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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

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

Unpublished Opinion No. 2011-UP-199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

Amy Davidson Petitioner,

v.

City of Beaufort, Branch Banking & Trust of South Carolina, Collins Engineers, Inc.,
Brantley Construction Company, Inc., and Tidal Wave 23, LLC..... Defendants,

Of Whom Collins Engineers, Inc., Brantley Construction Company, Inc., and Tidal Wave
23, LLC are..... Respondents.

and

Phillip Davidson..... Petitioner,

v.

City of Beaufort, Branch Banking & Trust of South Carolina, Collins Engineers, Inc.,
Brantley Construction Company, Inc., and Tidal Wave 23, LLC..... Defendants,

Of Whom Collins Engineers, Inc., Brantley Construction Company, Inc., and Tidal Wave
23, LLC are..... Respondents.

COLLINS ENGINEERING, INC.'S RESPONSIVE BRIEF

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. Does this Court have jurisdiction to consider this Petition given that Petitioners failed to timely file a petition for rehearing with the Court of Appeals, a remittitur was issued, but then improperly recalled?
- II. Did the South Carolina Court of Appeals properly conclude that the trial court appropriately granted summary judgment in favor of Collins as Petitioners failed to provide any affidavits, documents, depositions, or other evidence to show the existence of any issue of fact in response to Collins' Motion for Summary Judgment?
- III. Did the South Carolina Court of Appeals properly conclude that the trial court appropriately granted summary judgment in favor of Collins as Petitioners were dilatory in the discovery process and, ultimately, made no showing that further discovery would establish the existence of any genuine issue of material fact in response to Collins' Motion for Summary Judgment?
- IV. Did the Petitioners waive, and otherwise fail to preserve for appellate review, their apparent objections to Judge Mullen's August 10, 2007 Order, when Petitioners raised their objections for the first time in their Petition and arguments to this Court?

STATEMENT OF THE CASE

The Petitioners, Amy and Phillip Davidson, filed lawsuits on October 23, 2006, alleging negligence claims against the City of Beaufort (“Beaufort”), Branch Banking and Trust of South Carolina, (“BB&T”), Collins Engineers, Inc. (“Collins”), Brantley Construction Company, Inc. (“Brantley”), and Tidal Wave 23, LLC (“Tidal”). The Plaintiffs’ allegations revolve around the May 26, 2006 abduction and assault of the Plaintiffs by alleged criminals not parties to the lawsuits. (R. pp. 000038-000044, pp. 000100-000107).

Sometime in or prior to 2004, Beaufort undertook a renovation project at the Henry C. Chambers Waterfront Park located in downtown Beaufort, South Carolina (the “Project”). On July 19, 2004, Beaufort entered into an Owner and Engineer Contract (“Engineering Contract”) with Collins requiring Collins to provide specific engineering services to the Project. (R. pp. 000210-000243). 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. (R. pp. 000244-000246, pp. 000344-000357).

Under the terms of the Engineering Contract, Collins and Beaufort agreed as follows:

ENGINEER and [Architect] shall not . . . supervise, direct, or have control over Contractor’s [Brantley’s] work, nor shall ENGINEER and [Architect] have authority over or responsibility for the means, methods, techniques, sequences or procedures of construction selected by Contractor, for safety precautions and programs incident to

the Contractor's work in progress, nor for any failure of Contractor to comply with Laws and Regulations applicable to Contractor's furnishing and performing the Work.

(R. p. 000237, ¶D.6.02-B). As well, the Engineering Contract specifically reserved control over Project safety for Brantley. (R. p. 000229, ¶A.1.03.2-q) ("Contractor will be responsible for on-site safety of the public as well as construction personnel.").

