

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

Marvin H. Dukes, III, Master in Equity and Special Circuit Judge NOV - 4 2013

S.C. Supreme Court

Appellate Case No. 2011-199428
Unpublished Opinion No. 2011-UP-199
Filed May 3, 2011

Amy Davidson, (Petitioner)

vs.

City of Beaufort, Branch Banking &
Trust of South Carolina, Collins
Engineering, Inc., Brantley Construction
Company, Inc., and Tidal Wave 23,
LLC, (Respondents).

AND

Phillip Davidson, (Petitioner)

vs.

City of Beaufort, Branch Banking &
Trust of South Carolina, Collins
Engineering, Inc., Brantley Construction
Company, Inc., and Tidal Wave 23,
LLC, (Respondents).

**RESPONDENT, BRANTLEY CONSTRUCTION COMPANY, INC.'S, BRIEF AND
ANSWER TO PETITIONERS' COMPLAINT**

ROBERTSON HOLLINGSWORTH & FLYNN
R. Patrick Flynn, Esquire
Robert J. Cardillo, Esquire
177 Meeting St., Suite 300
Charleston, SC 29401
(843) 723-6470

Counsel for Brantley Construction Company, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF QUESTIONS PRESENTED vi

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 6

ARGUMENTS 7

I. The Supreme Court Has No Jurisdiction to Hear the Petition Because Petitioner Failed to Timely File a Petition for Rehearing with the Court of Appeals, the Court of Appeals Issued a Remittitur, and the Court of Appeals Improperly Recalled the Remittitur 7

II. The South Carolina Court of Appeals Properly Concluded that the Trial Court Correctly Granted Brantley's Motion for Summary Judgment Because Petitioners Failed to Present Any Affidavits, Documents, Depositions, or Other Evidence to Show the Existence of Any Issue of Fact in Response to Brantley's Motion for Summary Judgment 10

III. The South Carolina Court of Appeals Properly Concluded that the Trial Court Correctly Granted Brantley's Summary Judgment Motions When it was Petitioners Who Were Dilatory in Seeking Discovery. 11

A. The Respondents Conducted Discovery in Good Faith, in a Cooperative Spirit, and in Full Compliance with the South Carolina Rules of Civil Procedure. 12

B. Judge Mullen's August 10, 2007 Order Created No Unfairness to Petitioners, as it Clearly Allowed Discovery to Proceed, and Petitioners Failed to Timely Engage in Any Discovery. 15

1. The Petitioners' Statements and Oral Arguments Before the Trial Court on January 31, 2008 Demonstrate Their Understanding and Agreement to Judge Mullen's August 10, 2007 Order. 15

2. The Petitioners' Argument Concerning Judge Mullen's August 10, 2007 Order Conflicts with the Clear and Unambiguous Language of That Order, Which Allowed Discovery to Proceed in the Case 16

C. The Criminal Investigation Files and the Depositions of the Criminal Defendants and Investigating Officers Are Not Relevant to the Issues and Grounds Upon Which Summary Judgment Was Granted 18

IV.	The South Carolina Court of Appeals Properly Concluded That the Trial Court Correctly Granted Brantley’s Summary Judgment Motions Because No Amount of Additional Discovery or Further Factual Inquiry Would Have Salvaged the Petitioners' Claims Against Brantley.	19
V.	The South Carolina Court of Appeals Properly Concluded That the Trial Court Correctly Granted Brantley's Motion for Summary Judgment Because, as a Matter of Law, Brantley Owed No Duty of Care to Petitioners.	21
	A. Brantley Did Not Owe A Duty of Care to Petitioners Under a Premises Liability Theory Because the Assault Took Place in the BB&T Parking Lot Which Brantley Did Not Occupy, Repair, Maintain, or Control.	21
	B. Even Assuming Arguendo Brantley Did Occupy, Repair, Maintain, or Control the BB&T Parking Lot (Which it Did Not) No Duty Is Owed to the Petitioners Because Petitioners’ Admissions on Record Establish Their Status as Trespassers under a Premises Liability Theory.	22
	C. The South Carolina Court of Appeals Properly Concluded that the Trial Court Correctly Granted Brantley’s Motion for Summary Judgment Because Brantley Owed No Duty to Provide Security in or Around the BB&T Parking Lot to Protect the Petitioners from the Criminal Acts of Third Parties.	25
	D. The South Carolina Court of Appeals Properly Concluded That the Trial Court Correctly Granted Brantley's Motion for Summary Judgment Because There is No Legal Duty for the Occupier of One Parcel of Property to Light a Neighboring Parcel of Property.	28
VI.	Petitioners Waived, and Otherwise Failed to Preserve for Appellate Review, Their Objections to Judge Mullen’s August 10, 2008 Order when Petitioners Raised Their Objections for the First Time During These Appellate Proceedings	30
	A. The Petitioners’ Arguments Concerning Judge Mullen's August 10, 2007 Order Are Not Timely and this Issue Is Not Preserved for Appellate Review	31
	B. The Petitioners' New Argument Concerning Their New Interpretation of the Testimony of Gary Brantley is Not Timely and this Issue is Not Preserved for Appellate Review.	32
	CONCLUSION	33
	CERTIFICATE OF COUNSEL	34
	CERTIFICATE OF SERVICE	36

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Bankers Trust of SC v. Benson</u> , 267 S.C. 152, 226 S.E.2d 703 (S.C. 1976)	11, 12
<u>Broome v. Hoover</u> , 324 S.C. 531, 536, 479 S.E.2d 62, 65 (Ct. App. 1996)	23
<u>Carpenter v. Lewis</u> , 65 S.C. 400, 43 S.E. 881 (1903)	9
<u>Cogdill v. Watson</u> , 289 S.C. 531, 347 S.E.2d 126 (Ct.App.1986)	32
<u>Cooke v. Allstate Mgt Corp.</u> , 741 F. Supp. 1205, 1213 (D.S.C. 1990)	25
<u>Cramer v. Balcor Property Management, Inc.</u> , 312 S.C. 440, 441 S.E.2d 317 (1994)	25, 26
<u>Crolley v. Hutchins</u> , 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1998)	21
<u>Daniel v. Days Inn of America, Inc.</u> , 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987)	26
<u>Elam v. South Carolina Dept. of Transp.</u> , 361 S.C. 9, 602 S.E.2d 772 (2004)	30
<u>Gaffney v. Peeler</u> , 21 S.C. 55 (1884)	30
<u>Goode v. St. Stephens United Methodist Church</u> , 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997)	22, 25
<u>Jackson v. Swordfish Investments, LLC</u> , 365 S.C. 608, 620 S.E.2d 54 (2005)	26
<u>Long v. Dunlap</u> , 87 S.C. 8, 68 S.E. 801 (1910)	30
<u>Mahle v. Wilson</u> , 283 S.C. 486, 323 S.E.2d 65 (Ct.App. 1984)	28, 29
<u>Middleborough Horizontal Prop. Regime Council v. Montedison</u> , 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995)	11
<u>Miller v. Blumenthal Mills</u> , 365 S.C. 204, 616 S.E.2d 722 (Ct. App. 2005)	11
<u>Montgomery v. CSX, Transp., Inc.</u> , 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004)	11
<u>Nettles v. Your Ice Co., et al.</u> , 191 S.C. 429, 4 S.E.2d 797 (1939)	24
<u>Robin Constr. Co. v. United States</u> , 345 F.2d 610 (3d Cir. 1965)	12

<u>Sides v. Greenville Hosp. System</u> , 362 S.C. 250, 607 S.E.2d 362 (Ct. App. 2004)	23
<u>Singleton v. Sherer</u> , 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008)	23
<u>Southern Ramble Sales, Inc. v. American Motors Corp.</u> , 375 F.2d 932, 937 (5th Cir. 1967) ...	12
<u>State v. Hoffman</u> , 312 S.C. 386, 440 S.E.2d 869 (1994)	31, 32
<u>State v. Kells</u> , 39 S.C. 553, 17 S.E. 802 (1893)	9
<u>State v. Vanderbilt</u> , 287 S.C. 597, 340 S.E.2d 543 (1986)	32
<u>Thomas v. Lynch</u> , 87 S.C. 44, 68 S.E. 817 (S.C. 1910)	10
<u>Varnadore v. Nationwide Mut. Ins. Co.</u> , 289 S.C. 155, 345 S.E.2d 711 (1986)	32
<u>West v. Gladney</u> , 341 S.C. 127, 533 S.E.2d 334 (Ct. App. 2000)	11
<u>White v. Wilbanks</u> , 298 S.C. 225, 379 S.E.2d 298 (Ct. App.1989)	31, 32
<u>Wilder Corp. v. Wilke</u> , 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)	30
<u>Wise v. South Carolina Dept. of Corrections</u> , 372 S.C. 173, 642 S.E.2d 551 (S.C. 2007) ...	8, 10

