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since 1938

Phillip S. Ferderigos, Partner
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February 1, 2012

RECEIVED
FEB 06 2012
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Amy Davidson and Phillip Davidson v. City of Beaufort, et al.
Case Tracking Number 2011-199428
Our File No. 3031.002

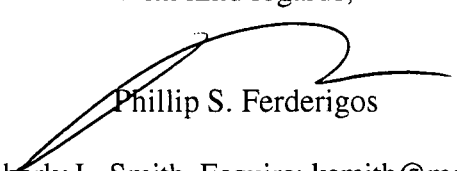
Dear Mr. Shearouse:

I am writing to request protection from court for a brief vacation from February 16 through 21, 2012, and a visit with family in Greece later in the summer from July 19 through August 17, 2012.

By copy of this letter, I am advising counsel of Record of my request.

Thank you for your assistance.

With kind regards,



Phillip S. Ferderigos

Cc via email: James H. Moss, Esquire, Kimberly L. Smith, Esquire: ksmith@mossandkuhn.com
Edward K. Pritchard, III, Esquire: epritchard@pritchard-elliott.com
H. Michael Bowers, Esquire, Laura Evans, Esquire: mike.bowers@smithmoorelaw.com
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PSF/bbm

{Client
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December 30, 2011

RECEIVED

JAN - 4 2012

S.C. Supreme Court
p m 12-30-12

Ms. Brenda F. Shealy
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *Amy Davidson v. City of Beaufort, Branch Banking and Trust of S.C. Collins Engineers, Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC*
Civil Action No.: 2006-CP-07-2682
Phillip Davidson v. City of Beaufort, Branch Banking and Trust of S.C., Collins Engineers, Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC
Civil Action No.: 2006-CP-07-2683

Dear Ms. Shealy:

Enclosed please find the original and seven (7) copies of Respondent, Brantley Construction Company, Inc.'s, SECOND Amended Return to Petition for Certiorari. Please file the original with the Court and return one of the copies to me in the envelope provided.

By copy of this letter, I am serving this document upon all counsel of record. If you have any questions, please do not hesitate to contact me. Thanking you in advance for your assistance in this regard, I remain

Sincerely,



Shene Wernham
Legal Assistant to R. Patrick Flynn and
Robert J. Cardillo

/sw

Enclosures

cc (w/enc.): James H. Moss, Esquire
H. Michael Bowers, Esquire
William B. Harvey III, Esquire
M. Dawes Cook, Jr., Esquire
Edward K. Pritchard III, Esquire
Mary Boss Lohr, Esquire

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December 22, 2011

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

JAN 08 2012

S.C. SUPREME COURT
pm 12-28-11

RE: Amy Davidson and Phillip Davidson v. City of Beaufort, et al.
Case Tracking Number 2011-199428
Case Nos. 2006-CP-07-2682 and 2006-CP-07-2683
Our File No. 3031.002

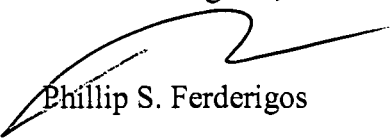
Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Respondent Tidal Wave 23, LLC's Revised Return to Petition for Certiorari. Also enclosed are the original and seven copies of the Proof of Service. Please file the original and six copies of each and return one clocked copy of each to me in the envelope I have provided herein.

By copy of this letter, and pursuant to the Proof of Service, I am serving counsel of Record with copies of the same.

Thank you for your assistance.

With kind regards,


Phillip S. Ferderigos

Enc.

Cc w/enc.: James H. Moss, Esquire, Kimberly L. Smith, Esquire
Edward K. Pritchard, III, Esquire
H. Michael Bowers, Esquire, Laura Evans, Esquire
R. Patrick Flynn, Esquire, Robert J. Cardillo, Esquire

PSF/bbm

{Client
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John A. Jones

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Barbara J. Wagner, Ph.D.

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SMITH MOORE LEATHERWOOD

December 29, 2011

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DEC 30 2011

VIA FEDERAL EXPRESS

The Honorable Daniel E. Shearouse
South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

S.C. Supreme Court

*pm 12-29-11
FedEx*

Re: Amy Davidson and Phillip Davidson v. City of Beaufort, Branch Banking &
Trust of South Carolina, Collins Engineers, Inc., Brantley Construction
Company, Inc., and Tidal Wave 23, LLC
Case No.: 06-CP-07-2682/2683
Client-Matter No. 05004890.11

Dear Mr. Shearouse:

Please find enclosed the original and six (6) copies of Respondent Collins Engineers, Inc.'s Amended Return to Petition for Writ of Certiorari in the above-referenced matter.

By copy of this letter, I am serving a copy of same upon all attorneys of record.

With kindest regards, I am

Sincerely,
SMITH MOORE LEATHERWOOD LLP



Laura J. Evans

LJE/cbn

Enclosures

cc: Robert J. Cardillo, Esquire
H. Fred Kuhn, Jr., Esquire
Phillip Ferderigos, Esquire

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*ALSO MEMBER OF GA BAR

November 30, 2011

RECEIVED

DEC 2 2011

S.C. SUPREME COURT

pm 11-30-11

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Amy Davidson v. City of Beaufort, Branch Banking & Trust of South Carolina, Collins
Engineering, Inc., Brantley Construction Company, Inc. and Tidal Wave, 23
Case No.: 2006-CP-07-2682

Philip Davidson v. City of Beaufort, Branch Banking & Trust of South Carolina, Collins
Engineering, Inc., Brantley Construction Company, Inc. and Tidal Wave, 23
Case No.: 2006-CP-07-2682

Dear Mr. Shearouse:

Enclosed please find the original and three (3) copies of the Supplemental Appendix to Petition for Writ of Certiorari and Certificate of Service. Please file the original and copies and return one (1) clocked copy to me in the enclosed envelope.

By copy of this letter and the enclosures, I am serving all counsel of record with a copy of the same.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.

H. Fred Kuhn, Jr.

HFKjr:sr
Enclosures

cc: H. Michael Bowers, Esquire
Laura J. Evans, Esquire
R. Patrick Flynn, Esquire
Edward K. Pritchard, III, Esquire
Mary Bass Lohr, Esquire
William B. Harvey, III, Esquire
M. Dawes Cook, Jr., Esquire
Philip S. Ferderigos, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

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November 16, 2011

Dawes Cooke, Jr., Esquire
Phillip S. Ferderigos, Esquire
Barnwell Whaley Patterson
& Helms, LLC
P O Drawer H
Charleston, SC 29402

Re: Davidson, Amy v. City of Beaufort
Davidson, Phillip v. City of Beaufort

Dear Counsel:

The following Order has been endorsed on the Respondents' Joint Motion to Supplement Returns and Appendix in the above entitled case on appeal.

"Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

November 16, 2011."

Please be advised that the amended returns and supplemental appendix will be due 15 days from the date of this letter.

Davidson, Amy v. City of Beaufort
Davidson, Phillip v. City of Beaufort
Page Two
November 16, 2011

Very truly yours,

Daniel E. Shearman
65

CLERK

DES/lda

cc: H. Fred Kuhn, Jr., Esquire
James H. Moss, Esquire
H. Michael Bowers, Esquire
Laura J. Evans, Esquire
R. Patrick Flynn, Esquire
Edward K. Pritchard, III, Esquire
Mary Bass Lohr, Esquire
William B. Harvey, III, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 19 2011

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

S.C. Supreme Court

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.

**RESPONDENT TIDAL WAVE 23, LLC'S RETURN TO PETITION FOR
CERTIORARI**

BARNWELL WHALEY
PATTERSON & HELMS, LLC
M. Dawes Cooke, Jr.
Phillip S. Ferderigos
P.O. Drawer H
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577-7700
Counsel for Tidal Wave 23, LLC

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JURISDICTIONAL CHALLENGE AND
COUNTERSTATEMENT OF QUESTIONS PRESENTED

- I. DOES THE SUPREME COURT HAVE 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 WHERE THE COURT OF APPEALS IMPROPERLY RECALLED THE REMITTITUR?
- II. DID THE TRIAL JUDGE ERR IN HEARING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WHERE PETITIONERS (1) FAILED TO PUT FORTH ANY EVIDENCE TO CREATE A GENUINE ISSUE OF FACT AFTER OVER A YEAR AND A HALF OF DISCOVERY, (2) WERE DILATORY IN SEEKING DISCOVERY, (3) HAVE MADE NO SHOWING THAT FURTHER DISCOVERY WOULD UNCOVER ANY EVIDENCE THAT WOULD HAVE DEFEATED SUMMARY JUDGMENT AND (4) AFTER PETITIONERS ADMITTED DISPOSITIVE FACTS ENTITLING RESPONDENT TIDAL WAVE TO SUMMARY JUDGMENT?
- III. DID THE TRIAL JUDGE CORRECTLY GRANT RESPONDENT TIDAL WAVE SUMMARY JUDGMENT UNDER SOUTH CAROLINA LAW WHERE A COMMERCIAL LANDLORD OWES NO DUTY TO PROVIDE SECURITY IN OR AROUND LEASED PREMISES TO IMPUTED LICENSEES OR TRESPASSERS?
- IV. DID THE TRIAL JUDGE CORRECTLY GRANT RESPONDENT TIDAL WAVE SUMMARY JUDGMENT WHERE PETITIONERS FAILED TO PUT FORTH ANY EVIDENCE TO CREATE AN ISSUE OF FACT AGAINST RESPONDENT'S MOTION AND MERELY RELIED ON THE ALLEGATIONS IN THE PETITIONERS' COMPLAINTS, ARGUMENTS OF COUNSEL AND RAMPANT SPECULATION?

STATEMENT OF THE CASE

Petitioners filed the lawsuits at issue on October 23, 2006 alleging negligence claims against the City of Beaufort, Branch Banking and Trust of South Carolina (hereinafter "BB&T"), Collins Engineering, Inc. (hereinafter "Collins"), Brantley Construction Company, Inc. (hereinafter "Brantley"), and Tidal Wave 23, LLC (hereinafter "Tidal Wave") in connection with a criminal abduction and assault incident

on May 26, 2006 involving the Petitioners and third party criminal assailants (R. pp. 36-44; 90-108; 113-119). On December 14, 2006, Respondent Tidal Wave filed its initial Motion to Dismiss pursuant to Rule 12(b)(6), SCRCPP concerning the legal classification of the Petitioners given the factual allegations asserted in the Petitioners' Complaint (R. pp. 314-325). On May 8, 2007, the court heard Respondent Tidal Wave's initial 12(b)(6) motion, and, on May 24, 2007, the court denied Respondent Tidal Wave's Motion to allow the parties to conduct discovery (R. pp. 34-35). As discovery proceeded from May, 2007 to August 2007, Petitioners admitted key dispositive facts via Respondent Tidal Wave's Request to Admit (dated June 13, 2007), and, based on such admissions, Respondent Tidal Wave filed its Motion for Summary Judgment on July 31, 2007.¹

On August 10, 2007 (ten months after proceeding with discovery between the parties, but before the court had scheduled a time for Respondents previously filed motions for summary judgment to be heard), and by consent of the parties, the court entered an Order protecting the release of the criminal files from the solicitor's office and protecting the case from trial, i.e. the Order explicitly set forth that these cases were not subject to trial until the resolution of the underlying criminal matter against the alleged criminal assailants (R. pp. 31-33). However, although the case was protected from trial, the parties were to conduct discovery and take depositions, and the court inherently reserved the right to consider any dispositive or discovery motions that might arise between the parties. Indeed, as Judge Mullen later noted, nothing in the Order divested the court of jurisdiction to entertain dispositive motions.²

¹ Similarly, Respondents Brantley and Collins also filed their respective motions for summary judgments.

