 of Plaintiff's Second Amended Complaint, Defendant repeats and realleges each and every allegation of the preceding paragraphs as if fully set forth verbatim herein.

10. Paragraph 11 of Plaintiff's Second Amended Complaint states conclusions of law to which no response is required. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

11. In response to Paragraph 12 of Plaintiff's Second Amended Complaint, Defendant repeats and realleges each and every allegation of the preceding paragraphs as if fully set forth verbatim herein.

12. Paragraph 13 and Paragraph 14 of Plaintiff's Second Amended Complaint state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

13. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 15 and Paragraph 16 of Plaintiff's Second Amended Complaint. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

14. Paragraph 17, Paragraph 18, and the WHEREFORE clause (and its subparts), which contain the remaining allegations in Plaintiff's Second Amended Complaint, contain conclusions of law to which no response is required. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

#### **AFFIRMATIVE DEFENSES**

15. Plaintiff's Second Amended Complaint fails to state facts sufficient to state a cause of action against this Defendant and should therefore be dismissed.

16. The injuries allegedly suffered by Jane Luanne Okun are the direct and proximate result of her comparative negligence, and Plaintiff's recovery should be barred or, alternatively, reduced proportionately by her comparative negligence.

17. Plaintiff has failed to mitigate her damages as required by law.

18. Plaintiff's damages, if any, are the direct and proximate result of the sole negligence of third parties not under the direction or control of this Defendant.

19. Any damages alleged by Plaintiff were due to intervening and superseding causes, and any act or omission on the part of this Defendant was not the proximate cause of Plaintiff's alleged damages.

20. Plaintiff's claims are barred, in whole or in part, by assumption of the risk.

21. Plaintiff's claims should be dismissed pursuant to the equitable doctrines of unclean hands, waiver, and estoppel.

22. Plaintiff's claims are barred by the applicable statute of limitations, and/or by the equitable doctrine of laches, and should therefore be dismissed.

23. Any injuries or damages sustained by Jane Luanne Okun were due to, caused and occasioned by a natural disease process over which Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

24. Jane Luanne Okun's injuries/medical problems alleged in the Second Amended Complaint were due to, and proximately caused by, her underlying medical conditions, ill health, natural causes and/or consequence, complication of her underlying medical condition, and debility, and not by the negligence of this Defendant, and as a result, Plaintiff may not recover against this Defendant.

25. Defendant had no duty to warn about possible dangers or hazards, if any, which were not known or which were not capable of being known.

26. Punitive damages are inappropriate in this case since this Defendant did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages would be based.

27. To the extent Plaintiff is seeking punitive damages, Plaintiff has not pled the punitive damages claim with the required particularity.

28. Any award of punitive damages as prayed for by Plaintiff would violate those clauses of the Constitutions of the United States Constitution and South Carolina related to privileges and immunities, due process and equal protection, and this Defendant would further

assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, et seq.

29. Defendant would show that any award of punitive damages is subject to the limitations set forth in S.C. Code §§15-32-520 and -530.

30. Defendant reserves the right to assert any additional defenses as may become available through investigation, discovery, or introduction of evidence at trial.

WHEREFORE, having fully answered Plaintiff's Second Amended Complaint, Defendant prays that the same be dismissed with attorneys' fees, costs and for such other relief as this Honorable Court deems just and proper.

Barnwell Whaley Patterson & Helms, LLC

s/D. Summers Clarke, II

M. Dawes Cooke, Jr. (S.C. Bar No. 1376)

D. Summers Clarke, II (S.C. Bar No. 74829)

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***Counsel for Defendant Alliance Commercial  
Property Management, Inc.***

April 4, 2022  
Charleston, South Carolina

**STATE OF SOUTH CAROLINA**  
**COUNTY OF GEORGETOWN**

**IN THE COURT OF COMMON PLEAS**  
**FIFTEENTH JUDICIAL CIRCUIT**  
**C/A NO. 2021-CP-22-00927**

Steven Michael Okun, as Personal  
 Representative of the Estate of Jane  
 Luanne Okun,

Plaintiff,

vs.

Pobuckra Properties, L.L.C. and Alliance  
 Commercial Property Management, Inc.,

Defendants.

NOTICE OF MOTION AND MOTION  
 TO STRIKE DEFENDANTS'  
 ANSWERS AND AFFIRMATIVE  
 DEFENSES

YOU WILL PLEASE TAKE NOTICE the undersigned will move the court for an Order striking all of the defenses in the Answers filed by both Defendants to preclude and prohibit the Defendants from arguing liability and notice of this accident as a defense. The basis of this motion is that Plaintiff filed this action on November 11, 2021 along with a Motion for Injunctive Relief and to Preserve Evidence. A Consent Order was issued on January 11, 2022 whereby Defendants and Defendants' counsel agreed to allow Plaintiff and Plaintiff's expert to view, inspect, examine and/or test the footbridge and handrails where Plaintiff slipped, fell and died. The deposition of Defendants' property manager's representative took place on September 27, 2022 wherein Plaintiff learned that Defendants had lost the handrail after taking custody of it pursuant to the Consent Order.

The actions of the Defendants and/or their officers, agents and/or employees in losing crucial and vital evidence precludes them from arguing actual and/or constructive notice of a defect since Defendants have caused material evidence to be lost.

Wherefore, as a result of the violation of this Court's Consent Order, the Defendants' Answers should be struck, and it should not be allowed to present any defenses including actual notice.

WHEREFORE, the Plaintiff requests that court issue its order based on the fact that the Defendants have lost and/or engaged in spoliation of evidence and that Plaintiff is entitled to the relief requested.

KELAHER, CONNELL & CONNOR, P.C.

s/ Gene M. Connell, Jr.