STATUTES AND OTHER AUTHORITIES

226 S.E.2d at 704	12
F.P. Hubbard and R.L. Felix, <i>The S.C. Law of Torts</i> 112-13 (2d ed. 1997)	22
Restatement (Second) of Torts § 330	23
Restatement (Second) of Torts § 330, 332	24
Restatement (Second) of Torts § 332, 343A	23
Rule 210(c), SCACR	30
SCRCP Rule 34	14
SCACR 221	5
SCAC Rule 221 and 240	8

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. Does the Supreme Court have jurisdiction to hear the Petitioners' Complaint even though the Petitioners failed to timely file a petition for rehearing with the Court of Appeals; the Court of Appeals issued a remittitur; and the Court of Appeals improperly recalled the remittitur?
- II. Did the South Carolina Court of Appeals properly conclude that the trial court correctly granted summary judgment in favor of Brantley when the Petitioners failed to put forth any affidavits, documents, depositions, or other evidence to show the existence of any issue of fact in response to Brantley's Motion for Summary Judgment?
- III. Did the South Carolina Court of Appeals properly conclude that the trial court correctly granted summary judgment in favor of Brantley when it was the Petitioners who were dilatory in seeking discovery?
- IV. Did the South Carolina Court of Appeals properly conclude that the trial court correctly granted summary judgment in favor of Brantley when the Petitioners made no showing that further discovery would establish the existence of any genuine issue of material fact?
- V. Did the South Carolina Court of Appeals properly conclude that the trial court correctly granted summary judgment in favor of Brantley when the Petitioners' own admissions fail to support the claim that Brantley owed any duty of care to Petitioners under a premises liability or any other theory?
- VI. Did the Petitioners waive, and otherwise fail to preserve for appellate review, their objections to Judge Mullen's August 10, 2007 Order, when Petitioners raised their objections for the first time during these appellate proceedings?
- VII. Did the Petitioners waive, and otherwise fail to preserve for appellate review, their claim that Gary Brantley's deposition testimony presents a scintilla of evidence that Brantley was responsible for shutting off power affecting lights in the BB&T Parking Lot, when Petitioners stated this claim for the first time during these appellate proceedings?

STATEMENT OF THE CASE

On October 23, 2006 the Petitioners, Amy and Phillip Davidson (the "Petitioners"), each filed the underlying civil lawsuits against the Respondents (ROA pp. 65-68, and pp. 130-134) alleging negligence claims in connection with the incident involving an abduction and assault of the Petitioners by third-party criminal assailants on May 26, 2006. (ROA pp. 36-44; 90-108; 113-119). The negligence claims against Brantley Construction Company, Inc. ("Brantley") alleged that Brantley had a duty to "use due care to maintain the area in their possession and control in a reasonably safe condition, and to properly light the subject neighboring Parking Lot to its work area, especially at night during construction for the protection of individuals traversing by the construction area." (ROA p. 40, ¶21, and p. 104, ¶21). The Petitioners further allege that Brantley breached this duty by failing to properly provide security to the BB&T Parking Lot, which Petitioners allege was a proximate cause of the their damages.

Brantley answered the Complaints on November 21, 2006, and thereafter, discovery immediately commenced. After discovery had proceeded for upwards of five months Brantley filed its Motion for Summary Judgment on April 23, 2007. (ROA pp. 338-340). Attached to its Motion were supporting affidavits from Brantley representatives, Gary Brantley and Louis White, as well as Brantley's contract with the City of Beaufort and a project site plan in connection with Brantley's renovation of the Park. In addition, Brantley submitted its Memorandum in Support of its Motion for Summary Judgment on May 7, 2007. (ROA pp. 326-337). On May 8, 2007, the Honorable Carmen T. Mullen heard lengthy oral arguments on Brantley's Motion for Summary Judgment and decided to take Brantley's motion under advisement (ROA p. 436-480) and afford the parties the opportunity to conduct further discovery. (ROA p. 478). On May 24, 2007, the trial court issued an

Order allowing the parties to conduct discovery. (ROA pp. 34-35). On August 10, 2007 (ten months after the filing of the Complaint and three months after its May 24, 2007 Order explicitly allowing discovery), the trial court entered an Order protecting the cases from trial until the resolution of the underlying criminal matter against the alleged criminal assailants (ROA pp. 31-33). However, although the case was protected from trial, the parties were to conduct discovery and take depositions, and the trial court reserved the right to consider any dispositive or discovery motions that might arise between the parties.

After the issuance of the May 24, 2007 Order, Judge Mullen transferred the pending Motions to Master-in-Equity and Special Circuit Judge Marvin H. Dukes, III. Judge Dukes held a hearing on January 31, 2008, during which the Petitioners and the Respondents made additional oral argument. After the hearing, Judge Dukes advised the parties that he would grant summary judgment to Respondents and requested that Respondents prepare a proposed order. However, on March 7, 2008, Judge Dukes issued an Order denying Respondents' summary judgment motions on the sole basis that the previously filed August 10, 2007 Order divested the court of jurisdiction to issue such rulings. (ROA pp. 28-30). On March 17, 2008, Respondents jointly filed a Notice of Motion and Motion for Reconsideration before Judge Dukes, in conjunction with Respondents' Notice of Motion and Motion to Alter, Amend and/or Clarify Previous Order of Stay. (ROA pp. 175-182). Respondents' joint motions were granted and, on March 26, 2008, Judge Mullen issued an "Order Clarifying Order of Stay filed August 10, 2007", reaffirming that the court retained its jurisdiction to entertain any discovery and/or dispositive motions during the pendency of the stay (ROA pp. 26-27). Judge Mullen's March 26, 2008 Order specifically mandated as follows:

"Accordingly, if any discovery and/or dispositive motions were filed with the Court, then this Court retained its jurisdiction to entertain such motions during the pendency of the Stay. Defendants . . . Brantley Construction Company, Inc. filed dispositive motions based, among other things, on the admissions of the Plaintiffs, and this Court referred these motions to be decided by the Master-in-Equity. **No party objected to the hearing schedule for these motions on January 31, 2008.**

Accordingly, the Court hereby clarifies that its Order of Stay dated August 10, 2007 did not deprive the Court of its jurisdiction to hear, or refer to the Master in Equity for hearing, any discovery or dispositive motions filed by any party after August 10, 2007. The Court hereby confirms that the hearing conducted by Judge Dukes on January 31, 2008 was properly scheduled and heard and, accordingly, Judge Dukes is authorized to rule on the aforementioned dispositive motions of . . . Brantley Construction Company, Inc. as he deems just and proper. (Emphasis Added). (ROA pp. 26-27). (Emphasis added).

After receiving Judge Mullen's clarifying order, and after already having considered Brantley's Motion, Memoranda in Support, and conducting the January 31, 2008 hearing, Judge Dukes issued an order on April 8, 2008 granting Brantley's Motion. (ROA pp. 03-25). Petitioners moved for reconsideration on April 17, 2008 (ROA pp. 167-174). The Respondents filed their Joint Memorandum Opposing the Motion for Reconsideration on June 19, 2008. (ROA pp. 156-166). Judge Dukes denied Petitioners' motion on August 27, 2008 issuing an order dated September 2, 2008. (ROA pp. 01-03).

Thereafter, Petitioners appealed to the Court of Appeals. After receiving and reviewing briefs and the Record on Appeal, the Court of Appeals affirmed the grant of summary judgment to the Respondents in a May 3, 2011 Order (Unpublished Opinion No. 2011-UP-199). On that same day, the opinion was sent to all counsel of record, as evidenced in a letter from Renee Johnson, Administrative Specialist, to Petitioners' counsel dated May 3, 2011. (Supplemental Appendix, p.1).

Pursuant to SCACR 221, Petitioners' Petition for Rehearing must have been **actually received** by the Appellate Court no later than May 18, 2011 in order for the Court of Appeals to retain jurisdiction to consider such Petition. On May 19, 2011, having not received a Petition for Rehearing, the Court issued its Remittitur to the lower court. (Supplemental Appendix, p. 19). On May 20, 2011, apparently having received Petitioners' late petition, the Clerk issued a letter returning the original Petitioners' Motion/Petition for Rehearing and filing fee to the Petitioners' counsel advising that the Petitioners' Motion/Petition for Rehearing was filed out of time. (Supplemental Appendix, p. 20).

On May 25, 2011, Petitioners filed a Motion to Recall Remittitur and Accept Motion for Rehearing for Filing. (Supplemental Appendix, pp. 21-31). On June 16, 2011, the Court of Appeals recalled the remittitur and advised Petitioners that their Petition for Rehearing was due on or before July 1, 2011. (Supplemental Appendix, p. 32).