² As described more fully below, on March 26, 2008, the court issued an Order Clarifying Order of Stay

From July 31, 2007 (Respondent Tidal Wave's motion for summary judgment filing date) until January 31, 2008 (Respondent Tidal Wave's hearing date for its motion for summary judgment), an additional period of six months, Petitioners did not contact, request or demand this Respondent to provide any further discovery (including any depositions) on behalf of or from this Respondent. Petitioners did not notice the deposition of Respondent Tidal Wave's representative or any of Tidal Wave's witnesses (at any time). During such time, however, Petitioners conducted several depositions of representatives from the City of Beaufort and Brantley in October 2007 (R. pp. 481-674). Further, during such time, Petitioners did not respond to Respondent Tidal Wave's Request to Admit. Moreover, in response to Respondent Tidal Wave's Motion for Summary Judgment, Petitioners submitted their Memorandum in Opposition to Respondent Tidal Wave's Motion for Summary Judgment prior to the hearing (R. pp. 309-313), but Petitioners did not submit any affidavits or other material in support of their position against Respondent Tidal Wave.

Meanwhile, after Respondents Tidal Wave, Brantley and Collins filed their respective motions, Judge Mullen transferred the motions to be decided to the Master-in-Equity and Special Circuit Judge Dukes. No party objected to the referral. Judge Dukes held a hearing where Petitioners and Respondents made their respective arguments in January 2008. Respondent Tidal Wave had submitted its Motion for Summary Judgment based upon the admissions by the Appellants (R. pp. 304-308; 183-194), and, on January 31, 2008, the court heard Respondent Tidal Wave's Motion (R. pp. 3-25; 394-435). At the hearing, Petitioners admitted Respondent Tidal Wave's Requests to Admit.

After the January 31, 2008 hearing, Judge Dukes advised the parties that, after considering the merits of the case, he would grant summary judgment to Respondents and he advised Respondents to prepare a proposed Order granting Respondent Tidal Wave summary judgment. However, surprisingly, Judge Dukes issued his March 7, 2008 Order Denying Respondents' summary judgment motions on the basis that the previously filed August 10, 2007 Order divested the court of jurisdiction to issue a decision (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 Respondents' Notice of Motion and Motion to Alter, Amend and/or Clarify Previous Order of Stay (R. pp. 175-182). Respondents' joint motions were granted, and, on March 26, 2008, Judge Mullen issued the court's "Order Clarifying Order of Stay filed August 10, 2007" (R. pp. 26-27), wherein she stated:

"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. (Emphasis Added). (R. pp. 26-27).

After considering the Respondents' motions and Respondents' and Petitioners'

dispositive motions during the pendency of the stay (R. pp. 26-27).

memoranda, and after receiving Judge Mullen's clarifying order, on April 7, 2008, Judge Dukes issued an Order Granting Respondent Tidal Wave's Summary Judgment motion pursuant to Rule 56, SCRCR (R. pp. 3-25). Thereafter, Petitioners moved for reconsideration and, on August 27, 2008, the court entered an Order Denying Petitioner's Motion to Alter or Amend (R. pp. 1-3). Petitioners subsequently 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 Respondent Tidal Wave via its May 3, 2010 Order (Unpublished No. 2011-UP-199). The Opinion of the Court of Appeals was issued and was sent to all counsel of record on May 3, 2010. (See Letter from Renee Johnson, Administrative Specialist, to Petitioners' counsel dated May 3, 2011, attached as Exhibit 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.³ On May 19, 2011, having not received a Petition for Rehearing, the Court issued its Remittitur to the lower court. (See Letter from Clerk to lower court dated May 19, 2011, attached as Exhibit 2.) 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. (See Letter from Clerk to Petitioners' counsel dated May 20, 2011, attached as Exhibit 3.) On May 25, 2011, Petitioners filed a Motion to Recall Remittitur and

³ Petitioners conceded that their Petition for Rehearing deadline was May 18, 2011 in their Motion to Recall the Remittitur filed with the Court of Appeals.

Accept Motion for Rehearing for Filing (See Petitioner's Motion, attached as Exhibit 4). 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. (See Letter from Clerk to Petitioners' Counsel, attached as Exhibit 5). On June 28, 2011, Respondents filed their Joint Motion/Petition for Reconsideration and Motion to Dismiss for Lack of Jurisdiction (See Joint Motion, attached as Exhibit 6). While the joint motion was still pending, Petitioners filed their Motion for Rehearing on or after July 7, 2011. (See Motion for Rehearing, attached as Exhibit 7).⁴ The Court of Appeals denied Respondents' June 28, 2011 Joint Motion and issued an Order denying Petitioners' Petition for Rehearing on August 24, 2011. (See Order, attached as Exhibit 8). The Petition for Writ of Certiorari was filed on or after September 15, 2011.

STATEMENT OF FACTS

At all times relevant hereto, BB&T operated at 706 Bay Street, in the waterfront area in Beaufort, South Carolina. Respondent Tidal Wave is the owner/commercial landlord of that property. A parking lot and 24-hour Automated Teller Machine were located between the BB&T bank and the Henry C. James Waterfront Park. Saltus Riverfront Bar and Grill ("Saltus") is a local establishment located at 820 Bay Street.

According to the Complaints, on May 26, 2006, the Petitioners parked in the subject parking lot at 706 Bay Street and went to Saltus to visit individuals and friends. (R. pp. 36-44; 97-107). When Petitioners left Saltus and returned to their car later that night at approximately 1:00 a.m., two men attacked, car jacked, abducted, and robbed

⁴ 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 in her June 16, 2011 correspondence.

them, and also sexually assaulted Petitioner Amy Davidson. (R. pp. 36-44; 97-107).

The Complaints do not allege that Petitioners were in the subject parking lot to conduct any business, either directly or indirectly, with BB&T or Respondent Tidal Wave; rather, the Complaints allege 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 in Respondent Tidal Wave's May 8, 2007 initial motion to dismiss hearing (R. pp. 436-480), as well as in the January 31, 2008 summary judgment hearing (R. pp. 394-435), Petitioners parked in a space marked "For BB&T Customers Only," despite the "No Parking" sign at the entrance of the subject bank parking lot.⁵

Respondent Tidal Wave served its Request to Admit on Petitioners on June 13, 2007 (R. pp. 365-368). Petitioners failed to timely respond to Respondent Tidal Wave's Request to Admit, and Petitioners' counsel acknowledged that the failure to timely respond to the Requests resulted in an admission by Petitioners. Moreover, Petitioners did not seek or request leave from the court to respond to the admissions, but rather, admitted the facts as alleged in Respondent Tidal Wave's Request to Admit at the January 31, 2008 hearing (R. pp. 394-435). Pursuant to Rule 36, SCRCp, Respondent Tidal Wave's Requests to Admit were conclusively deemed admitted.

Further, at the January 31, 2008 hearing, Petitioners' counsel conceded that, despite the fact that this case had been pending for over a year, Petitioners were unable to produce an Affidavit or any evidence to contradict the factual assertions contained in Respondent Tidal Wave's Request to Admit. Moreover, the Petitioners proffered no

⁵ Petitioners further alleged the existence of a "public parking" sign pointing into the BB&T parking lot. However, Petitioners admitted that these signs (which indicated "public parking") were City of Beaufort signs in reference to the City's property (R. pp. 365-368).

evidence in response to Respondent Tidal Wave's motion for summary judgment, other than citing Respondent Tidal Wave's and BB&T Responses to Petitioners' Request to Admit and referencing several photographs that were presented by Petitioners' counsel at the initial May 8, 2007 hearing concerning Respondent Tidal Wave's motion to dismiss (R. pp. 436-480).⁶

Pursuant to Respondent Tidal Wave's Request to Admit, Petitioners have admitted the following:

(1) Petitioners' presence at the BB&T parking lot on the date of the incident, May 26, 2006 did not confer any benefit on the commercial landlord Respondent Tidal Wave 23, LLC or the commercial tenant BB&T;

(2) Petitioners neither used nor intended to use BB&T's ATM at 706 Bay Street, Beaufort, SC on the date of loss of May 26, 2006;

(3) Petitioners were not customers of and did not conduct business with the commercial landlord Respondent Tidal Wave 23, LLC on May 26, 2006, and Petitioners were not customers of and were not transacting business with BB&T on May 26, 2006 at 706 Bay Street, Beaufort, SC;

(4) Moreover, the "public parking" signs referred to in Petitioners' Complaint were the property of the City of Beaufort and were located on the City of Beaufort's real property on the date of the incident, May 26, 2006, and the "public parking" signs referred to in Petitioners' Complaint were not the property of Respondent Tidal Wave 23, LLC or BB&T and were not located on the real property of Respondent Tidal Wave 23, LLC or BB&T;

(5) Finally, Petitioners admitted that the Respondent Tidal Wave 23, LLC property had a "No Parking" sign at the entrance of Respondent Tidal Wave's parking lot upon entering the parking lot from Carteret Street; the Petitioners parked in BB&T's parking space that was marked "For BB&T customers only"; the BB&T's parking lot space that the Petitioners parked in was held open to the public for BB&T customers only; and that Petitioners parked in the BB&T parking lot in order to go have dinner and drinks at the Saltus restaurant (R. pp. 365-368).

⁶As noted by the Court of Appeals, Petitioners failed to submit those photographs at the hearing and further failed to include such photographs in the Record on Appeal. Moreover, even if the photographs had been properly included in the Record on Appeal, the photographs are irrelevant to the appealed issues in this present appeal.

ARGUMENTS

I. THE SUPREME COURT LACKS 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

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.⁷ South Carolina law, however, allows for a recall of the remittitur in extremely unusual and limited circumstances of mistake, error or inadvertence of the Appellate Court itself. SCAC Rule 221 and 240 set forth the following:

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... 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

⁷ The actual timely receipt of the Petition for Rehearing by the Court of Appeals is a jurisdictional requirement. There is no discretion as the Petition for Rehearing must be received timely in order for the Court of Appeals to maintain jurisdiction.

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). 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.

In so holding, this Court relied upon well established precedent that, when the remittitur has been properly sent, an appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter; the only limited and unusual exception to this rule is when the remittitur is sent down by mistake, error, or inadvertence of the court itself.⁸

This Court's decision in Wise is binding here. There is no evidence of any mistake, error or inadvertence by the Court of Appeals or its staff. To the contrary, the

⁸ In setting forth the general rule and its limited exception, this Court relied and reaffirmed well established 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"), 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). As such, South Carolina law requires that the unusual power of recalling a remittitur is only available in the limited circumstances of a very strong showing of a mistake, error, or inadvertence by the appellate court itself.

Record sets forth that the Clerk simply did not receive Petitioners' Motion/Petition until May 19th. The only "mistake" in the Record is on behalf of the Petitioners who decided to mail their Motion/Petition for Rehearing on May 13th, hoping that the Court of Appeals would actually receive the Motion/Petition for Rehearing by the mandatory jurisdictional deadline of May 18th. Unfortunately for the Petitioners, the U.S. Postal Service apparently took one more day than they expected, and the Motion/Petition was received by the Court of Appeals a day late, after the mandatory jurisdictional deadline. There is simply no evidence in the Record to support a recall of the remittitur in this case; to the contrary, the Clerk's letters attached as Exhibit 2 and 3 establish that the Court of Appeals did not receive the Motion/Petition for Rehearing until May 19th, one day after the jurisdictionally required due date and, accordingly, the Motion was received late. No reason exists, other than Petitioners' own negligence, to recall the remittitur. As a matter of law, however, Petitioners' own negligence is not a sufficient reason to recall the remittitur.⁹

Here, Petitioners admit that they merely mailed their Motion for Rehearing on May 13, 2011 and *assumed* that the Clerk would receive the Motion on time. With no evidence, Petitioners imply that the Clerk "waylaid or misplaced" the Motion "for some unknown reason." Petitioners ignore or fail to consider the obvious – perhaps it took the U.S. Postal Service six days to deliver the mail from Beaufort to Columbia. Petitioners' unsavory

⁹ In their Motion, Petitioners acknowledge that the Motion for Rehearing was required to have been actually received by the Appellate Court no later than May 18th. Petitioners admit that they merely deposited the Petitioners' Motion for Rehearing in the United States Mail, first class, postage paid, properly addressed to the South Carolina Court of Appeals on May 13, 2011. Petitioners did not Federal Express or UPS the Petition. Petitioners did not hand deliver the Petition. Rather, Petitioners chose to rely on the U.S. Postal Service to ensure the Petition would be timely received by the Court of Appeals based on Petitioners' erroneous assumption that the Petition would be delivered from Beaufort County to the Court of Appeals in

assertion that the Clerk “waylaid or misplaced” or failed to stamp the Petition is pure conjecture. Indeed, the Record is contrary to and refutes Petitioners’ fanciful assumptions.