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**Attorney for Plaintiff**

October 12, 2022  
Surfside Beach, South Carolina

|                                             |   |                                     |
|---------------------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS        |
|                                             | ) |                                     |
| COUNTY OF GEORGETOWN                        | ) | C/A No. 2021-CP-22-00927            |
| Steven Michael Okun, as Personal            | ) |                                     |
| Representative of the Estate of Jane Luanne | ) |                                     |
| Okun,                                       | ) |                                     |
|                                             | ) |                                     |
|                                             | ) | <b>DEFENDANTS POBUCKRA</b>          |
|                                             | ) | <b>PROPERTIES, LLC AND ALLIANCE</b> |
|                                             | ) | <b>COMMERCIAL PROPERTY</b>          |
|                                             | ) | <b>MANAGEMENT, INC.'S</b>           |
| vs.                                         | ) | <b>MEMORANDUM IN OPPOSITION TO</b>  |
|                                             | ) | <b>PLAINTIFF'S MOTION TO STRIKE</b> |
| Pobuckra Properties, LLC and Alliance       | ) |                                     |
| Commercial Property Management, Inc.        | ) |                                     |
|                                             | ) |                                     |
| Defendants.                                 | ) |                                     |

Defendants Pobuckra Properties, LLC ("Pobuckra") and Alliance Commercial Property Management, Inc. ("Alliance") (hereinafter collectively "Defendants"), by and through the undersigned counsel, hereby file this Memorandum in Opposition to Plaintiff's Motion to Strike Defendants' Answers and Affirmative Defenses. As detailed below, Defendants submit that Plaintiff's Motion should be denied in its entirety.

### **FACTS AND BACKGROUND**

This case involves an accident that occurred on July 27, 2021 (the "Accident"), when Jane Luanne Okun ("Ms. Okun") fell while entering The Island Day Spa ("IDS") located at 21 Professional Lane in Pawleys Island, South Carolina. Pobuckra owns the property on which IDS operates. (Exhibit B, Affidavit of David R. Teems, ¶ 4). Alliance is the property management company for Pobuckra and oversees the property where IDS is located. *Id.* David Teems ("Mr. Teems") is the Regional Property Manager for Alliance. *Id.* at ¶ 3. At the time of the Accident, the rear entrance to IDS had a footbridge leading to the building with secondary handrails attached to the railings on both sides. *Id.* at ¶ 6. Plaintiff alleges the secondary handrail on the right side of the footbridge detached and disconnected from the railing, putatively causing Ms.

Okun, 87, to fall backwards. Ms. Okun was hospitalized for her injuries and passed away on August 5, 2021.

After the Accident, the premises were inspected by Dennis Cubit of James C. Greene Co. at the request of the insurance company, USLI. *Id.* ¶ 11. Mr. Cubit took photographs of the footbridge, the right-side secondary handrail, and the anchor points where the secondary handrails on both sides were connected to the railing on the footbridge. (Exhibit A, Photographs by Dennis Cubit). These photographs have been produced to Plaintiff and accurately depict the condition on the date of the Accident of the footbridge, secondary handrail, and anchor points, which Plaintiff alleges were involved in Ms. Okun's fall. (Exhibit B, ¶ 11).

Steven Michael Okun, as Personal Representative of the Estate of Jane Luanne Okun ("Plaintiff") filed his initial Complaint against Pobuckra on November 4, 2021; subsequently Plaintiff filed an Amended Complaint and a Motion for Injunctive Relief and to Preserve Evidence on November 11, 2021. On January 11, 2022, Plaintiff and Pobuckra entered a Consent Order not to take any further action to replace, repair, or alter the footbridge. (Exhibit C, Consent Order). Pobuckra further agreed to allow Plaintiff and Plaintiff's experts to view, inspect, examine and/or to perform testing on the handrails at a mutually agreeable time. *Id.* On January 31, 2022, Plaintiff filed a Second Amended Complaint to add Alliance as a Defendant.

Sometime after the Accident, Plaintiff's counsel photographed the premises. Since taking these photographs, Plaintiff has not requested to view, inspect, examine and/or test the footbridge and handrails with an expert or otherwise. It was only after Mr. Teems disclosed at his deposition that a third-party had discarded the secondary handrail from the right side of the footbridge that Plaintiff expressed an interest in an inspection. Alliance has possession of the left-side secondary handrail which is similar to the right-side secondary handrail. (Exhibit B, ¶

17). The left-side secondary handrail to the footbridge, the railings, and the anchor points are available for inspection by the Plaintiff at a mutually agreeable time. The railings and the anchor points are the only items of physical evidence which were not destroyed during Ms. Okun's fall and provide insight into how the handrail was attached to the footbridge on the date of the Accident. Plaintiff's decedent, who was walking without her medically required walker at the time of the Accident, caused the secondary handrail to detach from the railing during the Accident, thereby rendering it impossible to view or document how the right-side secondary handrail was attached to the railing immediately prior to the Accident. Put simply, had the right-side secondary handrail not been disposed of by a third-party, evidence regarding the connection between the right-side secondary handrail and railing could not have been gleaned after the Accident, given that the mechanics of the Accident itself destroyed that connection.

Plaintiff is now requesting the most extreme remedy, to Strike Defendants' Answers and Affirmative Defenses, based on an alleged denial of the opportunity to inspect the right-side secondary handrail. This request is entirely disproportionate to the alleged harm and ignores that Defendants *did not*, intentionally, negligently, or otherwise, take any action to dispose of the right-side secondary handrail involved in Ms. Okun's Accident. Regardless, Defendants do not deny that the secondary handrail on the right side of the footbridge detached from the railing on the date of Ms. Okun's fall, and the right-side secondary handrail has been photographed and documented. Defendants continue to offer Plaintiff the opportunity to inspect the left-side secondary handrail and the railings where the secondary handrails were attached. Thus, Plaintiff is not prejudiced by not having access to the right-side secondary handrail, and striking Defendants' Answers and Affirmative Defenses would not be reasonable in these circumstances.