On June 28, 2011, Respondents filed their Joint Motion/Petition for Reconsideration and Motion to Dismiss for Lack of Jurisdiction. (Supplemental Appendix, p. 33-43). While this motion was still pending, Petitioners filed their Motion for Rehearing on or after July 7, 2011. (Supplemental Appendix, p. 44-49). On July 19, 2011 the Respondents filed their Joint Opposition to Appellants' Motion for Rehearing. (Supplemental Appendix, pp. 50-63). On August 24, 2011 the Court of Appeals issued an Order denying the Respondents' June 28, 2011 Motion, but also denying the Petitioners' Petition for Rehearing on August 24, 2011 stating, "the court is unable to discovery any material fact or principle of law that has been overlooked or disregarded and hence, there is no basis for granting a rehearing." (Supplemental Appendix, pp. 64-67).

On September 15, 2011 the Petitioners petitioned the South Carolina Supreme Court to issue a Writ of Certiorari to review the decision of the Court of Appeals. On September 6, 2013 South Carolina Supreme Court granted the Petitioners' petition.

STATEMENT OF FACTS

The Petitioners brought the underlying lawsuits against Brantley and others, including the City of Beaufort ("Beaufort"), Branch Banking and Trust of South Carolina ("BB&T"), Collins Engineers ("Collins"), and Tidal Wave 23, LLC ("Tidal Wave") (Collins, Tidal Wave, and Brantley are collectively referred to as "Respondents" herein) seeking money damages in connection with a criminal incident committed by two non-party individuals within the City of Beaufort on May 26, 2006. The lower court granted Brantley's Motion for Summary Judgment, which gave rise to this appeal.

According to the Petitioners' Complaints, on May 25, 2006, the Petitioners parked their vehicle in the BB&T Parking Lot at 706 Bay Street behind the BB&T bank building ("BB&T Parking Lot")¹ near the waterfront area in downtown Beaufort, South Carolina and went to a local establishment called the Saltus Riverfront Bar and Grill (hereinafter, "Saltus") located at 820 Bay Street in Beaufort, South Carolina for the evening. (ROA p. 42, ¶32, and p. 105, ¶32). When the Petitioners left Saltus and returned to their car at approximately 1:00 a.m., two men attacked, car jacked, abducted, and robbed the Petitioners, and also raped the Amy Davidson. (ROA p. 42, ¶33-34, and p. 105, ¶33-34). The perpetrators of these crimes were later identified as Lorenzo Hicks and

¹ Respondent Tidal Wave was the owner/commercial landlord of the subject BB&T property, and Tidal Wave leased that property to Respondent, BB&T - the tenant of that property, for the sole operation of a bank building, a parking lot, and a 24-hour automated Teller Machine.

Alfonzo Jerome Heyward, who were criminally charged in relation to the attack and, upon information and belief, are currently incarcerated.

The Henry C. James Waterfront Park is located between the Beaufort River and Bay Street in downtown Beaufort, and is adjacent to the BB&T Parking Lot in which the Petitioners were abducted, and behind Saltus and other local businesses along Bay Street. There was a walkway which provided a direct path from Saltus to the BB&T Parking Lot. In 2004, Beaufort undertook a renovation project at the Henry C. Chambers Waterfront Park (the “Project”). On July 19, 2004, Beaufort entered into a Contract requiring Collins to provide specific engineering services to the Project. (ROA pp. 210-243). In July of 2005, Beaufort entered into an Owner and Contractor Agreement (“Contractor Agreement”) with Brantley in which Brantley agreed to perform specific construction tasks for the Project. (ROA pp. 244-246, pp. 344-357; ROA p. 39, ¶5, and p. 101, ¶5). Brantley began work on the Project on July 25, 2005, and that work was completed in late 2006.² Brantley was named as a Defendant in the lawsuits by virtue of the fact that it was serving as a contractor for the City of Beaufort during the renovation of the Project **which was adjacent to, and not part of the subject BB&T Parking Lot.** (ROA p. 39, ¶5, and p. 101, ¶5) (Emphasis added).

ARGUMENTS

I. The Supreme Court Has No Jurisdiction to Hear the Petition Because Petitioners Failed to Timely File a Petition for Rehearing with the Court of Appeals, the Court of Appeals Issued a Remittitur, and the Court of Appeals Improperly Recalled the Remittitur.

In South Carolina, the Appellate Court Rules and accompanying South Carolina law are clear – a petition for rehearing must actually be received by the Appellate Court no later than

² See Brantley’s Contract with Beaufort filed as Exhibit C to Brantley’s Motion for Summary Judgment. (ROA pp. 677-698).

fifteen (15) days after the filing of the Opinion. SCAC Rule 221 and 240 set forth the following in pertinent part:

Rule 221. REHEARING AND REMITTITUR.

(a) **Rehearing.** Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court...

(b) **Remittitur.** The Remittitur shall contain a copy of the judgment of the appellate court, shall be sealed with the seal and signed by the clerk of the court, and unless otherwise ordered by the court shall not be sent to the lower court or administrative tribunal until fifteen (15) days have elapsed (the day of filing being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal. If a petition for rehearing is received before the Remittitur is sent, the Remittitur shall not be sent pending disposition of the petition by the court....

Rule 240. MOTIONS AND PETITIONS GENERALLY.

(g) Failure to Comply. Failure of the moving party to perform any act required by this Rule may be deemed an abandonment of the motion or petition.

This Court has held that, when the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter; the only exception to the rule is when the remittitur is sent down by mistake, error or inadvertence **of the appellate court.** Wise v. South Carolina Dept. of Corrections, 372 S.C. 173, 642 S.E.2d 551 (S.C. 2007) (emphasis added). In Wise, the Supreme Court held that the Court lacked jurisdiction to recall a remittitur because, despite the fact that the Appellant mailed and the Court of Appeals actually received the petition to reinstate from the Appellant within 15 days of the issuance of the Order, the Appellant failed to provide the required Proof of Service. The Supreme Court held that:

The remittitur in this case was not sent down by mistake, error or inadvertence of the Court of Appeals. Instead, it was correctly sent after 15 days had elapsed from the date of the Order dismissing the appeal without the proper filing of a Petition for

Reinstatement. See Rule 224, SCACR (Certificate of Service shall be filed with all motions and petitions). Accordingly, this Court does not have jurisdiction to act in this matter. The documents filed by Appellant are hereby dismissed." (Emphasis added).

In so holding, this Court relied upon existing precedent, including Carpenter v. Lewis, 65 S.C. 400, 43 S.E. 881 (1903) ("After the Remittitur, however, is sent down, **the case passes beyond the reach of the Court and its jurisdiction is lost**, and no motion can be heard by this Court on the matter thereafter") (emphasis added); and State v. Kells, 39 S.C. 553, 17 S.E. 802 (1893) ("In order to justify this Court in exercising the unusual power of recalling the remittitur after it has been sent down, **a very strong showing would be required** that the remittitur was sent down through some mistake or inadvertence on the part of this Court or its officer, and there is no pretense of any such showing in this case) (emphasis added) (emphasis added).

This Court's prior decisions are binding here. There is no evidence of any mistake, error or inadvertence by Court of Appeals or its staff. There is no evidence in the Record to support a recall of the Remittitur in this case. To the contrary, the Clerk's letters, and the Clerk's certification of the Court requests the Clerk to issue a Certification for the Record, establish that the Court did not receive the Motion/Petition for Rehearing until May 19th, one day after the mandatory due date. No reason exists to recall the Remittitur other than the Petitioners' own negligence in entrusting that the package it sent regular mail would reach the Court of Appeals in time. As a matter of law the Petitioners' own negligence is not a sufficient reason to recall the Remittitur. Accordingly, based on the Record, South Carolina law dictates that there was/is no jurisdiction for the Court of Appeals to issue a Recall of the Remittitur as the Court of Appeals received the Petition for Rehearing on May 19th and, thereby, the Supreme Court lacks jurisdiction to consider the Petitioners' current petition for certiorari. Brantley recognizes Petitioners' failure is a fatal error to this appeal. However,

Appellant's failure in this matter is certainly more egregious than the Appellant in Wise (who, in the Wise case, at least ensured that his petition was received within the 15 days as mandated by the rules).

Brantley also appreciates that any Court would prefer to give every opportunity to the Petitioners or any party for an adjudication or reconsideration of an adjudication based on the merits; nevertheless, Petitioners must comply with the rules of the Court in order to avail themselves of such opportunity.