Here, the Clerk did not make any mistake, and the Petitioners’ Motion for Rehearing was in fact received by the Appellate Court on May 19th, as indicated via Exhibit 2 and Exhibit 3. Respondents recognize Petitioners’ failure is a fatal error to this appeal. However, Petitioner’s failure in this matter is certainly more egregious than the petitioner in Wise (who at least ensured that his petition was received within the 15 days as mandated by the rules). In this case, as a matter of law, Petitioners failed to establish the threshold requirement to avail itself to their reconsideration request with the Court of Appeals or for the availability of this current petition to this Honorable Court. Respondents also recognize 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.)

Similarly, here, Respondent Tidal Wave respectfully asserts that the due and orderly

administration of law and procedure prescribed by the statutes and rules of this Court require that the Court deny the Petitioners' petition on jurisdictional grounds alone and to dismiss this present appeal accordingly.

II. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN HEARING RESPONDENT TIDAL WAVE'S MOTION FOR SUMMARY JUDGMENT WHERE PETITIONERS (1) CONDUCTED DISCOVERY FOR OVER A YEAR AND A HALF, (2) WERE DILATORY IN SEEKING DISCOVERY, (3) MADE NO SHOWING THAT FURTHER DISCOVERY WOULD UNCOVER ANY EVIDENCE DEFEATING SUMMARY JUDGMENT, AND (4) ADMITTED DISPOSITIVE FACTS ENTITLING RESPONDENT TIDAL WAVE TO SUMMARY JUDGMENT

Petitioners' initial argument affects all Respondents as it concerns Petitioners' assertion that the Court of Appeal incorrectly affirmed the grant of summary judgment to Respondents because they did not have an opportunity to complete discovery. The newest reiteration of this argument now blames Petitioners' failure to properly contest the summary judgment motions on the court and an alleged (yet unsubstantiated) "non-cooperation" of Respondents in scheduling and taking depositions. Petitioners arguments are without merit. Throughout the appeals process, Petitioners have sought to wrongfully shift blame for their failure to conduct discovery to the Respondents and now on the court -- Petitioners raised such arguments previously, and the Court of Appeals summarily rejected these arguments. Nevertheless, Petitioners assert that the Court of Appeals "misapprehended or overlooked" that the Petitioners were "ambushed" by Judge Mullen and Judge Dukes and by an alleged "non-cooperation" of Respondents.

As indicated by Judge Mullen in her March 26, 2008 Order, Petitioners continue to ignore that Judge Mullen's prior August 10, 2007 Order of Stay clearly set forth: "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.” 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) they desired to take. Likewise, Petitioners were free to submit any Affidavit by the Petitioners on their behalf or take their own depositions, yet they failed to do so. After Judge Mullen’s August 10th Order, Petitioners continued to be able to take any deposition they wanted to either of themselves, or the Respondents or other witnesses. The only thing that they could not do was force the disclosure of the solicitor’s criminal file or try the case until the criminal file was released. Further, from the time Respondent Tidal Wave filed its motion for summary judgment on July 31, 2007 until the summary judgment hearing on January 31, 2008, Petitioners were free to notice any depositions Petitioners wished to take of the Respondents and Petitioners were free to submit any Affidavits on their own behalf and, yet, Petitioners failed to do so. They were free to conduct any discovery they wished absent production of the criminal file, and yet they again failed to do so.¹⁰

Nearly a year and one half after the institution of the underlying action and after three distinct orders allowing discovery to continue, after failing to conduct even the barest minimum of discovery and after failing to respond to Respondent Tidal Wave’s requests to admit, Petitioners appeared in front of Judge Dukes with no affidavits in opposition to

¹⁰ Petitioners had over a year and one-half in order to depose a Respondent Tidal Wave representative, if they desired to do so. The fact that Petitioners failed to set a deposition, request a deposition, or file a Motion to Compel any deposition of Respondent Tidal Wave reflects a strategic decision on the part of Petitioners not to take a Respondent Tidal Wave’s representative’s deposition. Certainly, after Respondent Tidal Wave served its Request to Admit or even after Respondent Tidal Wave filed its motion for summary judgment, Petitioners were free to request and notice the deposition of a Respondent Tidal Wave representative, but Petitioners failed to do so. Further, Petitioners were free to deny the factual allegations alleged in Respondent Tidal Wave’s Request to Admit (within the ethical constraints of Petitioners’ counsel). Regardless of the reason for Petitioners failure to take the deposition of a Respondent Tidal Wave representative or deny Respondent Tidal Wave’s Request to Admit, such failure is the responsibility of

Respondent Tidal Wave's motion. Instead, at the hearing, Petitioners' counsel conceded in Respondent Tidal Wave's Request to Admit, wherein Petitioners conceded to dispositive factual issues entitling Respondent Tidal Wave to summary judgment. Moreover, at the hearing, Petitioners' counsel did not submit any affidavit of the Petitioners, nor ask for leave of the Court to file any such affidavit; rather, Petitioners' counsel merely argued that it was premature for the Court to issue a decision as the Petitioners wanted to take other unspecified depositions, depositions which, admittedly, had nothing to do with the dispositive legal issues before the court. Finally, as noted by the Court of Appeals, Petitioners also failed to submit an Affidavit in accordance with the Rules of Civil Procedure setting forth what discovery they might be able to take which would somehow alter the dispositive admissions conceded by the Petitioners.¹¹

At the hearing and throughout the appeal of this case, Petitioners, on the one hand, assert that the Order of Stay prevented them from taking the needed discovery depositions while, on the other hand, they admit that the discovery Petitioners allegedly sought is irrelevant in light of the Petitioners' admissions via Respondent Tidal Wave's Request to Admit. In other words, to this day, Petitioners have been unable to articulate what discovery depositions they were prevented from taking which would lead to any evidence to create an issue of fact given the dispositive admissions conceded by the Petitioners.

Petitioners, not Respondent Tidal Wave.

¹¹Petitioners' counsel asserts it did not submit an Affidavit because Petitioners had "something better" than an Affidavit, i.e., an agreement/stipulation by the parties, concurred with by Judge Mullen; however, Petitioners purposely misconstrue Judge Mullen's Order and disregard the fact that the Order indicated that discovery shall progress without the disclosure of the subject criminal file. As Petitioners were free to take any depositions concerning the dispositive and relevant issues of the case at any time (both before and after Judge Mullen's Order), Petitioners' failure to do so rests squarely with the Petitioners, not the Respondents, and certainly not the Court. Further, as the March 26, 2008 Order Clarifying Order of Stay filed August 10, 2007 indicates, no party, including the Petitioners, objected to the hearing scheduled for Respondents' motions prior to the hearing date (R. pp. 26-27).

For example, Petitioners argue that discovery had not yet been completed on two issues: (1) who controlled the parking lot and was responsible for seeing that it was lit at night, and (2) discovery had not yet been completed related to the status of Petitioners. In light of Petitioners' admissions, however, both "issues" are, and continue to be, irrelevant given Petitioners' binding admissions. Further, Petitioners continue to raise and actually quote "arguments of counsel" as a defense to the Respondent Tidal Wave's motion for summary judgment, but Petitioners are unable to explain their own failure to merely put forth their own affidavits in the Record or to take any discovery depositions of Respondent Tidal Wave or its witnesses.

Petitioners failed to respond to Respondent Tidal Wave's motion for summary judgment with any evidence, but rather chose to file a Memorandum in Opposition with no relevant evidence. Petitioners cannot credibly claim they did not believe the court would hear a summary judgment hearing when (1) the Petitioners filed a Memorandum opposing Respondent Tidal Wave's Motion and (2) Judge Mullen's March 26, 2008 Order contradicts Petitioners' claim. Moreover, Petitioners argued their case before the Judge Dukes at the January 31, 2008 hearing, and Petitioners are not entitled to a second oral argument as Petitioners' brief suggests.¹²

¹² South Carolina courts have long held that a party has no due process right to an opportunity to present oral argument where previous oral argument was allowed. In PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988), the Court of Appeals held that the trial court did not deny the defendant's due process rights by refusing to grant oral argument on its reconsideration of the previous plaintiff's motion for summary judgment. Specifically, the Court of Appeals held that the trial court did not violate the defendant's due process rights by not giving the defendant an opportunity to present oral argument on the court's decision to reconsider its earlier denial of plaintiff's motion for summary judgment, where oral argument was previously allowed. On appeal, the defendant argued that the court violated his due process rights by not giving him an opportunity to be heard based on the court's reconsideration of the previous denial of the plaintiff's motion for summary judgment. Without any notice to the defendant, the trial court summarily reversed itself, reversing its previous denial of plaintiff's motion for summary judgment, and then granted the plaintiff's summary judgment motion.

Finally, Petitioners continue to allege a “non-cooperation of Respondents” whereas the Record proves otherwise. Petitioners took four depositions that Petitioners noticed throughout the period of time that they allege they were prohibited from taking depositions. In addition, Petitioners never inquired about taking Respondent Tidal Wave representative’s deposition at all. No evidence in the Record supports that Respondent Tidal Wave did not cooperate with Plaintiffs’ discovery requests, nor does the Record reveal any Motion to Compel any discovery or any deposition at all.

Under South Carolina law, 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

The Court of Appeals found that, because the defendant did have an opportunity to make an oral argument initially when the court denied the plaintiff’s motion for summary judgment, the defendant was not entitled to a second oral argument to argue against the Court’s reversal of its previous decision. The Court of Appeals stated: “Under the circumstances of this case, where oral argument was previously allowed, we find no merit to this contention.” PPG Industries, Inc. at 184. (emphasis added). Here, Petitioners already had an opportunity to be heard and to present oral arguments at the January 31, 2008 hearing. Once the Petitioners made their arguments at the hearing, Petitioners were no longer entitled to any additional opportunity to make additional arguments, or to have a “second bite at the apple.”

complacency.” Id. at 705 (citing Southern Ramble Sales, Inc. v. American Motors Corp., 375 F.2d 932, 937 (5th Cir. 1967)). 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).

Petitioners here had ample opportunity to conduct the discovery to defend Respondent Tidal Wave’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’ ruling.¹³ Rather, Petitioners chose to rely on arguments of counsel to oppose the summary judgment motion and, similarly, in this present appeal, Petitioners’ claims rely on their baseless allegations, speculative arguments of counsel, and rampant speculation, not any evidence in the Record. Moreover, Petitioners have been unable to demonstrate any likelihood that further discovery will uncover any relevant evidence in light of Petitioners’ admissions.

¹³ Petitioners were free to take any and all depositions they wanted to take concerning the liability issues involved in this case. Petitioners chose to proceed with the depositions of the City of Beaufort and Respondent Brantley representatives/employees. Petitioners were free to take any other depositions that they desired. No discovery concerning the legal classification/status of the Petitioners was subject to any stay and the Petitioners were certainly free to depose themselves, or, as is more customary, submit their own Affidavits in opposition to Respondent Tidal Wave’s motion. Petitioners failed to do so. Indeed, Petitioners’ argument that they were road blocked from taking any discovery or sand bagged by the Court unravel when the Court merely considers that the Petitioners (1) failed to submit their own Affidavits in support of their claims within the year and one-half that this matter proceeded in circuit court and (2) filed a Memorandum (with no Affidavits or supporting evidence) opposing Respondent Tidal Wave’s motion.