According to the allegations of the Complaints, on May 26, 2006, the Petitioners parked in a parking lot located at 706 Bay Street in downtown Beaufort (the "Lot") and proceeded to the Saltus Riverfront Bar and Grill ("Saltus"), located at 820 Bay Street. (R. p. 000042, p. 000105). The Complaints allege that the Lot is owned by Tidal and is operated, maintained, and controlled by BB&T and Beaufort. (R. p. 000039, p. 000101). The Lot lies outside the boundaries of the Project and Collins has no relationship to either Tidal, the Lot owner, or BB&T, the Lot lessee. (R. pp. 000210-000243, pp. 000341-000364). There has never been any allegation that Collins owned, managed, or exercised any control over the Lot. The Petitioners left Saltus at approximately 1:00 a.m. Upon returning to the Lot, they were abducted and robbed by two individuals not named in the underlying suits. They were then driven to another location, where they were assaulted. (R. p. 000042, p. 000105).

On October 23, 2006, Petitioners filed two separate negligence suits in the Beaufort County Court of Common Pleas. In the underlying suits, Petitioners alleged that Collins 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 said area, especially at night during construction for the protection of individuals traversing by the construction area.” (R. p. 000040, p. 000104). Petitioners further alleged that Collins breached this duty by failing to properly light the Lot, warn others of criminal acts in the Lot, and provide security to the Lot. (R. pp. 000042-43, pp. 000105-106). Collins filed its Answers on December 4, 2006, in which it also asserted cross-claims against Brantley and Beaufort. (R. pp. 000053-000064, pp. 000120-000129). Further, Petitioners served discovery requests on Collins on or about February 7, 2007. Such requests were answered on July 13, 2007. As admitted by Petitioners, in its responses to these requests, Collins named two witnesses to testify regarding the issues on Collins’ behalf, James O’Connor and David McSweeney. They further identified and offered for inspection and copying a voluminous number of documents pursuant to South Carolina Rule of Civil Procedure 34. (R. p. 424, lines 18-23).

Tidal Wave filed its initial Motion to Dismiss pursuant to Rule 12(b)(6) on December 14, 2006, concerning the legal classification of the Petitioners. (R. pp. 314-325). On April 23, 2007 Brantley filed its Motion for Summary Judgment. (R. pp. 338-340) and its Memorandum in Support on May 7, 2007. (R. pp. 326-337). On May 8, 2007, the trial court heard these motions, and on May 24, 2007, denied such motions with leave to refile to allow the parties *to conduct discovery*. (R. 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 (the “Stay Order”). Although protecting the cases from trial, the Stay Order allowed the parties to conduct discovery and take depositions and reserved the right to consider any dispositive or discovery motions. (R. pp. 31-33) (“However, it is understood by the Court and among the parties, that discovery shall progress to the degree possible without the disclosure of the subject criminal file.”).

Collins filed its Motion for Summary Judgment on December 10, 2007 and its memoranda in support on December 10 and December 14, 2007. (R. pp. 195-303). Tidal Wave and Brantley re-filed their respective motions as well. After the Respondents filed their dispositive motions, The Honorable Carmen T. 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, 2008¹, at which all Petitioners and Respondents made oral argument. Despite knowing the identity of Collins’ witnesses a full six months prior to the hearing before Judge Dukes, Petitioners *never noticed their depositions*. As well, in its discovery responses, Collins offered Petitioners the opportunity to review its project files upon request. *No request was ever made*.

Respondent Collins presented documentary evidence and deposition testimony at the hearing. The only documentary evidence as to the claim against Collins before Judge Dukes at the time of the hearing was the Engineering Contract between Beaufort and Collins, which read as follows:

¹ Petitioners herein did not make any motion or other request to continue this hearing.

ENGINEER [Collins] and [Architect] **shall not . . . supervise, direct, or have control over Contractor's work**, nor shall ENGINEER [Collins] and [Architect] have authority over or responsibility for the means, methods, techniques, sequences or procedures of construction selected by Contractor, **for safety precautions and programs incident to the Contractor's work in progress**, nor for any failure of Contractor to comply with Laws and Regulations applicable to Contractor's furnishing and performing the Work.