As this Court aptly stated in Thomas v. Lynch, 87 S.C. 44, 68 S.E. 817 (S.C. 1910):

"It is to be regretted in any case when a party loses the opportunity afforded by the law and the rules prescribed for the administration thereof to present his cause on the merits. But **it must always be remembered that the other party to the cause has the right to the orderly disposition thereof, and that his rights must be respected, and that it is essential to the due and orderly administration of the law that the methods of procedure prescribed by the statutes and rules of court be complied with. Otherwise, there would be no end to litigation. It has frequently been decided that, when the remittitur has been properly sent to the court below, the Supreme Court loses jurisdiction, and thereafter neither the court nor any justice thereof can make any order in the case.**" (Emphasis added.)

Accordingly, Brantley respectfully asserts that the due and orderly administration of law and procedure and the rules of this Court require the Court dismiss the Petitioners' petition on jurisdictional grounds.

II. The South Carolina Court of Appeals Properly Concluded that the Trial Court Correctly Granted Brantley's Motion for Summary Judgment Because Petitioners Failed to Present Any Affidavits, Documents, Depositions, or Other Evidence to Show the Existence of Any Issue of Fact in Response to Brantley's Motion for Summary Judgment.

The Petitioners failed to put forth any evidence against Brantley to establish the existence of a genuine issue of fact and avoid summary judgment in this matter. In fact, the Petitioners' original Opposition to Brantley's Motion for Summary Judgment was devoid of any affidavits, documents, deposition testimony, or any evidence whatsoever to contradict the factual assertions contained in the Motion for Summary Judgment. The trial court specifically recognized this point, which became a

key element of the decision to grant the Motion. (ROA pp. 18-19). Rather, Petitioners responded to the Motion by resting on the allegations in their Complaints, and on arguments by counsel for the Petitioners which were factually unsupportable and an insufficient defense against a motion for summary judgment. See West v. Gladney, 341 S.C. 127, 533 S.E.2d 334 (Ct. App. 2000) ("this court ordinarily will not consider statements of fact presented only in an attorney's argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment").

Based on the Petitioners' failure to set forth any evidence against Brantley in opposition to its Motion for Summary Judgment, Brantley was entitled to summary judgment as a matter of law. See Miller v. Blumenthal Mills, 365 S.C. 204, 616 S.E.2d 722 (Ct. App. 2005) ("A party opposing summary judgment cannot simply rest on mere allegations or denials contained in pleadings; rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial."); Montgomery v. CSX, Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004) ("Theoretical speculations, unsupported assumptions, and conclusory allegations ... are not entitled to any weight when raised in opposition to a motion for summary judgment.").

III. The South Carolina Court of Appeals Properly Concluded that the Trial Court Correctly Granted Brantley's Summary Judgment Motions When it was Petitioners Who Were Dilatory in Seeking Discovery.

According to prior decisions rendered by this Court, it has been established a party cannot be dilatory in attempting to pursue discovery, then use the lack of discovery as a defense to a summary judgment motion. See Middleborough Horizontal Prop. Regime Council v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). As such, where a party defending a summary judgment motion "has had ample time to secure information relative" to its defensive argument and fails to do so "or tender any reasonable excuse, there is little justification in postponing a decision on the merits." Bankers Trust of

SC v. Benson, 267 S.C. 152, 226 S.E.2d 703 (S.C. 1976) (citing Robin Constr. Co. v. United States, 345 F.2d 610 (3d Cir. 1965)). As the Benson court acknowledged, if a party can create a material issue of fact "based on ignorance of the facts and neglecting to pursue discovery, the office of summary judgment would be mummified." 226 S.E.2d at 704. "Diligence in opposing a motion for summary judgment is required, for such a motion with supporting logistics and gear does not lose its thrust by an opponent's complacency." Id. at 705 (citing Southern Ramble Sales, Inc. v. American Motors Corp., 375 F.2d 932, 937 (5th Cir. 1967)).

In the present case, the Petitioners attempted to explain away their failure to produce any evidence to contradict Brantley's Motion for Summary Judgment on their supposed inability to conduct discovery, however, the record will show that the Petitioners had more than ample opportunity to conduct all the discovery necessary related to the specific issues and grounds that concerned Brantley's Motion for Summary Judgment but failed to do so through their own inaction and complacency. In an attempt to justify their own dilatory conduct, the Petitioners' have engaged in a blame-shifting game, arguing in their Brief to this Court that the reason why they did not complete discovery was due to the Respondents' refusal to cooperate, the Petitioners being "ambushed" by Judge Mullen, and because their discovery efforts were thwarted by an ongoing criminal investigation. None of these arguments have any basis in fact.

A. The Respondents Conducted Discovery in Good Faith, in a Cooperative Spirit, and in Full Compliance with the South Carolina Rules of Civil Procedure.

Throughout the appeals process of this case, the Petitioners have sought to wrongfully shift blame for their own failure to conduct discovery to the Respondents alleging that the Respondents failed to cooperate in discovery – an argument that is entirely unsupported, and which the trial court and the Court of Appeals summarily rejected.

Throughout the 18 months this case was subject to discovery, the record is indisputable that Brantley cooperated in every regard. Specifically, on January 4, 2007, Petitioners served their only set of discovery requests on Brantley. Brantley answered those discovery requests within days on January 16, 2007. (ROA p. 380-386). In those responses, Brantley informed Petitioners that its entire project file was available for review at Brantley's offices, which, upon information and belief, Petitioners reviewed in part. In addition, Brantley identified a number of Brantley representatives as witnesses: Gary Brantley (Senior Vice President); Louis White (project manager), Ray Pinnette (site foreman), Morgan Gehring (superintendent), and Tony Capeder (superintendent). Thereafter, Petitioners waited approximately 10 months - until October 8, 2007 - to take any depositions, and in doing so, only took the depositions of two Brantley representatives, Gary Brantley and Louis White. Petitioners were given ample time to depose any other witnesses listed in Brantley's discovery responses, or mentioned during the depositions of Brantley representatives, but they chose not to do so. For example, during Gary Brantley's deposition, Mr. Brantley identified one of its subcontractors, Tri-M Electrical, as the party that might have turned the power on and off in isolated sections of the Project during construction. (ROA p. 519 (4-24)). Despite the fact Petitioners considered the lighting in the BB&T Parking Lot to be an important issue in the case, the Petitioners never attempted to take the deposition of Tri-M representatives, or otherwise subpoena Tri-M's project file documents, demonstrating another example of the Petitioners' repeated pattern of procrastination.

Further, Brantley provided Petitioners with supplemental discovery responses. During the deposition of Gary Brantley, Petitioners made informal requests for certain documents, but never made any attempt to issue any formal supplemental discovery responses. Nevertheless, and in good faith, counsel for Brantley provided the requested information to Petitioners on January 22, 2008 by

way of Brantley's Supplemental Responses to Plaintiffs' Requests for Production. (ROA pp. 374-376). After having been formally served with these Supplemental Responses to Requests for Production of Documents, Petitioners never requested clarification, further supplementation, or additional material from Brantley, either informally or in accordance with the applicable Rules of Civil Procedure. Yet, despite these facts, Petitioners allege Brantley did not fully respond to informal requests for documents made by the Petitioners' counsel during the depositions of Gary Brantley and Louis White - an allegation that is simply untrue.

Aside from the Petitioners' failure to take depositions, they had even failed to review Project files in a timely manner. An example of this is available from the transcript of the January 31, 2008 hearings on the Respondents' motions for summary judgment, during which counsel for the Petitioners attempted to justify her need for more discovery time because she had not reviewed many of the parties' files: ". . . [i]f we're going to look at project files of Brantley, Collins Engineers, and BB&T, whatever documents they aren't producing, but if we come look at them, then they'll produce them, I mean, you know, we're talking about it takes time." (ROA, pp. 414-415). First, counsel for the Petitioner appeared to be taking issue with Brantley agreeing to producing its voluminous project file by making it available for her inspection at Brantley's office as they were maintained in the usual course of business, in compliance with SCRPC Rule 34. Second, this hearing was taking place almost 15 months after the Petitioners filed their October 23, 2006 Complaints, and a full year after Brantley's January 16, 2007 answers to discovery wherein it offered the Petitioners the opportunity to inspect its project files. Yet, counsel for the Petitioners had still not even completed a review of Brantley's project files.

B. Judge Mullen's August 10, 2007 Order Created No Unfairness to Petitioners, as it Clearly Allowed Discovery To Proceed, and Petitioners Failed to Timely Engage In Any Discovery.

The Petitioners' now argue, for the first time in these proceedings, that the trial court should be blamed for allegedly "ambushing" the Petitioners in its Orders and placing the Petitioners in a position whereby they were unable to complete discovery and properly contest the Respondents' Motions. The Petitioners' focus in on Judge Mullen's August 10, 2007 Order and her March 26, 2008 Order Clarifying the August 10, 2007 Order, and the affect the Order allegedly had on the manner in which the Petitioners conducted themselves during the discovery phase of this case. As set forth below, there are significant reasons why this Court should disregard the Petitioners' arguments.