III. THE TRIAL JUDGE DID NOT ERR IN GRANTING RESPONDENT TIDAL WAVE'S MOTION FOR SUMMARY JUDGMENT BASED ON PETITIONERS' ADMISSIONS WHEREIN, AS A MATTER OF LAW, PETITIONERS AT MOST WERE IMPUTED LICENSEES OR TRESPASSERS (NOT INVITEES) AND WHEREIN A COMMERCIAL LANDLORD OWES NO DUTY TO PROVIDE SECURITY IN OR AROUND LEASED PREMISES TO LICENSEES OR TRESPASSERS CONCERNING A THIRD PARTIES' CRIMINAL ACTIVITIES

Respondent Tidal Wave asserts an example set forth in the Restatement as illustrative of the key legal issue in this case. Specifically, Restatement Number 332, Illustration Number Two, sets forth the following example:

“The City of X maintains a free public library for the use of anyone in the community. A comes to the library to read a book. A is an invitee, but if A enters to meet a friend or merely to get out of the rain, A is not an invitee.”

Restatement (Second) of Torts § 332 illus. 2 (1965).

Per the facts as alleged in the Petitioners' Complaint and admitted to via Respondent Tidal Wave's Request to Admit, Petitioners parked in the subject parking lot to go to the neighboring restaurant Saltus to visit individuals and friends. Petitioners further admitted that the subject parking lot was open to the public for BB&T customers only. Petitioners did not allege that they parked in the subject parking lot for the benefit of Tidal Wave or BB&T. Petitioners did not allege that they used or even intended to use the BB&T ATM on the date on the incident. To the contrary, Petitioners' factual allegations and admissions establish that Petitioners were on the property for their own benefit, i.e., to visit a neighboring restaurant, which precludes a classification of Petitioners as invitees.

In South Carolina, a public invitee must be invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public; also, a business visitor is a person who is invited to enter or remain on land for a purpose directly

or indirectly connected with business dealings with the possessor of the land. (App. Br., p. 7). Based on the Petitioners' Request to Admit admissions, Petitioners admitted before the court that: (1) the subject parking lot was a bank parking lot and was open to the public for BB&T customers only and Petitioners ignored the "No Parking" sign and parked in the parking space "for BB&T customers only" and (2) Petitioners did not park in the subject parking lot to do any business whatsoever, directly or indirectly, with the commercial tenant BB&T or the commercial landlord Tidal Wave.

Moreover, Petitioners have tacitly conceded that the legal classification of Petitioners as imputed licensees or trespassers is fatal. Petitioners have argued that they were invitees and have never alleged, argued or briefed that this Respondent would owe them a duty to protect them from intentional criminal activities from third parties if Petitioners were classified as imputed licensees or trespassers. Nevertheless, even if Petitioners had raised or preserved such a legal argument at any point, such argument would have been meritless as well settled law in South Carolina establishes the traditional rule that landlords are not liable for criminal activities of third parties to trespassers or licensees.¹⁴

¹⁴ 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). Moreover, 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. Finally, 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 patrol 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

Likewise, Petitioners continue to focus on immaterial issues of fact to attempt to create an issue of fact. Petitioners assert two such “issues” they claim need additional discovery. First, the issue of “who controlled the parking lot and was responsible for seeing that it was lit at night” is irrelevant given the Petitioners’ admissions as to why Petitioners were at the BB&T parking lot. Similarly, which entity installed a light pole in the parking lot four days after the assault of Petitioners is irrelevant.¹⁵ Moreover, Petitioners failed to proffer any evidence of insufficient lighting of the subject property on the date of the incident as alleged in the Petitioners’ Complaint. Likewise, Petitioner’s failed to proffer any evidence that either Respondent Tidal Wave or BB&T was on notice or had any actual knowledge of any alleged inadequate lighting or of any previous alleged criminal activity on the subject property.

Further, as for Petitioners’ self-described “second” issue, Petitioners again rely on Petitioners argument to the Court, not any evidence in the Record. Indeed, Petitioners’ arguments are contrary to the facts admitted by the Petitioners via Respondent Tidal Wave’s Request to Admit. No further discovery is needed concerning the Petitioners’ legal classification because the Petitioners admitted dispositive facts determining Petitioners’ classification as trespassers or, at best to Petitioners, imputed licensees. As such, BB&T’s counsel’s question to the City’s representative Mr. Taylor indicating that the public parking sign was near the BB&T parking lot is irrelevant in light of Petitioners’ admissions to Tidal

hinted that a duty to protect from foreseeable criminal acts might exist only if the plaintiff is an invitee and only if the area was under control of the commercial landlord.

¹⁵ Although Petitioners’ self-described “first” issue is irrelevant, Petitioners assert that such issues are representative of what discovery Petitioners were prevented from doing and what discovery the Petitioners would like to complete. However, discovery related to which entity had control of the parking lot and who put the light pole in the parking lot after the incident had nothing to do with the criminal file and were clearly not stayed under Judge Mullen’s Order of Stay. Regardless, Petitioners’ self-described “first” issue

Wave's Request to Admit. Likewise, Mr. White's testimony concerning an argument he had with the manager of Saltus about individuals knocking down an orange safety fence is also irrelevant in light of Petitioners' admissions to Respondent Tidal Wave's Request to Admit. Petitioners completely ignore their admissions wherein the Petitioners admitted that they parked in a parking space for BB&T customers only and that the parking space was held open for BB&T customers only. As Petitioners failed to respond to Respondent Tidal Wave's Request to Admit and otherwise admitted to the dispositive facts of the case before the court, Petitioners are bound by such admissions and their attempt to escape such admissions now is unavailing. Indeed, Petitioners counsel's argument that course of dealing and past custom raise an issue of fact concerning the purpose for which the parking lot was held open to the public (i.e. that the parking lot was held open *for the purpose of* free public parking at night) is expressly contrary to Petitioners admissions and is simply wild conjecture.¹⁶

Here, pursuant to the allegations of Petitioners' Complaints and the admissions of Petitioners (via Respondent's Tidal Wave's Requests to Admit) and the admissions of Petitioners' counsel at the January 31, 2008 motion for summary judgment hearing before the trial judge, Petitioners admitted that they parked in BB&T's parking lot in order to go to have dinner and drinks at a restaurant in downtown Beaufort. Accordingly, the reason why

is irrelevant in light of Petitioners' admissions.

¹⁶ Moreover, Petitioners' assertion that "clearly in a tort case which arises out of criminal activity, until discovery can be completed regarding the criminal activity, all other discovery is secondary" ignores the fact that Petitioners' admissions were fatal; only Petitioners themselves know why they were on the subject property, and Petitioners admitted that they parked in BB&T's parking lot to go to Saltus. Further, Petitioners admitted that the bank parking lot was open for the purpose of parking for BB&T customers only. Similarly, the activities of the criminals are irrelevant as to why Petitioners were on the subject parking lot or the purpose for which the bank parking lot was held open and, as such, the criminals' activities are immaterial in determining the legal classification/status of Petitioners as to the commercial landlord Tidal Wave. There is no amount of discovery that will change one dispositive fact – why the

Petitioners were in BB&T's parking lot (owned by the commercial landlord Tidal Wave) is known solely by Petitioners themselves, which was admitted to the court. Indeed, it is this key fact that determines the legal classification of Petitioners which, in turn, determines the lack of a duty of a commercial landlord to Petitioners. No "further inquiry" is needed concerning this dispositive fact and, moreover, the potential witnesses, the criminals themselves, or the investigating police officers would not have any knowledge concerning why Petitioners were on the subject property.¹⁷

Petitioners factually admitted that they were not invitees based on the facts admitted in Respondent Tidal Wave's Request to Admit. There is simply no proof or evidence in the Record that the BB&T parking lot was held open to the general public other than for BB&T customers. Petitioners admitted this fact in Respondent Tidal Wave's Request to Admit Nos. 11 and 12 (R. pp. 365-368). Petitioners' admissions belie Petitioners' unfounded assertion that the parking lot was held open for the purpose of free public parking at night or that Petitioners themselves perceived the parking lot to be open to the general public for free public parking at night. At no time did Petitioners submit Affidavits alleging that they believed that the BB&T parking lot was "open to the public" for the purpose of free public parking or, generally, that Petitioners perceived the parking lot to be available to the public for general public parking. To the contrary, Petitioners admitted that the BB&T parking lot (1) had a "no parking" sign (which Petitioners disregarded), (2) was open to the public for BB&T customers only, and (3) Petitioners parked in a parking space for BB&T customers only (R. pp. 365-368). It is not the Court's burden to review Petitioners' bold allegations

Petitioners were on the subject property.

¹⁷ Finally, Petitioners could certainly have provided an Affidavit or provided some evidence to create an issue of fact concerning Appellants' claimed legal status as invitees; to the contrary, Petitioners' admissions

and try to determine if a claim exists; rather, it is Petitioners' burden to put forth specific evidence in the Record to create an issue of fact. Petitioners failed to do so.

IV. THE TRIAL JUDGE DID NOT ERR IN GRANTING RESPONDENT TIDAL WAVE'S MOTION FOR SUMMARY JUDGMENT AS PETITIONERS FAILED TO PUT FORTH ANY EVIDENCE IN THE RECORD TO SUPPORT PETITIONERS' CLAIMS. PETITIONERS FAILED TO CREATE A GENUINE ISSUE OF MATERIAL FACT BETWEEN PETITIONERS AND RESPONDENT TIDAL WAVE AND PETITIONERS' MERE RELIANCE ON THE ALLEGATIONS OF THE COMPLAINT, ARGUMENTS OF COUNSEL AND SPECULATION DO NOT ENTITLE PETITIONERS TO SURVIVE SUMMARY JUDGMENT

Petitioners failed to respond to Respondent Tidal Wave's Motion for Summary Judgment with any evidence, but rather chose to file a Memorandum in Opposition with no evidence. Petitioners cannot claim they did not believe the Court would hear a summary judgment hearing when (1) Petitioners filed a Memorandum opposing Tidal Wave's Motion and (2) they did not file any motion to request a continuance of the hearing before hand and (3) Judge Mullen's March 26, 2008 Order contradicts Petitioners' claim. Moreover, Petitioners were not only able, but were required, to put forth an Affidavit (or some evidence) into the Record if Petitioners expected to survive to Respondent Tidal Wave's motion for summary judgment. The Rules require that Petitioners put forth some evidence and cannot merely rest on the conclusory allegations of the pleadings themselves or fanciful arguments of counsel or speculation. Accordingly, at any point in time, Petitioners were required to put forth an Affidavit or some evidence in support of their allegations against this Respondent (if they had any such evidence).¹⁸

to the court establish that Petitioners were not invitees.

¹⁸ If a "plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment" summary judgment is "required...if under the facts presented by defendant, he [is] entitled to judgment as a matter of law." Humana Hosp-Bayside v. Lightle, 305 S.C. 214, 407 S.E.2d 637 (1991); See Miller v. Blumenthal Mills, 365 S.C. 204, 616 S.E.2d 722 (Ct.

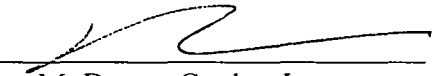
It is beyond dispute that the Petitioners had ample opportunity to provide affidavits in opposition to Respondent Tidal Wave's motion for summary judgment, but no such affidavits were submitted in response. Instead, Petitioners responded by resting on the allegations in their Complaints and on arguments by counsel for Petitioners which were factually unsupportable and an insufficient defense against a motion for summary judgment. Based on Petitioners failure to set forth any evidence against this Respondent in opposition to its motions for summary judgment, Respondent Tidal Wave was entitled to summary judgment as a matter of law.

IV. CONCLUSION

For the reasons set forth herein, Respondent Tidal Wave 23, LLC respectfully requests this Honorable Court dismiss this petition and affirm the grant of summary judgment in favor of Respondent Tidal Wave 23, LLC.

Respectfully submitted,

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: 
M. Dawes Cooke, Jr.
Phillip S. Ferderigos
885 Island Park Drive (29492)
P.O. Drawer H
Charleston, SC 29402
577-7700
Counsel for Tidal Wave 23, LLC

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."); West v. Gladney, 341 S.C. 127, 533 S.E.2d 334 (S.C. 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"); 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").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 19 2011

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

S.C. Supreme Court

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.