(R. p. 237, ¶D.6.02-B) (emphasis added) (see also R. p. 229, ¶A.1.03.2-q) (“Contractor will be responsible for on-site safety of the public as well as construction personnel.”).

Collins also presented deposition testimony in support of its motion from various witnesses, all of whom testified that Collins was not responsible for safety at the Project. Specifically, Collins directed the court's attention to the following testimony:

Isaiah Smalls, Public Works Director for the City of Beaufort:

Q: Okay. During the construction who was in charge or responsible for the safety of the park down there?

A: Brantley Construction.

(R. p. 000567, lines 9-12).

Gary Brantley, Vice President of Brantley Construction:

Q: Now, when you took over this project, your company took over this project, who was in charge of the lighting at night on the project; who with your company? Would that have been your superintendent, your safety superintendent or who?

A: The superintendent would have been in charge of the entire project when he took over the site.

(R. p. 000509, lines 6-14)

Lamar Taylor, City of Beaufort construction liaison to the Project:

Q: All right. Who was responsible for the safety in the park during construction?

A: Contractor (Brantley).

Q: Okay. Who was in charge of security down there at the time?

A: In regards to the park itself?

Q: Yes.

A: The contractor (Brantley).

Q: ... "As I understand it, all of the safety of the work site was the responsibility of Brantley Construction, the contractor, correct?"

A: Correct.

Q: In fact, isn't it true that the contract the City had with Collins actually specified that and said Collins didn't have any responsibility for that; it was Brantley Construction?

A: It was Brantley Construction.

(R. p. 000589, lines 7-9; p. 000592, lines 6-10; p. 000616, lines 11-23).

Petitioners presented no evidence to Judge Dukes or to the Court of Appeals that they sought to take the deposition of any Collins' representative or that Collins' counsel resisted the deposition of their client. Further, Petitioners admitted that they had not inspected Collins' records. Petitioners' counsel admitted during oral argument before the trial court that they were free to pursue discovery and to take the depositions of most potential witnesses, including

Collins' witnesses. (R. p. 424, lines 18-23). Petitioners presented no opposing testimony or affidavits in opposition to Collins' motion

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 instead issued an Order denying Respondents' summary judgment motions on the basis that the previously filed August 10, 2007 Order divested the court of jurisdiction to issue rulings on dispositive motions. (R. pp. 28-30). On March 17, 2008, Respondents jointly filed a Notice of Motion and Motion for Reconsideration before Judge Dukes, in conjunction with a Notice of Motion and Motion to Alter, Amend and/or Clarify Previous Order of Stay. (R. pp. 175-182). On March 26, 2008, Judge Mullen issued an "Order Clarifying Order of Stay filed August 10, 2007", reaffirming that the court retained jurisdiction to entertain any discovery and/or dispositive motions during the pendency of the trial stay (R. pp. 26-27). Judge Mullen's March 26, 2008 "Order Clarifying the Order of Stay filed August 10, 2007" 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 Tidal Wave 23, LLC, Collins Engineers, Inc. and 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 Tidal Wave 23, LLC, Collins Engineers, Inc., and Brantley Construction Company, Inc. as he deems just and proper.

(R. pp. 26-27) (emphasis added) (“Clarifying Order”).

After considering the parties’ motions and memoranda in support, and after receiving Judge Mullen’s clarifying order, on April 8, 2008, Judge Dukes granted Respondents’ Motions for Reconsideration and thereafter issued an order granting Respondents’ dispositive motions. (R. pp. 03-25). Petitioners moved for reconsideration on April 17, 2008 (R. pp. 167-174). Judge Dukes denied Petitioners’ motion on August 27, 2008 in an order dated September 2, 2008. (R. 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). In order to have been timely 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). In this filing, Petitioners conceded that their Petition for Rehearing deadline was May 19, 2011. On June 16, 2011, the Court of Appeals recalled the remittitur with no explanation 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, 2011.² (Supplemental Appendix, p. 44-49). On July 19, 2011 the Respondents filed their Joint Opposition to Petitioners' 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

² Although no filing date is apparent on this Motion, it was signed by Petitioners' counsel on July 7, 2011 and certified as being served on that same date. Thus, it could not have been filed prior to July 1, 2011, as the Clerk instructed.