1. The Petitioners' Statements and Oral Arguments Before the Trial Court on January 31, 2008 Demonstrate Their Understanding and Agreement to Judge Mullen's August 10, 2007 Order.

The Petitioners' allegations concerning Judge Mullen's August 10, 2007 and March 26, 2008 Orders "ambushing" them was presented as an argument by the Petitioners for the first time in their September 15, 2011 Petition to the South Carolina Supreme Court to issue a Writ of Certiorari to review the decision of the Court of Appeals, and now again in its Brief to this Court after the Petition was granted. Aside from these circumstances amounting to waiver (which Brantley will address further in this Brief), the argument is not credible because it is directly contradicted by the Petitioners position and statement before Judge Dukes during the January 31, 2008 hearing. At that hearing, the Petitioners' counsel was asked by the trial court what affect Judge Mullen's stay order had on the case. The following statements were made by the Petitioners' counsel: "It just says the trial, and it prohibits depositions involving the City and the plaintiffs, **but discovery is to continue.** (ROA, p. 424).

These statements represent a clear understanding and passive consent to Judge Mullen's Orders by the Petitioners themselves. At no time did they express any sense of confusion about the order, or object to its contents or the notion that discovery was suppose to continuing forward. Further, this "Ambush" theory was not raised in any of the Petitioners pleadings, not in its opposition memorandum to Brantley's motion for summary judgment, not in its Motion for Reconsideration of the grant of summary judgment, and not in any of their briefs to the Court of Appeals. It is a new theory conjured up by the Petitioners in a last ditch, final attempt to alter the course of this case.

2. The Petitioners' Argument Concerning Judge Mullen's August 10, 2007 Order Conflicts with the Clear and Unambiguous Language of That Order, Which Allowed Discovery to Proceed in the Case.

Following a conference call between counsel for the parties and Judge Mullen on July 12, 2007, Judge Mullen issued an Order on August 10, 2007 that provided the case was to be stayed only to the extent that the parties would not have access to the Beaufort County Solicitor's Office files or the City of Beaufort Police Department criminal investigation documents, but that the parties understood that **discovery shall progress to the degree possible without the disclosure of the subject criminal file.**" (ROA, pp. 32-33). (Emphasis added). Following receipt of that order, the Petitioners took no depositions, nor did they complete the review of any project files. Yet, five months later, they appeared before Judge Dukes during January 31, 2008 oral arguments and represented to the court that they still needed to review documents by BB&T, Brantley, and Collins (ROA, pp. 414-415); and they represented that they still needed to take upwards of ten depositions, including someone from BB&T, the branch manager, the managing partner of Tidal Wave, and the construction manager of Collins. (ROA, pp. 409-410). None of those files, and none of those deponents listed by the Petitioners during that hearing had anything to do with the criminal

investigation files maintained by the Solicitor's Office or the Police Department. Yet, the Petitioners had done nothing to prosecute their own case, and were arguing before Judge Dukes that summary judgment was premature. (ROA, pp. 409-410).

While the August 10, 2007 Order acknowledges "it would be impossible to take all the depositions required in this litigation" it did not bar the Petitioners from taking the depositions of BB&T, Tidal Wave, Collins, Brantley's superintendent, Brantley's subcontractors, or any other number of witnesses to address the premises liability issues in the case. But Petitioners did nothing, and are now conjuring up a justification for their inaction by misinterpreting and misapplying the August 10, 2007 Order that is unambiguous in all respects.

Not to mention that from the commencement of the litigation in October 23, 2006 until August 10, 2007, Petitioners were free to take any discovery depositions of the Respondents (or any other witness) they desired to take. They only took four depositions that entire time. Not to mention that the trial court issued another order earlier in the life of the case on May 24, 2007 that initially took Brantley's motion for summary judgment under advisement in order to afford the Petitioners more time for discovery. Likewise, the Petitioners were free to submit any Affidavit on their behalf, yet they failed to do so. After Judge Mullen's August 10th Order, the Petitioners continued to be able to take any deposition they wanted of the Respondents, or other witnesses. The only thing they could not do was force the disclosure of the criminal file or try the case until it was released. From the time Brantley filed its Motion for Summary Judgment until the summary judgment hearing on January 31, 2008, Petitioners were free to conduct any discovery they wished absent production of the criminal file. On all accounts, they failed to do so.

Nearly a year and one half after the commencement of the lawsuits, after three distinct orders allowing discovery to continue, after failing to conduct even the barest minimum of discovery, and after failing to respond to Requests to Admit, Petitioners appeared in front of Judge Dukes with no affidavits in opposition to the Brantley's Motion. Instead, Petitioners merely restated the points set forth in their pleadings, wrongfully accused the Respondents of refusing to cooperate in discovery, and presented attorney argument that it was premature for the Court to issue a decision because Petitioners wanted to engage in discovery.

C. The Criminal Investigation Files and the Depositions of the Criminal Defendants and Investigating Officers Are Not Relevant to the Issues and Grounds Upon Which Summary Judgment Was Granted.

Petitioners argue that they suffered an injustice because the criminal defendants and investigating officers were unable to sit for depositions until the criminal matter was closed. Brantley respectfully suggests that this issue is nothing more than a "red-herring." The Petitioners themselves have been unable to articulate any support for this contention or describe to the Court exactly how and why the criminal discovery could conceivably relate to the issues involved in Brantley's motion for summary judgment, and when the trial court asked them about that during the January 31, 2008 hearing, and asked them to speculate on what could any witness say that would change the facts and admissions on the record that appeared to classify the Petitioners as trespassers on the BB&T Parking Lot, counsel for the Petitioners offered nothing material. (ROA., p. 420).

Brantley contends it is inconceivable any testimony from the criminal defendants or investigating officers could (1) alter facts and other admissions by the Petitioners that firmly established why the Petitioners were in the BB&T Parking Lot and that they were trespassing; (2) shed any light on who had a duty to light and secure the parking lot; or (3) contradict the

overwhelming evidence on record that already existed that Brantley had absolutely no control over the BB&T Parking Lot or the safety and security of that Parking Lot. Each and everyone of those issues rendered critical conclusions that played a part in the grant of summary judgment, and the criminal files and witnesses would not have any relevance in those legal determinations.

The Petitioners here had ample opportunity to conduct the discovery to defend against Brantley's Motion. Their failure to conduct such discovery was not accepted as excusable by the trial court or the Court of Appeals and should not be used as an excuse now to reverse the Court of Appeals's ruling.

IV. The South Carolina Court of Appeals Properly Concluded That the Trial Court Correctly Granted Brantley's Summary Judgment Motions Because No Amount of Additional Discovery or Further Factual Inquiry Would Have Salvaged the Petitioners' Claims Against Brantley.

Even if we were to assume *arguendo* that the Petitioners were entitled to more discovery time for any of the reasons addressed in the preceding section of this Brief, the discovery would be an act of futility because of the Petitioners' own pleadings, the established facts, and their admissions on record. Even if they were provided with every conceivable opportunity to conduct infinite discovery, no amount of additional discovery could salvage their claims.

First, the Complaints do not allege that the Petitioners were in the subject parking lot to conduct any business, either directly or indirectly, with BB&T or Tidal Wave; rather, the Complaints allege the Petitioners were members of the public who decided to park in BB&T's Parking Lot and then go to Saltus. Moreover, as Petitioners' counsel admitted during the May 8, 2007 initial hearings on Respondents' motions (ROA pp. 436-480), as well as in the January 31, 2008 summary judgment hearing (ROA pp. 394-435), that Petitioners parked in a space marked "For BB&T Customers Only," despite the "No Parking" sign at the entrance of the subject parking lot.

Second, Petitioners have already made several significant admissions in this case that render their claims fatally flawed. Petitioners failed to respond to Requests to Admit served on the Petitioners on June 13, 2007 (ROA pp. 365-368) - a failure that the Petitioners' counsel acknowledged during hearings before the trial court. They are binding admission by the Petitioners. Pursuant to the Requests to Admit, the Petitioners admitted the following:

- (1) That their presence at the BB&T parking lot on the date of the incident did not confer any benefit on Tidal Wave;
- (2) That they neither used nor intended to use BB&T's ATM at 706 Bay Street, Beaufort, SC on May 26, 2006;
- (3) That they were not customers of and did not conduct business with BB&T on May 26, 2006;
- (4) That the "public parking" signs referred to in the Petitioners' Complaint were solely the property of Beaufort and were solely located on Beaufort's real property on May 26, 2006;
- (5) That Tidal Wave maintained a "No Parking" sign at the entrance of the parking lot upon entering the parking lot from Carteret Street;
- (6) That they parked in a parking space that was marked "For BB&T customers only", which was held open to the public for BB&T customers only; and
- (7) That they parked in the BB&T parking lot in order to go have dinner and drinks at the Saltus restaurant (ROA pp. 365-368).