PROOF OF SERVICE

The undersigned certifies that on the 17th day of October, 2011, Respondent Tidal Wave 23, LLC's
Return to Petition for Certiorari was served upon counsel of Record as set forth below by depositing
the same in the U.S. Mail, with sufficient postage:

James H. Moss, Esquire
Kimberly L. Smith, Esquire

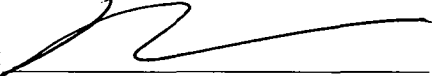
Moss, Kuhn & Fleming, P.A.
P.O. Drawer 507
Beaufort, SC 29901-0507

Edward K. Pritchard, III, Esquire
Pritchard & Elliott, LLC
129 Broad Street
Charleston, SC 29401

H. Michael Bowers, Esquire
Laura Evans, Esquire
Smith Moore Leatherwood, LLP
171 Church Street, suite 210
Charleston, SC 29401

R. Patrick Flynn, Esquire
Robert J. Cardillo, Esquire
Robertson & Hollingsworth
177 Meeting St., Suite 300
Charleston, SC 29401

Barnwell Whaley Patterson & Helms, LLC

By: 
M. Dawes Cooke, Jr.
Phillip S. Ferderigos
P.O. Drawer H
Charleston, SC 29402
885 Island Park Drive (28492)
(843) 577-7700
Attorneys for Tidal Wave 23, LLC



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 3, 2011

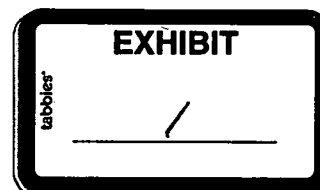
James H. Moss, Esquire
Kimberly L. Smith, Esquire
Moss, Kuhn & Fleming, P.A.
P O Drawer 507
Beaufort, SC 29901-0507

Edward K. Pritchard, III, Esquire
Pritchard & Elliott, LLC
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Charleston, SC 29401

Mary Bass Lohr, Esquire
Howell Gibson & Hughes, P.A.
P O Box 40
Beaufort, SC 29901-0040

Phillip S. Federigos, Esquire
Dawes Cooke, Jr., Esquire
Barnwell Whaley Patterson
& Helms, LLC
P O Drawer H
Charleston, SC 29402



R. Patrick Flynn, Esquire
Robertson & Hollingsworth
177 Meeting St., Ste. 300
177 Meeting St., Ste. 300
Charleston, SC 29401

William B. Harvey, III, Esquire
Harvey & Battey, PA
P.O. Box 1107
Beaufort, SC 29902

Re: Davidson, Amy v. City of Beaufort

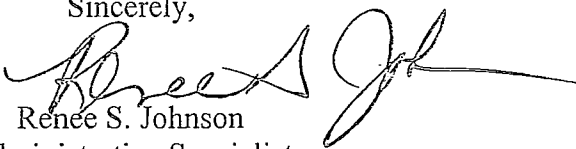
Dear Counsel:

Enclosed is the opinion of the Court of Appeals in this case.

Pursuant to Rule 221(b) of the South Carolina Appellate Court Rules, the remittitur in this case will be sent to the Clerk of Court for Beaufort County after fifteen (15) days, exclusive of the date of filing of this opinion.

No extension for a petition for rehearing will be granted except in the most extraordinary circumstances and, except in the rarest cases, with seven days' notice.

Sincerely,


Renee S. Johnson
Administrative Specialist

TAG/rj



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 19, 2011

REMITTITUR

The Honorable Jerri Roseneau
102 Ribaut Road, Rm 208
PO Box 1128
Beaufort, SC 29901

Re: Davidson, Amy v. City of Beaufort
2006-CP-07-02682 2006-CP-07-02683

Dear Mrs. Roseneau:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

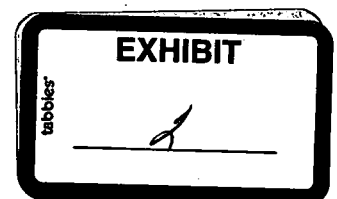
Sincerely,

A handwritten signature in black ink, appearing to read "Renee S. Johnson", is written over a horizontal line.

Renee S. Johnson
Administrative Specialist

Handwritten initials, possibly "VAG", are written above the typed name "TAG/rj".
TAG/rj

cc: James H. Moss, Esquire
Kimberly L. Smith, Esquire
Edward K. Pritchard, III, Esquire
H. Michael Bowers, Esquire
Mary Bass Lohr, Esquire
Phillip S. Federigos, Esquire
Dawes Cooke, Jr., Esquire





The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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May 20, 2011

James H. Moss, Esquire
Kimberly L. Smith, Esquire
Moss, Kuhn & Fleming, P.A.
P O Drawer 507
Beaufort, SC 29901-0507

Re: Davidson, Amy v. City of Beaufort

Dear Counsel:

Enclosed is the original Petition for Rehearing and the filing fee (check#55553) for \$25.00. The copies have been disposed of.

The Petition for Rehearing was filed out of time therefore I am returning these items to you.

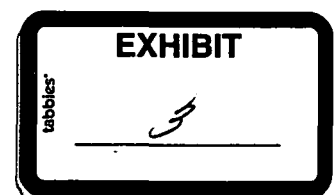
Sincerely,

A handwritten signature in black ink, appearing to read "Renee S. Johnson", is written over the typed name.

Renee S. Johnson
Administrative Specialist

UAG
TAG/rj

cc: Edward K. Pritchard, III, Esquire
H. Michael Bowers, Esquire
Mary Bass Lohr, Esquire
Phillip S. Federigos, Esquire
Dawes Cooke, Jr., Esquire
R. Patrick Flynn, Esquire
William B. Harvey, III, Esquire



LAW OFFICES

MOSS, KUHN & FLEMING, P.A.

303/ 002
5-31-11
STANLEY

JAMES H. MOSS

H. FRED KUHN, JR.

CORY H. FLEMING*

1501 North Street P.O. Drawer 507 - Beaufort, South Carolina 29901-0507

TELEPHONE 843-524-3373

FAX 843-524-1302

KIMBERLY L. SMITH

EVE M. FLEMING

*ALSO MEMBER OF GA BAR

May 25, 2011

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Amy Davidson v. City of Beaufort, Branch Banking & Trust of South Carolina, Collins Engineering, Inc., Brantley Construction Company, Inc. and Tidal Wave, 23
Case No.: 2006-CP-07-2682

Philip Davidson v. City of Beaufort, Branch Banking & Trust of South Carolina, Collins Engineering, Inc., Brantley Construction Company, Inc. and Tidal Wave, 23
Case No.: 2006-CP-07-2682

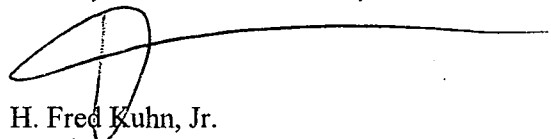
Dear Mrs. Gee:

Enclosed please find the original and seven (7) copies of the Motion to Recall Remittitur and Accept Motion for Rehearing for Filing regarding the above-referenced matter along with my firm's check in the amount of \$25.00 for the filing of the same. I would appreciate your returning one (1) filed copy to me in the enclosed self addressed stamped envelope. By copy of this letter I am serving a copy of the motion on all counsel of record.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.



H. Fred Kuhn, Jr.

HFKjr:sr

Enclosures

cc: Mary Bass Lohr, Esquire (w/enclosures)
William B. Harvey, III, Esquire (w/enclosures)
Edward K. Pritchard, III, Esquire (w/enclosures)
R. Patrick Flynn, Esquire (w/enclosures)
H. Michael Bowers, Esquire (w/enclosures)
Dawes Cooke, Jr., Esquire (w/enclosures)
Phillip S. Ferdergios, Esquire (w/enclosures)

EXHIBIT

tabbies

4

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Case No.: 2006-CP-07-2682

Amy Davidson,

Appellant

vs.

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

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

Respondents.

Case No.: 2006-CP-07-2683

Philip Davidson,

Appellant,

vs.

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

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

Respondents.

AND

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Case No.: 2006-CP-07-2682

Amy Davidson,

Appellant

vs.

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

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

Respondents.

Case No.: 2006-CP-07-2683

Phillip Davidson,

Appellant,

vs.

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

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

Respondents.

MOTION TO RECALL REMITTITUR AND
ACCEPT MOTION FOR REHEARING FOR FILING

TO: DAWES COOKE, JR., ESQUIRE and PHILLIP S. FERDERIGOS, ESQUIRE, ATTORNEY FOR THE RESPONDENT TIDAL WAVE 23, LLC
R. PATRICK FLYNN, ESQUIRE, ATTORNEY FOR THE RESPONDENT BRANTLEY CONSTRUCTION COMPANY, INC.
H. MICHAEL BOWERS, ATTORNEY FOR THE RESPONDENT COLLINS ENGINEERS, INC.:

PLEASE TAKE NOTICE that the Appellants, Amy Davidson and Philip Davidson, through their undersigned attorneys, hereby move before the South Carolina Court of Appeals for an order recalling the Remittitur in this case, and to accept for filing and to consider the Motion for Rehearing dated May 13, 2011, on the grounds that the Motion for Rehearing was timely submitted in well in advance of the May 18, 2011 deadline for filing, but, through no fault or neglect on behalf of the Appellants, was for some unknown reason not stamped as received by the office of the South Carolina Court of Appeals until May 19, 2011. More specifically, in support of this motion the Appellants would show as follows, to-wit:

1. The Opinion which is the subject of the Motion for Rehearing was filed on May 3, 2011.
2. In order to be timely, the Motion for Rehearing must have been actually received by the Appellate Court no later than May 18, 2011.
3. On May 13, 2011, the Motion for Rehearing was deposited in the United States Mail, First Class, postage paid, properly addressed to the South Carolina Court of Appeals and the attorney's of record, as shown by the Certificate of Service attached to the original Motion for Rehearing (Exhibit A) and the Affidavit of Carol Cobb (Exhibit B).
4. The Motion for Rehearing, accordingly, should have been received by the South Carolina Court of Appeals no later than Monday, May 16th or Tuesday May 17th.
5. For some unknown reason the Motion for Rehearing was not stamped by the office

of the South Carolina Court of Appeals as having been received until Thursday, May 19, 2011.

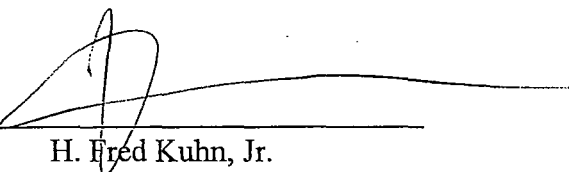
6. Upon information and belief, the Motion for Rehearing should have been received by the office of the South Carolina Court of Appeals in a timely fashion, but for some unknown reason, was waylaid or misplaced and not stamped as received until May 19, 2011.

It is respectfully submitted that it would be in the best interest of justice for the Remittitur to be recalled, and for the Court to accept for filing and consideration the Appellant's Motion for Rehearing.

It is, accordingly, respectfully requested that the South Carolina Court of Appeals recall the Remittitur and accept for filing and consideration the Appellant's Motion for Rehearing dated May 13, 2011.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By: 

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)524-1302- FX

Beaufort, South Carolina
May 25, 2011

Attorneys for Appellants

CERTIFICATE OF SERVICE

Undersigned certifies that the **Motion for Rehearing**, to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

Edward K. Pritchard, Esquire
Pritchard & Elliott, LLC
129 Broad Street
Charleston, South Carolina 29401

Dawes Cooke, Jr., Esquire
Phillip S. Ferderigos, Esquire
Barnwell, Whaley, Patterson & Helms, LLC
Post Office Drawer H
Charleston, South Carolina 29402-0197

H. Michael Bowers, Esquire
Wilkes Bowers, P.A.
171 Church Street, Suite 210
Charleston, South Carolina 29401

Mary Bass Lohr, Esquire
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, South Carolina 29901-0040

Patrick J. Flynn, Esquire
Robertson & Hollingsworth
171 Meeting Street, Suite 300
Charleston, South Carolina 29401

William B. Harvey, III, Esquire
Harvey & Battey
Post Office Drawer 1107
Beaufort, South Carolina 29901

in a post office or official depository under the exclusive care and custody of the United States

Postal Service, on May 13, 2011.