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.

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

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, this Court held that the Court of Appeals 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. This 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 decision in Wise and its predecessor and successor cases 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—clearly, though Petitioners could have utilized an overnight mailing service or other express hand-delivery service, but chose not to do so.

Based on the Record, South Carolina law dictates that the Court of Appeals lost jurisdiction over the appeal when Petitioners failed to file their motion by May 18, 2011. Therefore, when the Court of Appeals recalled the remittitur on June 16, 2011 (which contained no reason for the recall), it did so erroneously as it lacked the jurisdiction both to hear Petitioners' motion and to rule on it. Because the remittitur was inappropriately recalled and the remainder of the Court of Appeals' actions (including its review and ruling on the Petitioners' Motion for Rehearing) are nullified, this Court lacks jurisdiction to consider the current Petition for Writ of Certiorari.

Respondents recognize Petitioners' failure is a fatal error to this appeal. However, Petitioners' failure in this matter is certainly more egregious than the party in Wise (who at least ensured that his petition was received within the time period mandated by the rules). Respondents also recognize that courts prefer to give every opportunity to a 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.” 87 S.C. at 46, 68 S.E. at 817 (emphasis added.)

Respondents respectfully assert that the due and orderly administration of law and procedure and the rules of this Court require that the Court deny the Petitioners' petition on jurisdictional grounds and dismiss it. Petitioners have failed to follow the rules of the appellate courts. In fact, even though the Court of Appeals incorrectly granted Petitioners' Motion to Recall Remittitur and allowed the matter to proceed, Petitioners thereafter missed another deadline. In accordance with the Clerk's June 16, 2011 specific directive, Petitioners were to file their Motion for Rehearing by July 1, 2011. Instead of complying with this directive, Petitioners waited until July 7, 2011 (at the earliest) to submit their

Motion for Rehearing (Exhibit 7). While there is no submission date apparent from the copy sent to this Respondent, it is clear that the motion was signed by counsel on July 7 and the certificate of service lists July 7 as the service date. Therefore, Petitioners were at least six days late in filing this motion. Again, although the Court of Appeals had no jurisdiction to rule on the tardy motion, it did so, the denial of which allowed Petitioners to file the present Petition for Writ of Certiorari

On more than one occasion, Petitioners have violated the rules, forcing Respondents to expend time and expense to respond. This is not the orderly administration of law that this Court has advocated. The present Petition should be dismissed summarily for lack of jurisdiction.

II. The Court of Appeals Correctly Affirmed the Summary Judgment granted Collins because Petitioners: (1) were dilatory in seeking discovery; and (2) presented no evidence that further discovery would uncover evidence that would have defeated summary judgment?³

Petitioners assert that the Court of Appeals incorrectly affirmed the grant of summary judgment to Respondents because they did not have an opportunity to complete discovery. Petitioners' argument is without merit. Throughout the appeal of this case, Petitioners have sought to shift blame to the Respondents for their own failure to conduct discovery, alleging through Petitioners' counsel's statements, both verbal and written, that Respondents failed to cooperate in discovery, without providing any proof of such allegations. The Court of Appeals summarily rejected this argument. The current iteration of Petitioners is that the Court of Appeals "misapprehended" the impact of Judge Mullen's

³ By making the arguments in (II), (III), and (IV), Respondent Collins does not waive its jurisdictional arguments.

August 10, 2007 Stay Order, as well as the “non-cooperation” of Respondents. Petitioners made this same argument to the Court of Appeals.