## LEGAL AUTHORITIES AND ARGUMENT

Spoliation refers to the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). A party has a duty to preserve material evidence, and this duty "arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to the anticipated litigation." *Id.* at 591. The doctrine of spoliation allows the jury to draw an adverse inference against a party who "fails to preserve material evidence for the trial." *Stokes v. Spartanburg Reg'l med. Ctr.*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006). It is for the jury "to determine whether the party has offered a satisfactory explanation for that failure," and if the jury "find[s] the explanation unsatisfactory, [it is] permitted—but not required—to draw the inference that the evidence would have been unfavorable to the party's claim." *Id.*

As detailed in *Nucor Corp. v. Bell*, 251 F.R.D. 191 (D.S.C. 2008), "[s]anctionable spoliation of evidence occurs *only when three prerequisites are met*:" (i) the party alleged to have spoliated the evidence had control over the evidence and a "duty" to preserve the evidence at the time it was destroyed or altered; (ii) the destruction or loss was accompanied by a "culpable state of mind"; and (iii) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought it and the loss of such evidence caused "prejudice." *See id.* (emphasis added). Moreover, "[t]o demonstrate that spoliation occurred, *plaintiff bears the burden of proving the three elements by a preponderance of evidence*." *Id.* at 204 (emphasis added). The Court's ability to impose sanctions for spoliation "is limited to that necessary to redress conduct which abuses the judicial process." *Nucor Corp.*, 251 F.R.D. at 194 (internal citations omitted). Accordingly, "the applicable sanction should be molded to serve the

prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.” *Id.* (internal citations omitted).

As detailed herein, Plaintiff cannot establish the prerequisites for sanctionable spoliation of evidence, and Plaintiff’s Motion to Strike Defendants’ Answer and Affirmative Defenses should be denied.

**A. Defendants Complied with the Duty to Preserve Evidence**

Defendants complied with the duty to preserve evidence by not replacing, repairing, or altering the footbridge or its railings and by storing the secondary handrails in a fenced area. Defendants are not responsible for the independent acts of the third-party landscaping company which, without authorization, direction, or knowledge of Defendants, discarded the right-side secondary handrail after it had been documented. Furthermore, as the party seeking sanctions, Plaintiff must adduce sufficient evidence from which a reasonable trier of fact could infer that the footbridge and its railings are still in the same condition as they were immediately after the Accident, rendering the absence of the right-side secondary handrail immaterial.

On August 6, 2021, Dennis Cubit of James C. Greene Company conducted an inspection and took photographs of the footbridge, the anchor points where the secondary handrails were attached to the railings, and the secondary handrail to the right side of the walkway. (Exhibit A and Exhibit B, ¶ 11). These photographs have been provided to Plaintiff. Photographs that accurately represent the condition of the footbridge and handrails plainly constitutes evidence of the condition of the footbridge and handrails. *See Joyner v. B & P Pest Control, Inc.*, 853 So.2d 991 (Ala. Civ. App. 2002) (dismissal on the grounds of alleged spoliation is error when party is able to review pictures and cross examine witnesses). Any evidence that the right-side secondary handrail could have provided was destroyed when the handrail detached from the

railing. The railings, which have screw holes where the secondary handrails were attached, were the only evidence remaining after Ms. Okun's fall.

If there was any evidence that Plaintiff could have obtained from the discarded handrail, Plaintiff should be able to obtain evidence of comparable value from the left-side secondary handrail to that which he would have been able to get from the discarded handrail. Furthermore, Plaintiff has not demonstrated what beneficial evidence the right-side secondary handrail would even offer. While Plaintiff may be entitled to argue at trial how and why the photographs of the right-side secondary handrail are not accurate depictions or how the photographs prevent Plaintiff from determining whether they accurately depict the conditions, Plaintiff has not met his burden to demonstrate that Defendants did not comply with the duty to preserve evidence.

**B. Defendants Did Not Intentionally Discard the Handrail**

Here, the evidence was discarded *not* by Defendants, but by an independent third-party and without Defendants' knowledge or approval. This forecloses the possibility that Plaintiff can establish by a preponderance of the evidence that either Defendant breached the putative duty to preserve the evidence, let alone that either Defendant did so with the requisite "culpable state of mind" described by Judge Norton in *Nucor*. Striking the Answer and Affirmative Defenses would be too harsh and would not be reasonable given the facts of the case. Defendants did not act in bad faith, willfully, or with gross indifference to the rights of Plaintiff. Furthermore, Plaintiff cannot demonstrate any intent to destroy evidence or a culpable state of mind. A sanction of striking the pleadings and defenses is too severe if there is no evidence of any intentional misconduct. See *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989); *Kershaw Co. Bd. Of Educ. V. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990). In *Karppi v.*

*Greenville Terrazzo Co., Inc.*, the Court of Appeals reversed the striking of pleadings and entry of default, noting that

[W]hen the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is nevertheless harsh medicine that should not be administered lightly. Before invoking this severe remedy, the trial court must determine that there is some element of bad faith, willfulness, or gross indifference to the right of other litigants. The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. The sanction should be aimed at the specific misconduct of the party sanctioned. Furthermore, whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules of Civil Procedure.

489 S.E.2d 679, 327 S.C. 538 (Ct. App. 1997) (internal citations omitted). The handrail was discarded by a third-party landscaping service, not by Defendants. (Exhibit B, ¶ 13). As soon as it was discovered that the handrail was not in the location where it had been stored, David Teems of Alliance contacted the third-party landscaping service in an attempt to retrieve it. (Exhibit B, ¶ 14). There is no evidence of bad faith, willfulness, or gross indifference to Plaintiff. In fact, Defendants entered a Consent Order on January 11, 2022, to allow Plaintiff to inspect the footbridge, but no request for inspection was ever made in the eight months since the Order was entered. Therefore, the striking of Defendants' Answers and Affirmative Defenses would go beyond what is reasonably necessary to redress the wrong that was committed by a third-party individual over whom Defendants had no control over.