By: Sue Radford
Sue Radford

EXHIBIT A

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Case No.: 2006-CP-07-2682

Amy Davidson,

Appellant

vs.

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

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

Respondents.

Case No.: 2006-CP-07-2683

Philip Davidson,

Appellant,

vs.

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

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

Respondents.

AND

EXHIBIT B

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Case No.: 2006-CP-07-2682

Amy Davidson,

Appellant

vs.

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

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

Respondents.

Case No.: 2006-CP-07-2683

Phillip Davidson,

Appellant,

vs.

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

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

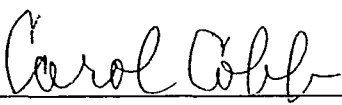
Respondents.

AFFIDAVIT OF CAROL COBB

Personally appeared before me, Carol Cobb, who being duly sworn deposes and states as follows:

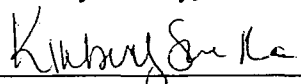
1. I am over eighteen years of age and competent to give this affidavit.
2. I have been employed by the firm of Moss, Kuhn & Fleming for many years. On May 13, 2011 I personally received from Sue Radford, a co-employee at Moss, Kuhn & Fleming, P.A. the first class mail package containing the Motion for Rehearing in Amy Davidson and Phillip Davidson's cases, properly addressed to the South Carolina Court of Appeals, as well as separate packages properly addressed to the other attorneys involved in the cases, and I personally affixed the proper postage to these packages and I personally carried these packages to the main Post Office branch located in the City of Beaufort and deposited them into the United States Mail.

Further the affiant sayeth naught.



Carol Cobb

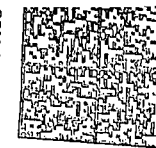
SWORN to before me this
25th day of May, 2011



Notary Public for South Carolina
My Commission Expires: 8/2012

FLEMING, P.A.
1501 NORTH STREET
P.O. DRAWER 507
BEAUFORT, SC 29901-0507

Priority Mail
ComBasPrice



UNITED STATES POSTAL SERVICE
02 1R \$ 04.970
0006555374 MAY 13 2011
MAILED FROM ZIP CODE 29902

Return Env. 1.48
\$ 6.45

MOSS, KUHN & FLEMING, P.A.

ATTORNEYS AT LAW

1501 North Street

P.O. Drawer 507

Beaufort, SC 29901-0507

(843) 524-3373

HPK

DANASen

To:

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

CERTIFICATE OF SERVICE

Undersigned certifies that the **Motion to Recall Remittitur and Accept Motion for Rehearing for Filing**, to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

H. Michael Bowers, Esquire
WILKES BOWERS, PA
171 Church Street, Suite 210
Charleston, SC 29401

Mary Bass Lohr, Esquire
HOWELL, GIBSON & HUGHES, PA
Post Office Box 40
Beaufort, SC 29901

William B. Harvey, III, Esquire
HARVEY & BATTEY, PA
Post Office Drawer 1107
Beaufort, SC 29901

Dawes Cooke, Jr., Esquire
Phillip S. Ferderigos, Esquire
BARNWELL, WHALEY, PATTERSON
& HELMS
Post Office Drawer H
Charleston, SC 29402

R. Patrick Flynn, Esquire
ROBERTSON & HOLLINGSWORTH
177 Meeting Street, Suite 300
Charleston, SC 29401

Edward K. Pritchard, III, Esquire
PRITCHARD & ELLIOTT, LLC
129 Broad Street
Charleston, SC 29401

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on May 25, 2011.

By: 

Sue Radford.
Secretary for H. Fred Kuhn, Jr.



3031.009
6-80-11
SCANNED

The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 16, 2011

James H. Moss, Esquire
H. Fred Kuhn, Jr., Esquire
Kimberly L. Smith, Esquire
Moss, Kuhn & Fleming, P.A.
P O Drawer 507
Beaufort, SC 29901-0507

Re: Davidson, Amy v. City of Beaufort

Dear Counsel:

Enclosed is a copy of an Order of the Court Granting your Motion to Recall the Remittitur in the above case. The Clerk of Beaufort County is directed to return the remittitur to the Clerk of the South Carolina Court of Appeals within ten (10) days from the date of this letter.

Please be advised that the Petition for Rehearing is due on or before July 1, 2011.

Sincerely,

A handwritten signature in black ink, appearing to read "Renee S. Johnson".

Renee S. Johnson
Administrative Specialist

JK
TAG/rj

cc: Edward K. Pritchard, III, Esquire
H. Michael Bowers, Esquire
Mary Bass Lohr, Esquire
Phillip S. Federigos, Esquire
Dawes Cooke, Jr., Esquire
R. Patrick Flynn, Esquire
William B. Harvey, III, Esquire
The Honorable Jerri Roseneau



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

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

Case No. 06-CP-07-2682/2683

Amy Davidson Appellant,

v.

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

and

Phillip Davidson.....Appellant,

v

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

**RESPONDENTS' JOINT MOTION/PETITION FOR RECONSIDERATION
AND MOTION TO DISMISS FOR LACK OF JURISDICTION**

BARNWELL WHALEY
PATTERSON & HELMS, LLC
M. Dawes Cooke, Jr.
Phillip S. Ferderigos
885 Island Park Drive (29492)
P.O. Drawer H
Charleston, SC 29402
577-7700
Counsel for Tidal Wave 23, LLC

RECEIVED

JUL 01 2011

SC Court of Appeals

SMITH MOORE LEATHERWOOD, LLP
H. Michael Bowers, Esquire

EXHIBIT

tabbles

6

The Franke Building
171 Church Street, Suite 210
Charleston, SC 29401
577-9888
Counsel for Collins Engineers, Inc.

ROBERTSON & HOLLINGSWORTH
R. Patrick Flynn, Esquire
177 Meeting St., Suite 300
Charleston, SC 29401
723-6470
Counsel for Brantley Construction
Company, Inc.

Respondents Tidal Wave 23, LLC, Collins Engineers, Inc. and Brantley Construction Company, Inc. hereby respectfully file Respondents' Joint Motion/Petition for Reconsideration and Motion to Dismiss for Lack of Jurisdiction in regard to the Court of Appeals' Order granting Appellants' Motion to Recall the Remittitur. Respondents respectfully file this Motion based on the lack of jurisdiction for the Court to issue an Order recalling the Remittitur in accordance with the Record.

A. RECORD

The Opinion of the Court was issued on May 3, 2010. (See Letter from Renee Johnson, Administrative Specialist, to Appellants' counsel dated May 3, 2011, attached as Exhibit 1.) Pursuant to SCACR 221, Appellants' 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.¹ On May 19, 2011, the Court issued its Remittitur to the lower court. (See Letter from Clerk to lower court dated May 19, 2011, attached as Exhibit 2.) On May 20, 2011, the Clerk issued a letter

¹ Appellants concede that their Petition for Rehearing deadline was May 18, 2011 in their Motion to Recall the Remittitur.

returning the original Appellants' Motion/Petition for Rehearing and filing fee to the Appellants' counsel advising that the Appellants' Motion/Petition for Rehearing was filed out of time. (See Letter from Clerk to Appellant's counsel dated May 20, 2011, attached as Exhibit 3.) On May 25, 2011, Appellants filed their Motion to Recall Remittitur and Accept Motion for Rehearing for Filing.

In their Motion to Recall Remittitur, Appellants argue that "the Motion for Rehearing was timely submitted well in advance of the May 18, 2011 deadline for filing, but, through no fault or neglect on behalf of Appellants, was for some unknown reason not stamped as received by the office of the South Carolina Court of Appeals until May 19, 2011." The Appellants' recitation of the facts in their Motion to Recall Remittitur, however, refutes Appellants' assertion that the Petition/Motion for Rehearing was timely. In their Motion, Appellants acknowledge that the Motion for Rehearing was required to have been actually received by the Appellate Court no later than May 18th. Appellants admit that they merely deposited the Appellants' Motion for Rehearing in the United States Mail, first class, postage paid, properly addressed to the South Carolina Court of Appeals on May 13, 2011. The Appellants did not Federal Express or UPS the Petition. The Appellants did not hand deliver the Petition. Rather, Appellants chose to rely on the U.S. Postal Service to ensure the Petition would be timely received by the Court based on Appellants' assumption that the Petition would be delivered from Beaufort County to the Court of Appeals in Columbia within five days.

Based on such assumption, Appellants assert that their Motion for Rehearing "should" have been received by the South Carolina Court of Appeals no later than Monday,

May 16th (three days after mailing) or Tuesday, May 17th (four days after mailing). Remarkably, Appellants further assert that “for some unknown reason, the Motion for Rehearing was not stamped by the office of the South Carolina Court of Appeals as having been received until Thursday, May 19, 2011,” but that, “upon information and belief, the Motion for Rehearing should have been received by the South Carolina Court of Appeals in a timely fashion, but, for some unknown reason, was waylaid or misplaced and not stamped as received until May 19, 2011.” Appellants’ argument is a non-sequitor.

Here, Appellants admit that they merely mailed their Motion for Reconsideration on May 13, 2011 and *assumed* that the Clerk would receive the Motion on time. With no evidence, Appellants imply that the Clerk “waylaid or misplaced” the Motion “for some unknown reason.” Appellants apparently fail to consider the obvious – perhaps it took the U.S. Postal Service six days to deliver the mail from Beaufort to Columbia. Appellants’ unsavory assertion that the Clerk “waylaid or misplaced” or failed to stamp the Petition is pure conjecture. Indeed, the Record is contrary to the Appellants’ assumptions.

After the Court of Appeals issued its Order granting the Recall of the Remittitur and prior to filing this present Motion, Counsel for Tidal Wave contacted Renee Johnson, the Clerk assigned to this appeal, and the Clerk advised that there is no doubt that the Petition/Motion for Rehearing of the Appellant was actually received by the clerk on May 19th. Simply put, the Clerk did not make any mistake, and the Motion of the Appellant was in fact received by the Appellate Court on May 19th, as indicated via Exhibit 2 and Exhibit 3.² Accordingly, based on the Record, Respondents respectfully assert that South Carolina

² If there is any doubt as to the date that the Clerk actually received the Motion for Reconsideration, Respondents respectfully request the Court to require the Clerk to certify for the Record when the Clerk received Appellants’ Motion for Reconsideration. If the Clerk certifies that the Motion/Petition for

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.

B. DISCUSSION

Under South Carolina law, 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.³ South Carolina law, however, allows for a recall of the Remittitur in extremely unusual and limited circumstances of mistake, error or inadvertence of the Appellate Court. SCAC Rule 221 and 240 set forth the following:

(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. No petition for rehearing shall be allowed from an order denying a petition for a writ of certiorari under Rule 242, SCACR.

(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. Where a petition for rehearing has been denied, the Court of Appeals shall not send the Remittitur to the lower court or administrative tribunal until the time to petition for a writ of certiorari under Rule 242(c) has expired. If a petition for writ of certiorari is filed, the Court of Appeals shall not send the

Rehearing was received on or before May 18th, Respondents would respectfully withdraw this Motion. If, however, the Clerk certifies that the Motion for Rehearing was received on or after May 19th, Respondents respectfully assert the Court of Appeals lacked and currently lacks jurisdiction to issue an Order recalling the Remittitur.

³ The actual timely receipt of the Petition for Rehearing by the Court of Appeals is a jurisdictional requirement. There is no discretion as the Petition for Rehearing must be received timely in order for the Court of Appeals to maintain jurisdiction.