Petitioners continually ignore that Judge Mullen’s March 26, 2008 “Order Clarifying Order of Stay filed August 10, 2007” clearly sets forth the following: “it is understood by the Court and among the parties that discovery shall progress to the degree possible without the disclosure of the subject criminal file.” (R. pp. 32-33). From the institution of the litigation in October of 2006 until August 10, 2007, Petitioners were free to take or notice any discovery depositions of the Respondents (or any other witness, including themselves) they desired. After Judge Mullen’s August 10, 2007 Order, Petitioners continued to be able to take any deposition they wished, either of themselves, the Respondents, or other witnesses. Thus, from October of 2006 until the January 31, 2008 hearings—a total of approximately fifteen (15) months--Petitioners were free to notice any depositions they wished. In fact, Petitioners noticed and took four (4) depositions, despite their current assertion that the Stay Order prevented them from doing so. As well, they were free to perform independent investigation into the crimes and to depose or obtain affidavits from any individual identified in the investigation—another task they failed to do. The only thing they could not do was force the disclosure of the criminal file or try the case until the criminal file was released.

Over fifteen (15) months after the institution of the underlying action, after distinct orders allowing discovery to continue, and after failing to conduct little more than the barest minimum of discovery, Petitioners appeared in front of Judge Dukes with no

affidavits and no evidence in opposition to the motions.⁴ Instead, Petitioners merely restated the points set forth in their pleadings, accused Respondents of refusing to cooperate in discovery (with no documentary or other evidence), and argued that it was premature for the Court to issue a decision as they wanted to take other *unspecified* depositions⁵. The truth of the matter is that each and every Respondent made every effort to cooperate in discovery, *when it was requested*. Although Collins identified its witnesses in discovery a full six months prior to the dispositive motions hearing, Petitioners never noticed their depositions (and have never produced any evidence other than bald assertions that they even informally requested that they be scheduled). As well, Petitioners never requested to review any project files, as offered by Collins in responses to discovery. Petitioners' counsel admitted in the motion hearing before Judge Dukes that if "we're going to look at project files of Brantley, Collins, and BB&T...we're talking about it takes time." (R. 414-415, ll. 19-4).⁶

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). 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

⁴ Again, Petitioners' counsel did not request a continuance of the motions.

⁵ As admitted by Petitioners in their Brief, they had identified specific depositions they wished to take, but yet never took them.

⁶ Petitioners seem to imply in their argument that the production of project files for inspection pursuant to Requests to Produce somehow equates to not producing the documents. However, South Carolina Rule of Civil Procedure 34 clearly allows production by inspection. Petitioners simply failed to follow through and inspect the documents identified.

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)). Petitioners here had ample opportunity to conduct the discovery to defend Collins’ motion before it was heard. Even after Judge Dukes’ indicated that he was inclined to grant summary judgment, they did not attempt to inspect the documents produced for inspection, though they could have before his order was issued. 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’ ruling.

Further, if a party opposes a summary judgment motion (or appeals from a decision granting summary judgment or from an appellate decision affirming it) on the ground that the motion and/or order were premature because further discovery was warranted, the party “must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition.” Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); see also Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

At the hearing and throughout the appeal of this case, the Petitioners have been unable to articulate what discovery depositions they were prevented from taking which

would create an issue of fact on any dispositive factual issue as to Collins. While Petitioners argue that discovery had not yet been completed on two issues (who controlled the parking lot and its lighting and the legal status of Petitioners), they fail to delineate what additional discovery—specifically discovery regarding the criminal file that they were prevented from taking by the Stay Order-- could have shed light on these issues. The Petitioners failed to respond to any Respondents' summary judgment motion with any evidence, but rather chose to file a generalized Memorandum in Opposition with no supporting affidavits or documentary evidence. The trial court specifically recognized this point, which became a key element of the decision to grant the Motions. (R. pp. 18-19). Petitioners did not seek a continuance of the summary judgment motion hearing based upon any alleged discovery delays. Petitioners have presented no evidence of non-cooperation by Respondents. Petitioners argued their case before the trial court at the January 31, 2008 hearing and Petitioners were not entitled to a second oral argument as Petitioners' brief suggests [A party has no due process right to an opportunity to present oral argument where previous oral argument was allowed. PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988)].