**C. Plaintiff Did Not Make a Prima Facie Showing of Relevance or Prejudice**

"To demonstrate that spoliation occurred, plaintiff bears the burden of proving the three elements by a preponderance of evidence." *Nucor Corp.*, 251 F.R.D. at 204. Specifically, "[t]he burden is on the aggrieved party to establish a reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the lost material would have produced evidence favorable to [the moving party's] cause." *Finch v. BASF Catalysts, LLC*, Case No. 1:16-CV-

1077, 2018 WL 2770140 (M.D.N.C. June 08, 2018) *quoting Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 180 (D. Md. 2008).

Here, Plaintiff has offered no cogent explanation on the relevance of the right-side secondary handrail, nor can he establish prejudice, let alone prejudice rising to the level sufficient to impose the draconian measures requested in his motion. First, Defendants do not deny that the secondary handrail on the right side of the footbridge detached. Second, Defendants have possession of the secondary handrail from the left side of the footbridge, which is similar to the secondary handrail that was attached to the right side of the walkway. (Exhibit B, ¶ 17). The secondary handrail from the left side of the footbridge is the same material and age as the secondary handrail from the right side of the footbridge and is available for inspection. *Id.* Third, the right-side secondary handrail has been inspected and photographed, and these photographs have been provided to Plaintiff. (Exhibit A and Exhibit B, ¶ 11). The handrails were available for inspection for at least a year after the accident and for at least eight months after this litigation was initiated, but no request was ever made by Plaintiff to inspect them. In fact, Plaintiff's counsel inspected and photographed the footbridge after the accident and never even requested to look at the secondary handrails. Therefore, Plaintiff has not been prejudiced by not being able to inspect the right-side secondary handrail, and there is no evidence that the discarded secondary handrail would have produced evidence favorable to Plaintiff's case. Therefore, Plaintiff has not satisfied his prima facie burden to show relevance or prejudice.

Moreover, the remedy requested by the Plaintiff, striking Defendants' Answers, is wholly disproportionate. As noted in *Nucor*, if warranted, "the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." *Id.* Frequently, parties alleging spoliation will seek the remedy of an adverse inference, as

opposed to striking an opponent's pleadings. For example, in *Pringle v. SLR, Inc. of Summerton*, the Court of Appeals ruled that the mere absence of a piece of evidence in question does not require the charge of an adverse inference. 382 S.E.2d 397, 675 S.E.2d 783 (Ct. App. 2009). Instead, an adverse inference charge is appropriate only upon a showing that "the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder." See *Pringle*, 382 S.E.2d at 397, 675 S.E.2d at 783 (citing and quoting Kevin Eberle, *Spoilation in South Carolina*, 19-SEP S.C. Law, Sept. 2007, 26, 32 (holding that any inference a jury could make from the absence of the evidence at issue – a chair – would not change the fact that there was no indication that the chair was dangerous or unfit for use)). "To draw an adverse inference from the absence, loss or destruction of evidence, it would have to appear that the evidence would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence." *Vodusek v. Baylinder Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). Here, Plaintiff cannot establish the requisite factors for *any* spoliation sanction, whether an adverse inference or the drastic striking of pleadings. As such, Plaintiff's motion should respectfully be denied.

### CONCLUSION

Defendants complied with the duty to preserve evidence by not altering the footbridge or railings and by storing the right-side secondary handrail in a fenced-in area for safekeeping. The right-side secondary handrail was discarded by a third-party landscaping company without Defendants' knowledge, and Defendants did not have a culpable state of mind. Furthermore, any evidence that the right-side secondary handrail could have provided was destroyed when it detached from the railing. Nevertheless, Alliance is in possession of the similar left-side secondary handrail, which is available for inspection if Plaintiff believes it may reveal any

favorable evidence. Moreover, the discarded secondary handrail was photographed and documented by an investigator after the accident, and those photographs have been provided to Plaintiff. Consequently, Plaintiff has not been prejudiced, and no sanction is warranted or appropriate.

Assuming arguendo that Plaintiff is entitled to any relief, which Defendants deny, the remedy is not to strike Defendants' Answers and Affirmative Defenses, but rather an instruction to the jury at the trial of this case, which allows the factfinder to determine what weight, if any, to place on the discarded handrail.

For the foregoing reasons, Defendants respectfully request that Plaintiff's Motion to Strike Defendants' Answer and Affirmative Defenses be denied.