Remittitur until notified that the petition has been denied. If the writ is granted by the Supreme Court, the Court of Appeals shall not send the Remittitur.

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.

Further, the Supreme 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). Indeed, the Supreme Court's Wise decision is dispositive in this case. 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.”

Specifically, in Wise, the appeal was dismissed by the Court of Appeals on October 12, 2006. On October 27, 2006, the Court of Appeals timely received a Petition to Reinstate from the Appellant; however, the Appellant failed to provide proof of service

as required by the Court rules. The Remittitur was sent to the lower court by Order dated October 30, 2006. Despite the fact that the Petition was actually received by the Appellate Court within 15 days of the issuance of the Order, the Supreme Court nevertheless held that the Petition was not proper and the Remittitur was properly sent in accordance with the strict requirements of the Appellate Court Rules.

In addressing whether or not the Supreme Court had jurisdiction to consider the Petition, the Supreme Court stated the general rule is 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 this rule is when the Remittitur is sent down by mistake, error, or inadvertence of the Court. In setting forth the general rule and its limited and unusual exception, the Supreme Court cited several older Supreme Court cases, including Carpenter v. Lewis, 65 S.C. 400, 43 S.E. 881 (1903) (wherein the Supreme Court stated, "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"), and State v. Kells, 39 S.C. 553, 17 S.E. 802 (1893) (wherein the Supreme Court stated, "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). As such, South Carolina law requires that the unusual power of recalling a Remittitur is only available in the limited circumstances of a very strong showing of a mistake, error, or inadvertence by the Appellate Court itself.

Here, there is no evidence of any mistake, error or inadvertence by the Appellate Court or the Court of Appeals' clerk. To the contrary, the Record sets forth that the Clerk simply did not receive the Appellants' Motion/Petition until May 19th. The only "mistake" in the Record is on behalf of the Appellants who decided to mail their Motion/Petition for Rehearing on May 13th, hoping that the Court of Appeals would actually receive the Motion/Petition for Rehearing by the mandatory jurisdictional deadline of May 18th. Unfortunately for the Appellants, the U.S. Postal Service apparently took one more day than they expected, and the Motion/Petition was received by the Court of Appeals a day late, after the mandatory jurisdictional deadline. There is simply no evidence in the Record to support a recall of the Remittitur in this case; to the contrary, the Clerk's letters attached as Exhibit 1 and 2 (and the Clerk's certification if 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 and, accordingly, the Motion was received late. No reason exists, other than the Appellants' own negligence, to recall the Remittitur. As a matter of law, however, the Appellants' own negligence is not a sufficient reason to recall the Remittitur.

Respondents recognize Appellants' failure is a fatal error to this appeal, albeit for an erroneous assumption on the part of the Appellants. However, Appellant's failure in this matter is certainly more egregious than the Appellant in Wise (who at least ensured that his Petition was received within the 15 days as mandated by the rules). In this case, Appellants failed to establish the threshold requirement to avail itself to their reconsideration request. Respondents also recognize that any Court would prefer to give every opportunity to the Appellants or any party for an adjudication or reconsideration of an adjudication based on

the merits; nevertheless, Appellants must comply with the rules of the Court in order to avail themselves of such opportunity. In Thomas v. Lynch, 87 S.C. 44, 68 S.E. 817 (S.C. 1910) (an older opinion cited by the more recent Wise, supra, Supreme Court decision), while addressing the strict jurisdictional requirements involving a Remittitur, the Supreme Court aptly stated:

“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.”

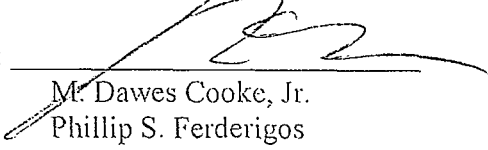
Similarly, here, Respondents respectfully assert that the due and orderly administration of law and procedure prescribed by the statutes and rules of court be complied with in this instance, and, in accordance with the Rules of the Court and South Carolina law, for this Court to reconsider its recall and dismiss this present appeal in accordance with its prior Order.

C. CONCLUSION

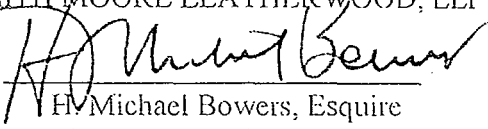
Accordingly, Respondents, Tidal Wave 23, LLC, Brantley Construction Company, Inc., and Collins Engineers, Inc. respectfully request that the Court of Appeals reconsider its decision to recall the Remittitur and to dismiss this appeal because, respectfully, the Court of Appeals lacks jurisdiction to recall the Remittitur based on the Record.

Respectfully submitted,

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: 
M. Dawes Cooke, Jr.
Phillip S. Ferderigos
885 Island Park Drive (29492)
P.O. Drawer H
Charleston, SC 29402
577-7700
Counsel for Tidal Wave 23, LLC

SMITH MOORE LEATHERWOOD, LLP

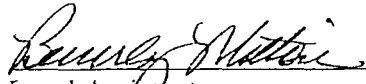
By: 
H. Michael Bowers, Esquire
The Franke Building
171 Church Street, Suite 210
Charleston, SC 29401
577-9888
Counsel for Collins Engineers, Inc.

ROBERTSON & HOLLINGSWORTH

By: _____
R. Patrick Flynn, Esquire
177 Meeting St., Suite 300
Charleston, SC 29401
723-6470
Counsel for Brantley Construction
Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondents' Joint Motion/Petition for Reconsideration and Motion to Dismiss for Lack of Jurisdiction has been sent to all counsel of Record via U.S. Mail, correctly addressed with sufficient postage, this 28th day of June, 2011.


Legal Assistant

By: _____
H. Michael Bowers, Esquire
The Franke Building
171 Church Street, Suite 210
Charleston, SC 29401
577-9888
Counsel for Collins Engineers, Inc.

ROBERTSON & HOLLINGSWORTH

By:  _____
R. Patrick Flynn, Esquire
177 Meeting St., Suite 300
Charleston, SC 29401
723-6470
Counsel for Brantley Construction
Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondents' Joint Motion/Petition for Reconsideration and Motion to Dismiss for Lack of Jurisdiction has been sent to all counsel of Record via U.S. Mail, correctly addressed with sufficient postage, this _____ day of June, 2011.

Legal Assistant



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 3, 2011

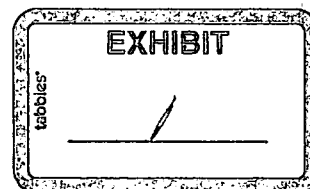
James H. Moss, Esquire
Kimberly L. Smith, Esquire
Moss, Kuhn & Fleming, P.A.
P O Drawer 507
Beaufort, SC 29901-0507

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Howell Gibson & Hughes, P.A.
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Dawes Cooke, Jr., Esquire
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& Helms, LLC
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Robertson & Hollingsworth
177 Meeting St., Ste. 300
177 Meeting St., Ste. 300
Charleston, SC 29401

William B. Harvey, III, Esquire
Harvey & Battey, PA
P.O. Box 1107
Beaufort, SC 29902

Re: Davidson, Amy v. City of Beaufort

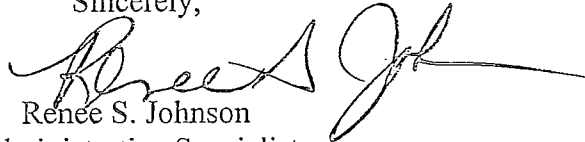
Dear Counsel:

Enclosed is the opinion of the Court of Appeals in this case.

Pursuant to Rule 221(b) of the South Carolina Appellate Court Rules, the remittitur in this case will be sent to the Clerk of Court for Beaufort County after fifteen (15) days, exclusive of the date of filing of this opinion.

No extension for a petition for rehearing will be granted except in the most extraordinary circumstances and, except in the rarest cases, with seven days' notice.

Sincerely,

A handwritten signature in black ink, appearing to read "Renee S. Johnson", with a long horizontal flourish extending to the right.

Renee S. Johnson
Administrative Specialist

TAG/rj



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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May 19, 2011

REMITTITUR

The Honorable Jerri Roseneau
102 Ribaut Road, Rm 208
PO Box 1128
Beaufort, SC 29901

Re: Davidson, Amy v. City of Beaufort
2006-CP-07-02682 2006-CP-07-02683

Dear Mrs. Roseneau:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

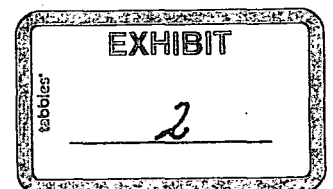
Sincerely,

A handwritten signature in black ink, appearing to read "Renee S. Johnson", is written over the typed name.

Renee S. Johnson
Administrative Specialist

VCA
TAG/rj

cc: James H. Moss, Esquire
Kimberly L. Smith, Esquire
Edward K. Pritchard, III, Esquire
H. Michael Bowers, Esquire
Mary Bass Lohr, Esquire
Phillip S. Federigos, Esquire
Dawes Cooke, Jr., Esquire





The South Carolina Court of Appeals

TANYA A. GEE
CLERK

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DEPUTY CLERK

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May 20, 2011

James H. Moss, Esquire
Kimberly L. Smith, Esquire
Moss, Kuhn & Fleming, P.A.
P O Drawer 507
Beaufort, SC 29901-0507

Re: Davidson, Amy v. City of Beaufort

Dear Counsel:

Enclosed is the original Petition for Rehearing and the filing fee (check#55553) for \$25.00. The copies have been disposed of.

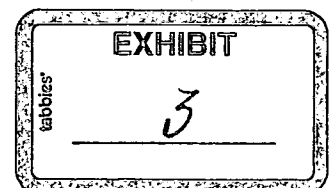
The Petition for Rehearing was filed out of time therefore I am returning these items to you.

Sincerely,

Renee S. Johnson
Administrative Specialist

VTA
TAG/rj

cc: Edward K. Pritchard, III, Esquire
H. Michael Bowers, Esquire
Mary Bass Lohr, Esquire
Phillip S. Federigos, Esquire
Dawes Cooke, Jr., Esquire
R. Patrick Flynn, Esquire
William B. Harvey, III, Esquire



IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Case No.: 2006-CP-07-2682

Amy Davidson,

Appellant

vs.

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

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

Respondents.

Case No.: 2006-CP-07-2683

Philip Davidson,

Appellant,

vs.

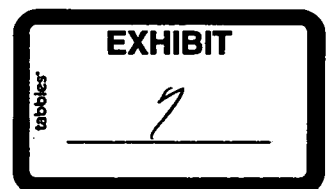
City of Beaufort, Branch Banking &
Trust of South Carolina, Collins
Engineering, Inc., Brantley Construction
Company, Inc., and Tidal Wave 23, LLC,

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

Respondents.

AND



IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Case No.: 2006-CP-07-2682

Amy Davidson,

Appellant

vs.

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

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

Respondents.

Case No.: 2006-CP-07-2683

Phillip Davidson,

Appellant,

vs.

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

Defendants

Of Whom Collins Engineering, Inc., Brantley
Construction Company, Inc. And Tidal Wave
23, LLC are

Respondents.

MOTION FOR REHEARING
(UNPUBLISHED OPINION NO. 2011-UP-199 FILED MAY 3, 2011)

TO: DAWES COOKE, JR., ESQUIRE and PHILLIP S. FERDERIGOS, ESQUIRE,
ATTORNEYS FOR RESPONDENT TIDAL WAVE 23, LLC;
R. PATRICK FLYNN, ESQUIRE, ATTORNEY FOR RESPONDENT BRANTLEY
CONSTRUCTION COMPANY, INC.; and
H. MICHAEL BOWERS, ESQUIRE, ATTORNEY FOR RESPONDENT COLLINS
ENGINEERS, INC.:

PLEASE TAKE NOTICE that the Appellants, Amy Davidson and Phillip Davidson, through their undersigned attorneys, hereby move before the South Carolina Court of Appeals pursuant to Rule 221(a), SCACR, for a reconsideration and rehearing of its Unpublished Opinion No. 2011-UP-199, filed May 3, 2011, on the grounds that the Court overlooked or misapprehended the following the following matters, to-wit:

1. In concluding that the Beaufort County Master in Equity properly granted summary judgment to the Respondents despite the fact that discovery had not yet been completed, it is respectfully submitted that the Court of Appeals misapprehended or overlooked the impact of Judge Mullen's Stay Order, as well as the noncooperation of the Respondents in scheduling and taking depositions.