The present Petition is simply another attempt by Petitioners to divert attention away from their failure to conduct discovery and to defend against dispositive motions. In the present iteration of their argument, because the tort case “arose out of criminal activity, until discovery [could] be completed regarding the criminal activity, all other

discovery in secondary.”⁷ In that same paragraph, *Petitioners admit that they performed only “cursory” discovery.* This action (or inaction) completely contravenes Judge Mullen’s original order which stated clearly that “discovery is to proceed to that degree possible without the release of the above referenced investigative file.” (R. at 23-33). There is no discussion whatsoever of what Petitioners allege could be contained within a *criminal* investigative file which might clarify or explain Respondent Collins’ role in the case. Further, Petitioners were not “ambushed” by the clarification of Judge Mullen’s original order—they were well aware that Judge Dukes would have granted summary judgment absent the Petitioners’ questioning of Judge Mullen’s order, which seemingly was clarified only to emphasize that the original order was not as Petitioners now allege.

Based on the Petitioners' failure to set forth any evidence against Respondents in opposition to their Motions for Summary Judgment, Respondents were 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.”). It seems that Petitioners rely only upon the unsupported contention of their counsel that some fact might exist in the criminal file to support their claim against Collins.

⁷ The Petitioners did not paginate their brief, but this statement is made on the page before their second legal argument.

This is simply insufficient to defeat 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").

III. The South Carolina Court of Appeals properly concluded that the trial court appropriately granted summary judgment in favor of Collins because Petitioners were dilatory in the discovery process and, ultimately, made no showing that further discovery would establish the existence of any genuine issue of material fact in response to Collins' Motion for Summary Judgment?

Petitioners argue that the Court of Appeals "overlooked the fact that the Respondents Brantley and Collins were the ones responsible for cutting off the power to the lights that had previously illuminated the parking lot from which the Petitioners were abducted." Collins first notes that the deposition testimony cited in support of this argument is that of Brantley, not of Collins. It secondly notes that Petitioners take this testimony out of context – the witness (Curtis Brantley) in fact testified its subcontractor, *TRI-M Electrical (not Collins)*, was responsible for turning power on and off in isolated sections of the Project during construction. (R. p. 519 (4-24)). It is a complete mischaracterization of the testimony of Curtis Brantley to suggest that Collins was the "subcontractor" who dealt with the power at the site. First, Collins was the engineer on the project, not a "subcontractor". Second, later on in his deposition, Curtis Brantley specifically identified TRI-M Electrical as the subcontractor to which he was referring. Petitioners never took the deposition of TRI-M or otherwise subpoenaed TRI-M's project file documents. Nothing in such testimony supports Petitioners' contention that Collins had

any role in determining when and how to terminate power to either the Project or the subject parking lot.

The Engineering Contract and the testimony set forth in the factual background section above are clear and unambiguous. Collins had no responsibility whatsoever for safety and security on the Project premises and, therefore, certainly had no responsibility for safety and security in an area that abutted the Project but was not contained within the Project premises. Clearly, Collins, which had no control over the use of the subject parking lot,⁸ owed no duty to anyone on it. Nesbitt v. Lewis, 335 S.C. 441, 517 S.E.2d 11 (Ct. App. 1999).

VI. Petitioners Waived, and Otherwise Failed to Preserve for Appellate Review, Their Objections to Judge Mullen’s August 10, 2008 Order (“Clarifying 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. Our courts have continually emphasized the 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. 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

⁸ Petitioners have never alleged that Collins owned or operated the parking lot at issue.

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); SCAC 210(c) (record on appeal shall not include matter which was not presented to lower court).