Barnwell Whaley Patterson & Helms, LLC

s/D. Summers Clarke, II

M. Dawes Cooke, Jr. (S.C. Bar No. 1376)

D. Summers Clarke, II (S.C. Bar No. 74829)

P.O. Drawer H

Charleston, SC 29402

(843) 577-7700

mdc@barnwell-whaley.com

sclarke@barnwell-whaley.com

***Counsel for Defendants Pobuckra Properties, LLC  
and Alliance Commercial Property Management,  
Inc.***

December 12, 2022  
Charleston, South Carolina



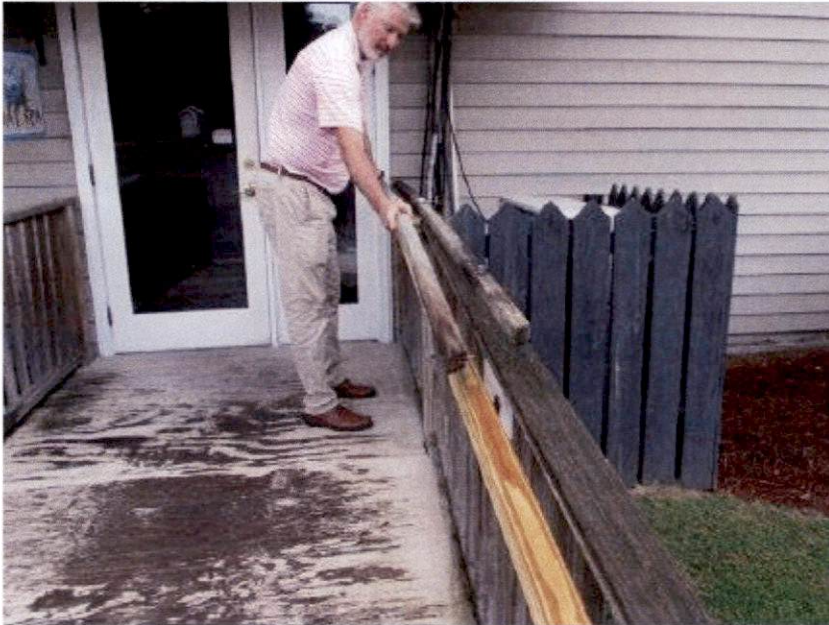




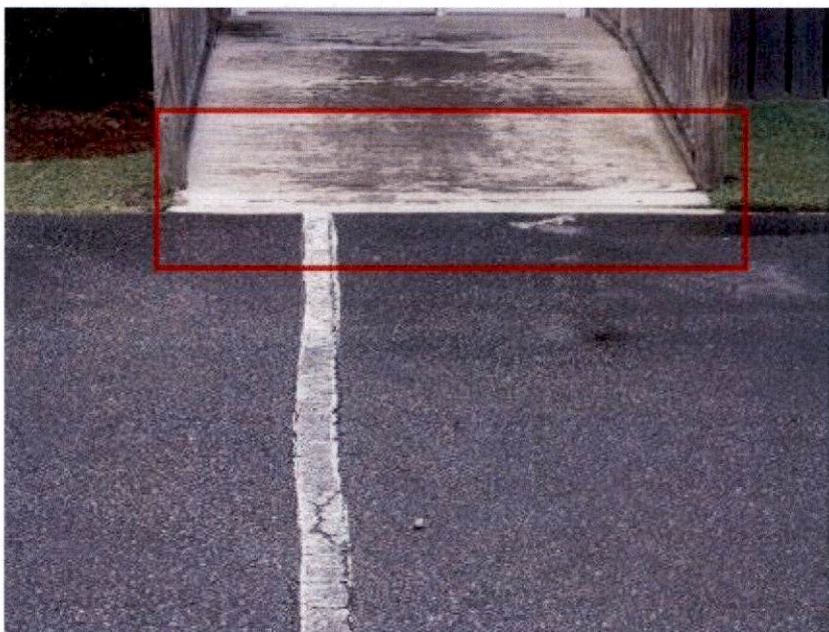


















STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Steven Michael Okun, as Personal  
Representative of the Estate of Jane Luanne  
Okun,

Plaintiff,

vs.

Pobuckra Properties, LLC and Alliance  
Commercial Property Management, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No. 2021-CP-22-00927

AFFIDAVIT OF DAVID R. TEEMS

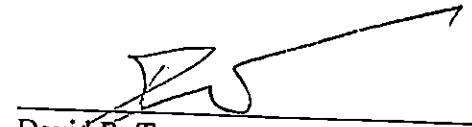
PERSONALLY APPEARED BEFORE ME, David R. Teems, Regional Property  
Manager for Alliance Commercial Property Management, being duly deposed and sworn, says:

1. I make this Affidavit based on my own personal knowledge unless otherwise specified.
2. I am competent to make this affidavit and am over the age of eighteen (18).
3. I am the Regional Property Manager for Alliance Commercial Property Management, Inc. ("Alliance").
4. Alliance is the property management company for PoBuckra Properties, LLC ("PoBuckra"), which owns the property located at 21 Professional Lane in Pawleys Island, South Carolina.
5. The Island Day Spa operates its business at 21 Professional Lane in Pawleys Island, South Carolina on the property it leases from PoBuckra.
6. On the date of the incident, the rear entrance to the Island Day Spa had a footbridge with secondary handrails attached to the railings on either side. The secondary handrail on the left side of the footbridge was one piece of wood, and the secondary

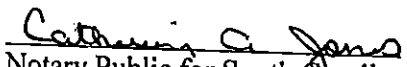
- handrail on the right side of the walkway was two pieces of wood. Both secondary handrails were attached to the railings of the footbridge by brackets and screws.
7. Plaintiff alleges that on or about July 27, 2021, Jane Luanne Okun was crossing a footbridge from the parking lot to the Island Day Spa, and when she reached for the secondary handrail on the right side to the footbridge, it detached from the railing and allegedly caused her to fall backwards.
  8. Plaintiff has brought claims against PoBuckra and Alliance (collectively referred to as the "Defendants").
  9. Upon being notified that a secondary handrail detached near the rear entrance to the Island Day Spa, I went to inspect the area where Ms. Okun fell. I removed the remaining screws attaching a portion of the secondary handrail on the right side of the footbridge and safely stored it in a fenced area next to the building.
  10. Thereafter, I contacted Brinson General Contractors, LLC ("Brinson"), which repaired and installed a new secondary handrail on the right side of the footbridge. Brinson removed the secondary handrail on the left side of the footbridge and placed it against the building. The railings have not been altered, and the anchor points for the secondary handrails are visible.
  11. On August 6, 2021, I met with Dennis Cubit of James C. Greene Company at the Island Day Spa to inspect the footbridge and handrails where the subject incident occurred, and Mr. Cubit took photographs of the old and new secondary handrails, the railings, and the footbridge. These photographs have been provided to the Plaintiff's counsel and accurately depict the condition of the footbridge, secondary handrail, and anchor points of the secondary handrails to the railing.