The Petitioners never sought request for leave from the court to respond to the admissions, but rather, went on to even admit the facts as alleged in the Requests to Admit either before, at, or after the January 31, 2008 hearing (ROA pp. 394-435). Pursuant to Rule 36, SCRPC, these Requests to Admit were conclusively deemed admitted, and in light of these admissions no amount of additional factual inquiry, no about of depositions of any of the Respondents' representatives, or project file reviews and or access to any related criminal investigation files in the prosecution of Mr.

Hicks and Mr. Heyward, will change the reason why the Petitioners were present in the Parking Lot in the early morning hours of May 26, 2006. Under South Carolina law and the admissions on record, the Petitioners were not invitees, but rather trespassers, and no further factual inquiry will change why the Petitioners were using the BB&T parking lot.

V. The South Carolina Court of Appeals Properly Concluded That the Trial Court Correctly Granted Brantley's Motion for Summary Judgment Because, as a Matter of Law, Brantley Owed No Duty of Care to Petitioners.

To establish that Brantley was liable for negligence, the Petitioners must have been able to prove that 1) Brantley owed the Petitioners a duty of due care; 2) Brantley breached that duty; and 3) that the breach proximately caused the Petitioners' damages. Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1998). As demonstrated below, the lower court was justified in granting summary judgment to Brantley because the Petitioners are unable to point to any applicable legal authority which would establish that Brantley had any legal duty to the Petitioners under the circumstances of the instant case, much less adduce any evidence which would tend to show that Brantley breached such a nonexistent duty.

A. Brantley Did Not Owe A Duty of Care to Petitioners Under a Premises Liability Theory Because the Assault Took Place in the BB&T Parking Lot Which Brantley Did Not Occupy, Repair, Maintain, or Control.

The Petitioners' claims against Brantley is tenuous because Brantley was NOT an owner or occupier of the BB&T Parking Lot, and the Petitioners never alleged that they ever entered the boundaries of the Brantley project site, which is the only property which was even arguably under Brantley's control. The Petitioners failed to establish that Brantley had any right to enter, much less occupy, repair, maintain, or control the BB&T Parking Lot in which the criminal activity occurred. The Parking Lot was strictly "off limits" to Brantley personnel at all times. Brantley performed

general contracting services pursuant to its contracts that were comprised of various documents including plans, drawings, and specifications (the "Contract Documents") that, among other things, delineated Brantley's scope of work. The Contract Documents clearly delineate Brantley's limits of work as not including any portion of the BB&T Parking Lot in question. In fact, the Contract Documents clearly show that Brantley did not even have the right to use the BB&T Parking Lot, much less perform construction services on it. Brantley performed its work at the Project pursuant to the Contract Documents, and as such did not perform work on, light, or enter the BB&T Parking Lot. Brantley did not undertake to work outside the Project boundaries whatsoever. (ROA p. 595, lines 10-13; p. 622, lines 10-12; and p. 636, 4). Based on the foregoing, Brantley neither owned, controlled, used, nor had the right to control or use the BB&T Parking Lot where the assault took place, and on that basis alone, the Court of Appeals properly affirmed the trial court's grant of summary judgment.

B. Even Assuming Arguendo Brantley Did Occupy, Repair, Maintain, or Control the BB&T Parking Lot (Which it Did Not) No Duty Is Owed to the Petitioners Because Petitioners' Admissions on Record Establish Their Status as Trespassers Under a Premises Liability Theory.

South Carolina case law specifically defines the duties that owners and occupiers of land owe to individuals according to the categories which describe the status of the individual who is injured while on the property at issue. These categories include invitees, licensees, and trespassers. An invitee is a person who enters onto the property of another at the express or implied invitation of the property owner. Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997). Invitees include patrons of stores, patients in a physician's office, persons visiting a filling station to use the restroom or vending machines or to ask directions, and workmen invited to work on the premises. F.P. Hubbard and R.L. Felix, *The S.C. Law of Torts* 112-13 (2d ed. 1997).

Under South Carolina law, an invitee is classified as either a public invitee or business visitor. In order to be considered a public invitee in South Carolina, one must be "invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public." Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008). Also, a business invitee is defined as "a person who is invited to enter or remain on land for the purpose directly or indirectly connected with business dealings with the possessor of the land." Broome v. Hoover, 324 S.C. 531, 536, 479 S.E.2d 62, 65 (Ct. App. 1996). A property owner owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety. Restatement (Second) of Torts § 332 (2,3). A property owner has a duty to warn an invitee only of latent or hidden dangers of which the property owner has or should have knowledge. Sides v. Greenville Hosp. System, 362 S.C. 250, 607 S.E.2d 362 (Ct. App. 2004). The landowner's duty to the invitee includes the duty to refrain from any act which may make the invitee's use of the premises dangerous or result in injury to him or her. Restatement (Second) of Torts § 332, 343A.

A licensee is a social guest, or a person who is privileged to enter upon land by virtue of the owner's consent. To be considered a licensee, the person's presence on the property must be for the primary benefit of that person, not the owner. Restatement (Second) of Torts § 332, 343A. A landowner is under no duty to the licensee except: 1) to use reasonable care to discover him and avoid injury to him in carrying on activities upon the land; and 2) to use reasonable care to warn him of any concealed dangerous conditions or activities of which the owner knows or which he may reasonably be expected to discover. Restatement (Second) of Torts § 330. The basic distinction between an invitee and licensee is that an invitee confers a benefit on the landowner. Restatement (Second) of Torts § 330, 332.

A trespasser is one who enters land without the consent of the landowner. The owner has no duty to a trespasser except not to wilfully or wantonly injure that individual. Nettles v. Your Ice Co., et al., 191 S.C. 429, 4 S.E.2d 797 (1939).

In the present case, Petitioners contend they were public invitees on BB&T's property, but they base their position on pure speculation. The Petitioners argue they were invited by BB&T to utilize the property as a public parking area because the public believed it was public parking, based on another sign installed and owned by the City of Beaufort on an adjacent lot next to the BB&T Parking Lot which was apparently open to the public. However, that City sign, which clearly applied to a different lot owned and maintained by Beaufort, referred to a parking lot that was no longer in existence at the time of the incident due to the ongoing construction Project in the area. Under South Carolina law, the Petitioners' mistaken belief does not alter the Petitioners' legal classification. Furthermore, regardless of the existence or absence of any such sign according to the oral arguments of counsel for Petitioners, there was no affidavit, document, testimony, or any other evidence whatsoever which was introduced by the Petitioners to support such a perception. Without any evidence to even consider on this point, the trial court's grant of summary judgment was proper.

Moreover, the Petitioners' tenuous position that they were owed a duty by Brantley is further discredited by Petitioners' own admissions with respect to Requests to Admit to Plaintiff dated June 13, 2007. (ROA pp. 365-368). These deemed admissions alone render it impossible as a matter of law for the Petitioners to be classified as invitees in the BB&T Parking Lot. The Petitioners admitted that the BB&T Parking Lot was held open for BB&T customers only, that the parking lot had a "No Parking" sign at its entrance, and the Petitioners parked in a BB&T parking space that was marked "For BB&T Customers Only." Id. Petitioners further admitted that on the evening of May 26, 2006,

they were not customers of and did not intend to transact business with BB&T. Petitioners admitted that the "public parking" sign next to the BB&T lot they refer to was not owned by the commercial landlord or the commercial tenant and was not on the commercial landlord/commercial tenant's property, but rather was a City of Beaufort sign on the City's property. *Id.* Accordingly, the facts and admissions in the Record unequivocally prove that the Petitioners cannot fulfill the definition of invitee because they were not "invited" and they were not on the subject property for the purpose for which the property was held open to the public.

C. The South Carolina Court of Appeals Properly Concluded That the Trial Court Correctly Granted Brantley's Motion for Summary Judgment Because Brantley Owed No Duty to Provide Security in or Around the BB&T Parking Lot to Protect the Petitioners from the Criminal Acts of Third Parties.

The Petitioners are essentially arguing that Brantley has a duty to prevent criminal activity by third parties from occurring in an area over which Brantley neither had any control nor the right to enter. This contention is contrary to the well settled law in South Carolina which follows the traditional rule that landlords are not liable for criminal activities of third parties. In Cramer v. Balcor Property Management, Inc., 312 S.C. 440, 441 S.E.2d 317 (1994) the South Carolina Supreme Court answered a certified question by holding that landlords do not owe a duty to provide security in and around leased premises to protect tenants from criminal activities of third parties. The Court stated that "[t]he landlord cannot be expected to protect [tenants] against the wiles of felony any more than the society can always protect them upon the common streets and highways leading to their residence or indeed in their home itself." *Id.* at 318, citing Cooke v. Allstate Mgt Corp., 741 F. Supp. 1205, 1213 (D.S.C. 1990).

In Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997), a social guest of a tenant at an apartment complex was assaulted by a third person. The Court

of Appeals followed the Cramer precedent holding that even if the guest was viewed as an invitee, the owner did not owe a duty to protect him from the assault.

In Jackson v. Swordfish Investments, LLC, 365 S.C. 608, 620 S.E.2d 54 (2005), the Supreme Court addressed a similar issue, but involving commercial landlords liability for the criminal actions of third parties. In Jackson, a nightclub patron was shot multiple times by an assailant inside the nightclub, and the victim filed an action against the commercial landlord alleging it had a duty to protect her from criminal actions of others by providing adequate security. The Supreme Court held the landlord had no duty to protect patrons from the criminal acts of third parties, and the plaintiff's status as an invitee did not create a duty on the part of the nightclub owner to protect her from the criminal acts of third parties inside the leased premises over which the owner did not control or possess. *Id.* The Jackson Court only hinted that a duty to protect might exist from foreseeable criminal acts only if the plaintiff is an invitee and only if the area was under control of the commercial landlord. See also Daniel v. Days Inn of America, Inc., 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987) (The only circumstances under which a business owner may be liable for the criminal acts of a third party is when the business owner's negligent behavior proximately caused a criminal attack on a customer).

In the present case, Brantley had no duty to protect these Petitioners from the criminal acts of third parties. First, the Petitioners were not invitees and there is no case in South Carolina that even expands a landlord's liability, much less liability on a neighboring property owner or a contractor performing work on a nearby parcel of land, for the criminal acts of third parties to individuals classified as licensees or trespassers. Second, Brantley had no duty to protect these Petitioners from the criminal acts of third parties because the criminal activity occurred in an area which Brantley did not occupy, repair, maintain, or control, and in an area where Brantley had no right to even enter.

Brantley's only duty was to provide light to the actual Project site while construction activity was taking place pursuant to its contract with Beaufort. Brantley had neither the right nor duty to provide light to the BB&T Parking Lot. Indeed, Brantley would have violated its Contract had it undertaken to light or otherwise secure the BB&T Parking Lot. If any duty to provide lighting or security to the BB&T Parking Lot existed, the duty would have been held by a party who was at least legally entitled to enter or exert any control over the Parking Lot. Brantley had no such duty, and is entitled to judgment as a matter of law on this point. To suggest that Brantley is required to take action in an area that it was not even permitted to enter is clearly beyond any duty contemplated by the laws of this State. To suggest such a duty is to require a neighboring property owner to trespass onto the property of another, which cannot be within the contemplation of our Supreme Court.

Finally, the Petitioners now make a assertion that certain lighting in the BB&T Parking Lot may have been turned off or disconnected, presumably asserting that some construction activity may have required some disruption in this lighting. During the trial phase of these cases, the Petitioners offered absolutely no support that Brantley's performance at the Project turned off the BB&T Parking Lot lights, or that Brantley directed and authorized the termination of any power to the parking lot. In fact, the Petitioners took the position at the trial level that Brantley did not turn it off the power, and that they needed to take more depositions to determine the identity of that party. Yet, now that this matter is presented before the Supreme Court, Petitioners for the first time attempt to support this argument by mischaracterizing and incorrectly paraphrasing portions of the deposition testimony of Gary Brantley to allege Mr. Brantley testified that Brantley turned off lighting in the BB&T Parking Lot. Upon reading the entire line of questioning on this topic, the record is clear that Mr. Brantley testified that he has no knowledge that Brantley turned off lights in the BB&T Parking Lot, but rather, he is only aware that Brantley turned off certain lights within the confines of the Project boundaries.

(ROA pp. 516 - 522; see also Materials Plan Part E filed as Exhibit D to Brantley's Motion for Summary Judgment. (ROA p. 677-698)). Mr. Brantley further testified that its electric contractor, Tri-M, was the entity that actually turned power off within the boundaries of the Project, and that perhaps it could shed more light on the topic.

Again, the Petitioners never attempted to depose Tri-M, and while Petitioners had ample opportunity to provide some affidavit or other support for the allegation that Brantley turned off power to the BB&T Parking Lot, Petitioners failed to offer any evidence or affidavit whatsoever indicating that the lights in in the BB&T Parking Lot were ever disconnected by Project activity, much less on the evening of the alleged incident. Accordingly, as a matter of law, the Petitioners are unable to support their allegations that Brantley in any way negligently or intentionally created any risk which would create a duty to warn the Petitioners or to control the acts of others.

D. The South Carolina Court of Appeals Properly Concluded That the Trial Court Correctly Granted Brantley's Motion for Summary Judgment Because There is No Legal Duty for the Occupier of One Parcel of Property to Light a Neighboring Parcel of Property.

In light of the absence of any legal duty based upon any premises liability legal classification, the Petitioners final effort is to assert that Brantley is somehow responsible for lighting in the BB&T Parking Lot neighboring the Project work site.

The South Carolina Court of Appeals has considered and rejected a similar argument in Mahle v. Wilson, 283 S.C. 486, 323 S.E.2d 65 (Ct.App. 1984). In that case, the Court of Appeals recognized that there is no legal duty for one land owner to light a neighbor's land. In Mahle, a plaintiff was injured while crossing a highway after leaving a skating rink and sought to hold the skating rink owner liable for failing to light the highway that abutted its premises. Judge Gardner noted that the Mahle case "broache[d] the subject of what duty, if any, an adjoining property owner owes to one

injured on a public highway adjacent to his property." *Id.* at 66. The Court further noted that, similar to the instant matter, the Appellant in the Mahle case "cited no authority whatsoever in support of his position that the demurrer should have been overruled." *Id.* The Court held that the skating rink had no duty to light the abutting state highway, and the same rule holds true in the instant matter, that Brantley has no duty to light any property which neighbors or abuts its Project.

The Petitioners spend a notable amount of time in their Brief to this Court trying to establish through deposition testimony of Gary Brantley that there is a scintilla of evidence on record that Brantley and/or its subcontractors were responsible for the BB&T Parking Lot lights being turned off. Even if this were true, the Petitioner's position is inconsistent from the positions it took during the trial court level. During the trial level, the Petitioners stated the following during the January 31, 2008 hearing before Judge Dukes: "Gary Brantley in his deposition testified that the power was turned off during the time they were doing construction there. Who turned it off? We don't know." (ROA., p. 411). Its disingenuous for the Petitioners to take a contrary position for the first time at this level of the appellate proceedings.

Further, its focus on who had involvement in turning off the lights is misguided. Even assuming *arguendo* Brantley turned the lights off, the identity of the party that turned off the power is not the issue. The issue is who controlled the BB&T Parking Lot? Who had the duty, as owners and operators of that bank property, to make sure the lot was safe and secure? If nearby construction activity resulted in the loss of lighting, who was maintaining that parking lot that would have the authority and control over the parking lot to go on the site and make the proper modifications to provide for temporary night-time lighting. It certainly was not Brantley's job to do so. As we have already discussed, Brantley would have been a trespasser had it done so. Establishing Brantley's construction activity resulted in lights being turned off does not create any legal duty on Brantley

owed to these Petitioners, it does not establish that Brantley had the requisite control over the property to create a legal duty under premises liability, it does not change the legal classification of the Petitioners as trespassers, and it does not render Brantley responsible for criminal acts of others.

Based upon the absence of any legal duty owed by Brantley to the Petitioners, and the lack of any evidence or fact which would even support any argument of a breach of that assumed duty, much less causation of the Petitioners' alleged injuries, the lower court properly granted Brantley's Motion for Summary Judgment and the lower court's order must be affirmed.

VI. Petitioners Waived, and Otherwise Failed to Preserve for Appellate Review, Their Objections to Judge Mullen's August 10, 2008 Order when Petitioners Raised Their Objections for the First Time During These Appellate Proceedings.

It is well settled that an issue which is not properly preserved cannot be raised for the first time on appeal. A great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. Elam citing to Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); Gaffney v. Peeler, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); and Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).

A. The Petitioners' Arguments Concerning Judge Mullen's August 10, 2007 Order Are Not Timely and this Issue Is Not Preserved for Appellate Review.