In the present matter, the Petitioners are making new objections and arguments for the first time which contradict the positions they took at the trial court. First, Petitioners object to the Clarifying Order, alleging they were “ambushed” by it and Judge Dukes’ subsequent order. The Petitioners raised their objection to the Clarifying Order and its timing for the first time in their September 15, 2011 Petition to the South Carolina Supreme Court to issue a Writ of Certiorari and now again in their Brief. This “ambush” theory was not raised in any of the Petitioners’ Motion for Reconsideration of the grant of summary judgment or in any of their many filings in the Court of Appeals. It simply is a baseless new theory invented by the Petitioners in a desperate attempt to reopen the case. In fact, Petitioners’ counsel specifically acknowledged that the Stay Order simply 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.**” (R, p. 424). Further, Petitioners’ counsel noticed and took several depositions and served written discovery (though it was never followed-up on for inspection and copying). Never in the hearing on the summary judgment motions did Petitioners’ counsel argue that no discovery was allowed—it is only now, in the eleventh hour that they argue that such discovery was “secondary” and “cursory”. Petitioners never requested that Judge Mullen reconsider her

Clarifying Order despite the fact that Judge Dukes had already indicated he was inclined to grant summary judgment if he was procedurally allowed.

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 Clarifying Order are not timely and this issue is not appropriate for appellate review.

CONCLUSION

Petitioners' repetitive failure to meet deadlines set by appellate court rules stripped the Court of Appeals and this Court of jurisdiction to entertain the present petition. If this Court chooses to entertain the current petition, it still must fail. Petitioners have demonstrated no reason for this Court to disturb the trial court's grant of summary judgment to Collins or the Court of Appeals affirmance of it. Discovery as it related to Collins was not stayed. Petitioners had ample opportunity to pursue discovery with regard to Collins and they chose, for whatever reason, not to do so, even after being served with Collins' dispositive motion. Petitioners have offered no reasonable excuse for their dilatory behavior. Thus, the trial court's entertainment of Collins' motion and its ruling thereupon were not premature. In addition, Petitioners have made no showing

whatsoever that further discovery could or would lead to evidence that might defeat Collins' request for summary judgment. Petitioners simply do not wish to accept the very clear testimony in the record. Finally, Collins has proven by clear evidence that it had no duty for safety and security on the Project and, thus, could not possibly have a duty towards Petitioners.

Respectfully submitted,

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Engineering, Inc.

Charleston, South Carolina
November 3, 2013

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing COLLINS ENGINEERING, INC.'S RESPONSIVE BRIEF has been sent to all counsel of record via U.S. Mail, correctly addressed with sufficient postage, this 4th day of November, 2013.

Christina B. Nel
Legal Assistant

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

NOV - 4 2013

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

S.C. Supreme Court

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

Amy Davidson Petitioner,

v.

City of Beaufort, Branch Banking & Trust of South Carolina, Collins Engineers, Inc.,
Brantley Construction Company, Inc., and Tidal Wave 23, LLC Defendants,

Of Whom Collins Engineers, Inc., Brantley Construction Company, Inc., and Tidal Wave
23, LLC are Respondents.

and

Phillip Davidson Petitioner,

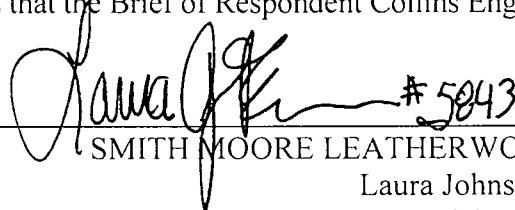
v.

City of Beaufort, Branch Banking & Trust of South Carolina, Collins Engineers, Inc.,
Brantley Construction Company, Inc., and Tidal Wave 23, LLC Defendants,

Of Whom Collins Engineers, Inc., Brantley Construction Company, Inc., and Tidal Wave
23, LLC are Respondents.

SCAC RULE 242 CERTIFICATION OF COUNSEL

The undersigned counsel hereby certifies that the Brief of Respondent Collins Engineering,
Inc. complies with SCAC Rule 242.

 #5043

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