12. After this inspection, the secondary handrail from the right side of the footbridge was secured in a fenced area near the Island Day Spa. The secondary handrail from the left side of the footbridge was stored against the building near the footbridge.
13. Unbeknownst to me, several months ago, a third-party landscaping service inadvertently discarded the already inspected and documented right side secondary handrail from the fenced area without my or the Defendants' permission, authority, knowledge, or assent.
14. Immediately upon noticing that the secondary handrail to the right side of the footbridge was not where it had originally been stored, I contacted the landscaping company to retrieve it, but the landscaping company informed me that they no longer had possession of that handrail.
15. The removal of the previously inspected and documented right side secondary handrail from the fenced area was not requested by me or by the Defendants, was not conducted by me or at the behest of the Defendants and was done unintentionally by a third-party landscaping company.
16. After my deposition in September 2022, I moved the left side secondary handrail into my office for storage.
17. I have possession of the secondary handrail from the left side of the footbridge, which is similar to the secondary handrail to the right side of the footbridge and is the same age and material as the right-side secondary handrail that was removed without my knowledge by the third-party landscaping company. The left side secondary handrail and footbridge is available for inspection upon request.

FURTHER AFFIANT SAYETH NOT.

  
David R. Teems  
Regional Property Manager  
Alliance Commercial Property Management

SWORN TO before me this  
12 day of December, 2022

  
Notary Public for South Carolina  
My commission expires: 6/30/27



- 1) Pobuckra Properties, LLC will not take any further action to replace, repair or alter the footbridge and handrails located at 21 Professional Lane in Pawleys Island, South Carolina until further order of this Court; and
- 2) That Pobuckra Properties, LLC will allow Plaintiff, his counsel, and Plaintiff's experts to view, inspect, examine and/or to perform an agreed upon scope of testing of the footbridge and handrails at a mutually agreeable time when Defendant and/or its experts are able to attend such inspection and testing.

---

Steven H. John  
Chief Administrative Judge, 15<sup>th</sup> Judicial  
Circuit

January\_\_\_\_\_, 2022  
Conway, South Carolina

I consent:

s/Gene M. Connell, Jr.

Gene M. Connell, Jr.  
Kelaher Connell & Connor, PC  
P.O. Drawer 14547  
Surfside Beach, SC 29587-4547  
(843) 238-5648  
gconnell@classactlaw.net  
***Counsel for Plaintiff***

January 10, 2022  
Surfside Beach, South Carolina

We consent:

D. Summers Clarke, II

M. Dawes Cooke, Jr. (S.C. Bar No. 1376)  
D. Summers Clarke, II (S.C. Bar No. 74829)  
Barnwell Whaley Patterson & Helms, LLC  
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Charleston, SC 29402  
(843) 577-7700  
mdc@barnwell-whaley.com  
sclarke@barnwell-whaley.com  
***Counsel for Defendant Pobuckra Properties, LLC***

January 10, 2022  
Charleston, South Carolina



Georgetown Common Pleas

**Case Caption:** Steven Michael Okun , plaintiff, et al VS Pobuckra Properties Llc ,  
defendant, et al  
**Case Number:** 2021CP2200927  
**Type:** Order/Consent Order

So Ordered

s/ Steven H. John, Resident Circuit Judge, #129

Electronically signed on 2022-01-11 11:36:09 page 4 of 4

State of South Carolina                     )  
                                                           ) Court of General Sessions  
County of Georgetown                     ) 2017-CP-08-02238

---

Steven Michael Okun, as                     )  
Personal Representative of                     )  
the Estate of Jane Luanne                     ) Transcript of Record  
Okun                                             )  
                                                           )  
                                                           )  
                                                           ) vs.                                             )

Pobuckra Properties, LLC, et  
al.

January 6, 2023  
Georgetown, South Carolina

B E F O R E:

The Honorable William Seals, Judge.

A P P E A R A N C E S (All present by video or telephone):

Gene Connell, Esq  
Attorney for the Plaintiff

D. Summers Clarke, Esq  
Attorney for the Defendant

Ashley Bennett  
Transcriber

1 THE COURT: All right. Good morning, y'all.

2 MR. CONNELL: Good morning, Judge.

3 THE COURT: Hi.

4 MS. CLARKE: Good morning.

5 THE COURT: Ready whenever y'all are.

6 MR. CONNELL: Judge, this is my motion. This is Okun v.  
7 Pobuckra Properties. And it's a relatively simple motion, I  
8 believe. Ms. Okun was on her way to get her hair done at some  
9 shops in Pawleys Island, and she's attempting to walk across a  
10 wooden bridge to the hair shop. And the wooden bridge has two  
11 hand railings on each side. And as Ms. Okun walks across the  
12 bridge, she puts her hand on the handrail, the handrail comes  
13 off, she falls backwards, she suffers a subarachnoid fracture  
14 to the skull, taken to Grand Strand hospital, and dies about  
15 two weeks later.

16 So when I brought the case, I brought a lawsuit and a  
17 motion to -- and an order to rule to show cause, if you will,  
18 to require the defendants to keep the evidence, which is the  
19 handrail that was attached to the small bridge that goes  
20 across to the hair salon. The Court signed an order with  
21 consent indicating that that material would be kept.

22 So at the deposition of the defendants' agent about six  
23 weeks ago, he indicated that he had lost the handrail, they no  
24 longer had the handrail. And as Your Honor knows, on all  
25 these premises liability cases, one of the defenses is we

1 didn't have notice of this handrail problem.

2 And so my motion is simply to strike their -- either to  
3 strike their answer, or to strike those defenses that say that  
4 we didn't have any notice. And the reasoning is simple, the  
5 Court issued an order, the defendants knew about the order,  
6 the defendants lost the evidence that they were charged to  
7 keep, and there's a court order in place for that, and it was  
8 filed sometime last year.

9 So I ask Your Honor to either strike their defenses, or  
10 strike their answer, and that's based on the spoliation of  
11 evidence case law that you're probably aware of, and it's  
12 based on the -- it's the only -- I can't have them, now, say  
13 to me this is an issue of notice when I got an order that said  
14 they needed to keep the evidence, and they didn't keep the  
15 evidence. So I simply ask the Court to do that in this case.