In the present matter, the Petitioners are making new objections and arguments for the first time. New arguments that explicitly contradict the positions they took at the trial court level. First, the issue concerning the Petitioners objections to the Judge Mullen August 10, 2007 Order (i.e. the Petitioners' "Ambush" theory). This issue was addressed at length earlier in this Brief. As discussed, the Petitioners raised their objection to the Judge Mullen Order for the first time in their September 15, 2011 Petition to the South Carolina Supreme Court to issue a Writ of Certiorari to review the decision of the Court of Appeals, and now again in its Brief to this Court after the Petition was granted. This "Ambush" theory was not raised in any of the Petitioners pleadings, not in its opposition memorandum to Brantley's motion for summary judgment, not in its Motion for Reconsideration of the grant of summary judgment, and not in any of their briefs to the Court of Appeals. It is a new theory conjured up by the Petitioners in a final attempt to alter the course this case has taken.

Further, when asked by the trial court about their understanding of the order, the Petitioners' counsel did not state any objection to Judge Mullen's order. At no time did she express any sense of confusion about the order, or object to its contents or the notion that discovery was suppose to continuing forward. In fact, counsel instead iterated her understanding of the order by confirming it just stayed the trial, but not discovery : "It just stays the trial, and it prohibits depositions involving the City and the plaintiffs, **but discovery is to continue.**" (ROA, p. 424). These statements represent a clear understanding and agreement to Judge Mullen's Orders by the Petitioners themselves. It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994); White v.

Wilbanks, 298 S.C. 225, 379 S.E.2d 298 (Ct. App.1989); see also Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986). Failure to object when the evidence is offered constitutes a waiver of right to object. Cogdill v. Watson, 289 S.C. 531, 347 S.E.2d 126 (Ct.App.1986). An issue which is not properly preserved cannot be raised for the first time on appeal. Hoffman, 312 S.C. 386, 440 S.E.2d 869; State v. Vanderbilt, 287 S.C. 597, 340 S.E.2d 543 (1986). Accordingly, the Petitioners' arguments concerning Judge Mullen's August 10, 2007 Order are not timely and this issue is not available for appellate review.

B. The Petitioners' New Argument Concerning Their New Interpretation of the Testimony of Gary Brantley is Not Timely and this Issue is Not Preserved for Appellate Review.

The very same analysis is applicable to the Petitioners new argument that the deposition testimony of Gary Brantley offers a scintilla of evidence that Brantley and/or its subcontractors were responsible for cutting off the lights that had previously illuminated the BB&T Parking Lot by virtue of the construction taking place on adjacent land. Aside from that inquiry not being legally relevant as it may apply to Brantley in this case, it is a new argument being offered for the first time at the appellate level. In fact, at the trial level after 15 months of litigating this case, the Petitioners' position was clearly articulated by their counsel during the January 31, 2008 hearing before Judge Dukes: "Gary Brantley in his deposition testified that the power was turned off during the time they were doing construction there. Who turned it off? We don't know. From that deposition we've got to depose someone else to find out who authorized that." (ROA., p. 411). It was not until page 9 of the Petitioners' Final Brief to the Court of Appeals that this argument and this new interpretation of Mr. Brantley's testimony surfaced.

It is clear and indisputable that as of January 31, 2008 - after 15 months of litigation - the Petitioners were taking a position that it was not Brantley that turned off the power, but in fact, it was

someone else, and that other party turned off the power based on a decision authorized and directed by an additional unknown party. Counsel's statements during that hearing clearly demonstrate the Petitioners' interpretation of Gary Brantley's testimony at that time. Its disingenuous for the Petitioners to now take a contrary position and strain to interpret Mr. Brantley's testimony another way for the first time at this level of the appellate proceedings for the purpose of salvaging its claim. Accordingly, the Petitioners' arguments concerning the testimony of Gary Brantley offering a scintilla of evidence are not timely and this issue is not available for appellate review.


CONCLUSION

For the foregoing reasons, the trial court properly granted the Motion for Summary Judgment of Respondent Brantley Construction Company, and the Court of Appeals properly affirmed the trial court's ruling. Brantley requests that this Honorable Court deny Petitioners' petition and affirm these rulings.

Respectfully Submitted,

ROBERTSON HOLLINGSWORTH & FLYNN
177 Meeting St., Suite 300
Charleston, South Carolina 29401
Telephone: (843) 723-6470
Fax: (843) 853-9045
Email: rpf@roblaw.net

By: _____


R. Patrick Flynn
Robert J. Cardillo

**Attorneys for Respondent Brantley Construction
Company, Inc.**

Charleston, South Carolina
November 1, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Special Circuit Judge

Appellate Case No. 2011-199428
Unpublished Opinion No. 2011-UP-199
Filed May 3, 2011

Amy Davidson, (Petitioner) vs. City of Beaufort, Branch Banking &
Trust of South Carolina, Collins
Engineering, Inc., Brantley
Construction Company, Inc., and
Tidal Wave 23, LLC, (Respondents).

AND

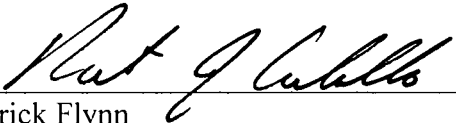
Phillip Davidson, (Petitioner) vs. City of Beaufort, Branch Banking &
Trust of South Carolina, Collins
Engineering, Inc., Brantley
Construction Company, Inc., and
Tidal Wave 23, LLC, (Respondents).

CERTIFICATE OF COUNSEL

R. Patrick Flynn, Esquire
Robert J. Cardillo, Esquire
ROBERTSON HOLLINGSWORTH & FLYNN
177 Meeting Street, Suite 300
Charleston, SC 29401
(843) 723-6470
Attorneys for Brantley Construction Company, Inc.

The undersigned certifies that the foregoing Brief and Answer to Petitioner's Complaint of Respondent Brantley Construction Company, Inc. complies with Rule 211(b), SCACR.

ROBERTSON HOLLINGSWORTH & FLYNN
177 Meeting St., Suite 300
Charleston, South Carolina 29401
(843) 723-6470
(843) 853-9045 fax

By: 
R. Patrick Flynn
Robert J. Cardillo
Attorneys for Brantley Construction Company, Inc.

Charleston, South Carolina
November 1, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Special Circuit Judge

Appellate Case No. 2011-199428
Unpublished Opinion No. 2011-UP-199
Filed May 3, 2011

RECEIVED

NOV - 4 2013

S.C. Supreme Court

Amy Davidson, (Petitioner) vs. City of Beaufort, Branch Banking &
Trust of South Carolina, Collins
Engineering, Inc., Brantley
Construction Company, Inc., and
Tidal Wave 23, LLC, (Respondents).

AND

Phillip Davidson, (Petitioner) vs. City of Beaufort, Branch Banking &
Trust of South Carolina, Collins
Engineering, Inc., Brantley
Construction Company, Inc., and
Tidal Wave 23, LLC, (Respondents).

CERTIFICATE OF SERVICE

R. Patrick Flynn, Esquire
Robert J. Cardillo, Esquire
ROBERTSON HOLLINGSWORTH & FLYNN
177 Meeting Street, Suite 300
Charleston, SC 29401
(843) 723-6470
Attorneys for Brantley Construction Company, Inc.

The undersigned certifies that foregoing Brief and Answer to Petitioner's Complaint of Respondent Brantley Construction Company, Inc. was served upon the counsel set forth below, by depositing the same in the U.S. Mail, postmarked on the date set forth below.

James H. Moss, Esquire
Kimberly L. Smith, Esquire
Moss, Kuhn & Fleming, P.A.
1501 North Street
P.O. Drawer 507
Attorneys for Amy Davidson and Phillip Davidson

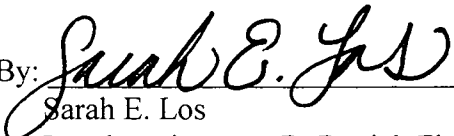
H. Michael Bowers, Esquire
Laura J. Evans, Esq.
Wilkes Bowers, P.A.
171 Church Street, Suite 210
Charleston, SC 29401
Attorneys for Collins Engineers, Inc.

M. Dawes Cook, Jr., Esquire
Philip S. Ferderigos, Esquire
Barnwell, Whaley, Patterson, & Helms, LLC
885 Island Park Drive
P.O. Drawer H
Charleston, SC 29402
Attorneys for Tidal Wave 23, LLC

Mary Bass Lohr, Esquire
Howell, Gibson & Hughes, P.A.
P.O. Box 40
Beaufort, SC 29901
Attorney for City of Beaufort

William B. Harvey, III, Esquire
Harvey & Battey, P.A.
1001 Craven Street
Post Office Drawer 1107
Beaufort, South Carolina 29901-1107
Attorney for City of Beaufort

Edward K. Pritchard, III, Esquire
Pritchard & Elliott, LLC
129 Broad Street (29401)
P.O. Box 630
Charleston, SC 29402
Attorney for Branch Banking and Trust of South Carolina

By: 
Sarah E. Los
Legal Assistant to R. Patrick Flynn and
Robert J. Cardillo

Charleston, South Carolina
November 1, 2013