16 THE COURT: Ms. Clarke?

17 MS. CLARKE: Thank you, Gene. And thank you, and I'm  
18 here on behalf of the defendants today, Pobuckra and Alliance.  
19 Alliance is the property management company, and Pobuckra owns  
20 the property where the incident occurred.

21 The order that was -- the consent order that Mr. Connell  
22 is referring to is one that was entered on January 11th, 2022.  
23 At the time, Alliance was not a defendant in the case. This  
24 was an agreement -- a consent order between plaintiff and  
25 Pobuckra.

1       And as far as the handrail goes, the handrail was  
2 disposed of by a third party landscaping company that was  
3 doing some cleanup from -- during the spring, of the leaves.  
4 The handrail had been stored in a fenced in enclosure by the  
5 property manager, and unbeknownst to him, they went and got  
6 this handrail from an enclosed area where he had stored it,  
7 and got rid of it. And immediately when he found out that  
8 they'd thrown it out, he called, tried to find it, tried to do  
9 everything he could.

10       But more to the case law, if you look at the new court  
11 case, Judge Norton's (phonetic) ruling in that, he sets forth  
12 the three prerequisites that are required in order for  
13 spoliation of evidence to be met. First, the party alleged to  
14 have spoliated the evidence had to have control over the  
15 evidence, and a duty to preserve the evidence at the time that  
16 it was destroyed or altered. Second, the destruction or loss  
17 was accompanied by a culpable state of mind. Third, that the  
18 evidence was destroyed or altered as relevant to the claims or  
19 defenses of the party that sought it, and the loss of such  
20 evidence caused prejudice. All of these elements must be  
21 proven by a preponderance of the evidence by plaintiff.

22       As far as prerequisite one, we assert that defendants  
23 complied with the duty to preserve the evidence, by they  
24 didn't replace, repair, alter, or do anything after this order  
25 was entered. They stored the handrail in a fenced-in

1 enclosure thinking it would be protected, and no one would  
2 take it. Defendants are not responsible for the independent  
3 acts of the third party landscaping company who, without  
4 authorization, direction, or knowledge of the defendants,  
5 discarded this handrail.

6       Also, any evidence that the right side, secondary  
7 handrail, that is in discussion right now could've provided,  
8 was actually destroyed when plaintiff pulled that handrail --  
9 or when it came detached in the first place. So we assert  
10 that that handrail wouldn't have shown anything anyway. We  
11 don't dispute that the handrail detached. The evidence was  
12 destroyed right then.

13       Regardless, even if they think this handrail would have  
14 shown something, we have the handrail from the left side.  
15 That is -- we still have that, that's available for  
16 inspection, it's the same material, the same age. Any  
17 evidence that plaintiff believes they could glean from the  
18 right side handrail that we don't have, we still have the left  
19 side handrail.

20       So one, we don't think -- we think the evidence was  
21 destroyed during the incident in the first place, but if it  
22 wasn't, then he's welcome to look at the handrail from the  
23 left side. Same material, same age, everything.

24       Back to the prerequisites, the second one about a  
25 culpable state of mind. Defendants did not intentionally

1 discard the handrail, therefore there can be no culpable state  
2 of mind. And striking the answer and the affirmative defenses  
3 would be too harsh and not reasonable given the facts of this  
4 case.

5 It's clear that defendants did not act in bad faith,  
6 willfully, or with gross indifference to the rights of  
7 plaintiff. And plaintiff cannot demonstrate any intent of the  
8 defendants to destroy the evidence. It would be such a severe  
9 remedy to order the striking of the answer, or affirmative  
10 defenses. And this is not the proper sanction, the gold  
11 standard, for looking at -- for analyzing spoliation of  
12 evidence in federal or state cases, is Nucor (phonetic). And  
13 when you look at that, that's not even something that's  
14 addressed. And in order to even get to what Nucor says, if  
15 you can prove the three elements by a preponderance of  
16 evidence, the correct remedy would be an adverse inference.  
17 But in this case, plaintiff has not even met the burden to get  
18 an adverse inference.

19 Plaintiff has not made a prima facie showing of relevance  
20 or prejudice in this. The burden is on plaintiff to establish  
21 a reasonable possibility based on the evidence that access to  
22 the handrail would've produced evidence favorable to its case.  
23 We don't deny, once again, that the handrail detached. We  
24 have the handrail from the left side available for inspection.  
25 We also have photographs, documentation, of the handrail that

1 has -- of the left side and the -- or of the right side, that  
2 is at issue, that has been provided to plaintiff's counsel.  
3 And photographs show the condition of the bridge, of the  
4 handrail, and the witnesses can be cross-examined about that  
5 condition. So once again, we don't believe that plaintiff was  
6 prejudiced by the loss of this handrail.

7 So overall, we don't believe that plaintiff has  
8 established the burden, or the requisite factors in order  
9 to -- for any spoliation sanction, or for an adverse  
10 inference, or the drastic measure of the striking of the  
11 pleadings and affirmative defenses. And therefore, we  
12 respectfully request that this motion be denied.

13 THE COURT: Any response to that?

14 MR. CONNELL: Yes, Your Honor. So that goes to the old  
15 phrase of having your cake and eating it too. Because in this  
16 situation, they lost the handrail, there was a court order in  
17 effect that they had to keep it, and they want to continue to  
18 argue that there was no notice -- they had no notice that this  
19 thing was going to happen.

20 And Judge Norton's four factor test is not what South  
21 Carolina goes by. South Carolina has it's (indiscernible),  
22 and that test is found in Kershaw County v. US Gypsum, and it  
23 does not list those four factors. But even if it did, even if  
24 those factors were something that the Court should consider,  
25 the simple fact is, there was a court order in place from the

1 day this lawsuit started, that they had to keep this handrail  
2 in their possession. And they lost it, or did whatever with  
3 it, it was their responsibility to hold on to it, and they  
4 can't now use that as a sword against the plaintiff in a case,  
5 which we knew up front, that they should've kept that.

6 So as to the argument about the management company, I  
7 agree they didn't have -- they weren't party to the order, so  
8 they shouldn't be bound by any order. But Pobuckra Properties  
9 surely knew because the day the lawsuit was filed, this motion  
10 was filed to keep this evidence, and they didn't do that. And  
11 there ought to be a penalty when you don't keep the evidence.  
12 There's actually a penalty if you lose the evidence without a  
13 court order, and the Kershaw County Gypsum case says that. So  
14 this is even a stronger case because there was a court order  
15 in effect, and they should've kept it, and they can't now use  
16 that against me and say, we didn't have any notice of this,  
17 when the crucial evidence that they thought -- that we all  
18 thought was going to decide a case is something that they  
19 disposed of.

20 MS. CLARKE: And in response to that, if this handrail  
21 was so important, which we don't think it was because we think  
22 it was -- the evidence was destroyed when it detached, once  
23 again, we have the left side handrail, which same material,  
24 same age. And then second of all, plaintiff waited ten months  
25 until after the complaint was filed to even inquire about an

1 inspection. This case was filed November 4th, 2021. And  
2 that -- the handrail was there, it was available, it was just  
3 in the springtime that it was discarded, and as soon as we  
4 found out, David Teems of Alliance tried to locate that  
5 handrail. But the handrail was available. So if it was that  
6 important, if it was that -- you would think that there  
7 would've been an inquiry before now.

8 MR. CONNELL: Well, why would there be an inquiry when I  
9 had a court order? You're required to keep it. I don't see  
10 the distinction there, anyway.

11 MS. CLARKE: We -- yes. We -- defendant's position is  
12 that they did what they thought was right to store the  
13 handrails, and unbeknownst to them, a third party landscaper  
14 discarded of it, and it was not with any culpable state of  
15 mind or intention.

16 MR. CONNELL: A third party landscaper working for you,  
17 right? Right?

18 MS. CLARKE: They did not -- the third party landscaper  
19 did not do it at the direction of either of the defendants.

20 MR. CONNELL: But they were your contractors, right?

21 THE COURT: I'll tell you what --

22 MS. CLARKE: They were landscapers for the property, but  
23 they did spring cleaning and they threw it away. It was not  
24 anything nefarious, no one was trying to hide evidence, we  
25 don't even -- and if you'd like to inspect the left side

1 handrail, it is available. The posts are still there,  
2 everything's documented by photograph. I don't believe that  
3 there's anything else that you need other than that, if that  
4 helps you at all.

5 THE COURT: I'll take it under advisement, and let you  
6 know something.

7 MR. CONNELL: Thank you, Your Honor.

8 THE COURT: Thank you all.

9 MS. CLARKE: Thank you, Your Honor. Thanks Gene.

10 MR. CONNELL: Have a good day.

11 MS. CLARKE: Have a good day.

12 MR. CONNELL: You too, Summer.

13 THE COURT: You too.

14 MS. CLARKE: Bye-bye.

15 (End of Transcript of Record)

16

17

18

19

20

21

22

23

24

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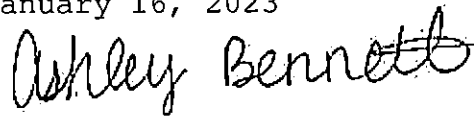
CERTIFICATE OF TRANSCRIBER

State of South Carolina           )  
                                                  )  
County of Georgetown           )

I, ASHLEY BENNETT, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Georgetown County, South Carolina, on the 6th day of January, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 16, 2023



---

Ashley Bennett  
Transcriber

**RECEIVED**

**Jan 13 2023**

**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY

Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2021-CP-22-00927

Pobuckra Properties, LLC and  
Alliance Commercial Property Management, Inc. .... Appellants,

v.

Steven Michael Okun, as Personal Representative  
of the Estate of Jane Luanne Okun ..... Respondent.

NOTICE OF APPEAL

Appellants Pobuckra Properties, LLC and Alliance Commercial Property Management, Inc. hereby appeal the Form 4 Order of the Honorable William H. Seals, Jr. signed and filed on January 6, 2023, and email of same date from Margaret Scalise, Law Clerk to the Honorable William H. Seals, Jr., that supplemented the Form 4 Order. Appellants received written notice of entry of this order on January 6, 2023. This Notice of Appeal is timely filed pursuant to Rule 203(c), SCACR.

Barnwell Whaley Patterson & Helms, LLC

s/M. Dawes Cooke, Jr.

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January 13, 2023  
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Personal Representative of the Estate of Jane Luanne Okun***

IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY

Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2021-CP-22-00927

Steven Michael Okun, as Personal Representative  
of the Estate of Jane Luanne Okun.....Respondent,  
v.

Pobuckra Properties, LLC and Alliance Commercial  
Property Management, Inc. .... Appellants.

AMENDED NOTICE OF APPEAL

Appellants Pobuckra Properties, LLC and Alliance Commercial Property Management, Inc. hereby appeal the Form 4 Order of the Honorable William H. Seals, Jr. signed and filed on January 6, 2023, and email of same date from Margaret Scalise, Law Clerk to the Honorable William H. Seals, Jr., that supplemented the Form 4 Order. Appellants received written notice of entry of this order on January 6, 2023. This Notice of Appeal is timely filed pursuant to Rule 203(c), SCACR.

Barnwell Whaley Patterson & Helms, LLC

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January 18, 2023  
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**Certification of Counsel**

The undersigned hereby certified that the record on appeal contains all materials proposed to be included by any of the parties and not any other material.

July 17, 2023

/s/ Colleen P. Sorensen

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