Although the Court of Appeals, in its Opinion, acknowledges the existence of Judge Mullen's Stay Order, the Court of Appeals failed to appreciate the effect this Order had upon discovery when the Order is considered and read as a whole, particularly given the context in which this Order, and the subsequent "clarifying" Order, arose.

As a result of a status conference held in these cases on July 12, 2007, Judge Mullen issued an Order on August 10, 2007 which provides in pertinent part as follows:

Counsel have raised concerns over the rate in which the discovery was

progressing in this matter. The parties were in agreement that this was the result, primarily, of an ongoing criminal investigation of a related matter to the assault of the Plaintiffs giving claims raised (sic, giving rise to the claims raised) by the Plaintiffs. The parties, as well as this Court, wish to do nothing that may jeopardize any criminal proceeding or investigation, through the forced disclosure by either the Beaufort County Solicitor's Office or the City of Beaufort Police Department of information contained in the criminal investigation.

Additionally, the parties agreed that until the full investigative file could be released by the City of Beaufort Police Department and/or the Beaufort County Solicitor's Office, that **it would be impossible to take all the depositions required in this litigation.**

That being the case, the parties **came to an agreement that this matter would be stayed** pending the release of the criminal investigative file in this matter by the Beaufort County Solicitor's Office and the City of Beaufort Police Department.

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.

In light of the foregoing, **it is therefore ordered that this matter will be stayed** pending the release of the criminal investigative file Case No. 2006 05 2633 by the Beaufort County Solicitor's Office and/or the City of Beaufort Police Department. However, **discovery is to proceed to that degree possible** without the

release of the above referenced investigative file.

IT IS SO ORDERED.

ROA, pp. 32-33(emphasis added).

As a result of motions for summary judgment filed by the co-Defendants Tidal Wave, Brantley Construction and Collins Engineering, a hearing was held before Judge Dukes on January 31, 2008. At that hearing Appellants' counsel opposed summary judgment on the ground that, *inter alia*, it was premature inasmuch as discovery was incomplete, citing the scheduling difficulties involved with so many lawyers, as well as the roadblock posed by the pending criminal investigation. ROA, pp. 409-415 It was also noted that Judge Mullen's Stay Order stayed the case except for discovery to a limited extent, which would include a stay on the hearing of dispositive motions. Judge Dukes agreed and on March 7, 2008 he issued an Order concluding that Judge Mullen's Stay Order did not "allow a motion that would result in a disposition of the case prior to the release of the (Solicitor's and Police Department) file . . . and concluding that "the motions for summary judgment . . . are stayed by prior Order" ROA, pp. 29-30.

On March 26, 2008, at the request of the co-Defendants Tidal Wave, Collins Engineers and Brantley Construction, Judge Mullen issued an Order captioned "Order Clarifying Order of Stay filed August 10, 2007." In this Order, Judge Mullen "clarified" her Order of Stay and "confirmed" that the hearing that had been held before Judge Dukes on January 31, 2008 on the co-Defendants' summary judgment motions was "properly scheduled and heard" and finding that Judge Dukes was "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." ROA, pg. 27.

A few days later, on April 8, 2008, Judge Dukes, without holding another hearing, issued his Order Granting Summary Judgment in favor of the co-Defendants, which Order is the subject of this appeal.

Although the Appellants, as the Court of Appeals notes in its Opinion, did not submit an affidavit regarding the fact that discovery was incomplete, it is respectfully submitted that in this case the Appellants had something better than an affidavit, i.e., an agreement/stipulation by the parties, concurred in by Judge Mullen, that until the criminal case was concluded “it would be **impossible** to take all the depositions **required** in this litigation.” ROA, pg. 32 (emphasis added).

“Summary judgment is a drastic remedy which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.” *Baughman v. American Telephone and Telegraph Company*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). “An Appellate Court reviews the grant of summary judgment under the same standard applied by the Circuit Court.” *David v. McLeod Regional Medical Center*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).

The Circuit Court should grant summary judgment “if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Rule 56(c), SCRCF*. See also, *Guinan v. Tenant Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 53, 677 S.E.2d 32, 36 (Ct. App. 2009). In determining whether any triable issues of fact exists, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Law v. South Carolina Department of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). “A Court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is

completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Regional Medical Center*, 367 S.C. 242 at 250, 626 S.E.2d 1, 5 (2006).

“This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003), quoting *Baughman v. American Telephone and Telegraph Company*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991). See also *Jones v. Enterprise Leasing Company Southeast*, 383 S.C. 259, 264, 678 S.E.2d 819, 821 (Ct. App. 2009) (“the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery . . .”).

“Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Guinan v. Tenant Healthsystems of Hilton Head, Inc.*, *supra*, 383 S.C. at 53-54, 677 S.E.2d at 35-36.

“Therefore, although an Appellate Court must view the evidence through the prism that is most favorable to (the non-movant), her contention regarding the Circuit Court’s grant of summary judgment before she had had a full and fair opportunity to complete discovery, may only be successful if the evidence she had presented, or the evidence she alleges would be introduced through discovery, would create a genuine issue of material fact as to (the movant’s) liability” *Jones v. Enterprise Leasing Company Southeast*, *supra*, 383 S.C. at 264, 678 S.E.2d at 821-22.

In the instant case, it is respectfully submitted that the Court of Appeals overlooked or misapprehended the fact that as a result of the stay order issued by Judge Mullen on August 10, 2007, which was compounded by the non-cooperation on the part of the Respondents, the Davidsons

had not had a full and fair opportunity to complete discovery at the time summary judgments were entered.

The Davidsons' attorney, in open Court and on the record, explained why summary judgment was premature. At the hearing held before Judge Dukes on January 31, 2008, the Davidsons' attorney, Ms. Smith, opposed the entry of summary judgment on the ground that discovery had not yet been completed, stating:

MS. SMITH: First of all, they've given you kind of a factual background and a procedural background. This case is sixteen months old. It was recently stayed by Judge Mullen, because right now we are not entitled to the criminal file.

They want to prosecute the criminal case first before they release the file, before we can take depositions of our clients or any member of law enforcement. So part of the case is stayed, which is why it is sixteen months old.

The first thing, as far as summary judgment at this point, we have done some discovery. We have taken four depositions.¹

We have many depositions left to take, and mainly we have not taken anyone from BB&T. The Branch Manager there, who we've scheduled to take her deposition, for some reason she wasn't notified. We've tried to reschedule that. It's been very hard to schedule depositions with six lawyers.

We have not been able to take the managing partner of Tidal Wave, nor have we been able to take the Construction Manager for Collins Engineering, who was

¹These are the depositions of two (2) City employees, Lamar Taylor and Isaiah Smalls, and two (2) employees of Brantley Construction Company, Gary Barnes and Louis White.

hired as the Construction Manager for the City. We have taken depositions of Gary Brantley and another member of his company and two members from the City.

We have about ten depositions that we need to schedule that include our witnesses, as well as our clients. **Summary Judgment at this point is completely premature.**

ROA, pg. 409, line 18 - pg. 410, line 20 (emphasis added). At that hearing, the Davidsons' attorney continued, stating:

So at this point, we find that it is very premature, not to mention as far as discovery from BB&T, I got a list of two hundred pages of documents that I'm to come to Charleston and look at. I mean, we're not trying to unreasonably delay this, but I mean if 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. But at this point, we do not think summary judgment is even appropriate to heard.

Id., pg. 414, line 19 - pg. 415, line 4.

Davidsons' counsel explained that full and fair discovery had not yet been completed on two (2) issues.

The first issue was who controlled the parking lot and was responsible for seeing that it was lit at night. She explained that one of the main issues in the case was lighting of the parking lot, inasmuch as it was "pitch black dark" at the time of the assault upon the Davidsons. *Id.*, pg. 410, line 24 to pg. 411, line 1. As noted earlier, all power to the parking lot had been cut as a result of the nearby construction, and none of the lights were functioning. ROA, pg. 515, lines 4 - 22, pg.

520, lines 2 - 25; pg. 519, lines 4 - 20; pg. 516, lines 3 - 24; pg. 518, lines 17 - 39 and White Deposition, pg. 659, line 20 - pg. 660, line 15. Discovery was accordingly needed in order to ascertain "who had control over that parking lot?" *Id.*, pg. 683, lines 21 - 23. In other words, "what we are trying to find out is who had control over the maintenance and safety of that parking lot, who controlled that parking lot with respect to lighting. . . . With respect to lighting and whatnot, because right now BB&T says, "Oh, Tidal Wave is responsible for it," and Tidal Waves says, "BB&T is responsible." So that's what we are trying to get to the bottom of. *Id.*, pg. 647, line 18 - pg. 648, line 2.

The Davidsons' attorney explained that part of the problem was that each co-Defendant was pointing the finger at the other co-Defendant. For example, the co-Defendant Tidal Wave 23 asserted that the Respondent BB&T was in control of the parking lot, stating:

Well, Tidal Wave in their Answers to Interrogatories, Number Ten, they say BB&T was responsible for paying all electrical bills on the premises owned by Tidal Wave. So, without the depositions of someone from Tidal Wave and someone from BB&T, we can't figure out who has control of the parking lot.

Id., pg. 413, lines 6 - 11.

Part of the problem with completing discovery was that each deposition was leading to the need for more depositions. Again, the Davidsons' counsel explained to the Trial Court:

Gary Brantley in this 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, pg. 411, lines 7 - 11. Additionally, in the deposition of the City employees, Isaiah Smalls and Lamar Taylor, the Appellants attempted to find out who installed a light pole in the parking lot four (4) days after the assault on the Appellants. These City employees professed not to know who requested the installation of this "after the assault" parking lot lighting. Deposition of Isaiah Smalls, pg. 572, line 4 - pg. 574, line 20 and ROA, pg. 597, line 6 - 18. The Davidsons' counsel explained to the trial Court that she was still in the process of attempting to track this down, stating:

In previous, I think at the last hearing, they actually probably four days after this incident, a light pole was put up in the parking lot that we are talking about. Prior to that, there was no light there. We have records from that. We deposed the City on that. It looks like maybe the City put it in. The City Officials didn't know if they ordered it, who ordered it. We are still trying to get to the bottom of that, and from there, we got more names to depose.

ROA, pg. 414, lines 10 - 18. In other words, each deposition was proving to raise more questions than were being answered, and each deposition was leading to the need for more depositions.

The second issue on which discovery had not yet been completed related to the status of the Appellants, that is, were the Appellants invitees, or were they, as claimed by the Respondents, trespassers? This issue was directly raised by the Court with Appellants' counsel:

THE COURT: . . . [w]hat is your opinion as to what the status of the Plaintiffs was in that parking lot? Was it licensee, or?

MS. SMITH: It's our position they were invitees.

THE COURT: Okay. For what purpose?

MS. SMITH: For the purpose that the parking lot was held open to the public for public parking, and through use of custom, was used by the public to park in there to go to the restaurants downtown.

Id., pg. 421, lines 6 - 16. Appellants' counsel elaborated, as follows:

Now with regard to their classification as an invitee, it is our position that they are. And under - - it's our position that they are an invitee, in that they entered as a member of the public for a purpose for which the land was held open to the public through courses of dealing and just past custom. That parking lot after hours, after 5:00 o'clock, has been used as a parking lot for the restaurant, Saltus, and that's just local custom.

They say, you know, that it says *BB&T Parking Only*. Well, that's right next to the BB&T sign when you pull in there off of Boundary Street, there is - - or off of Carteret, next to the BB&T sign, there's a *Public Parking Sign*. That *Public Parking Sign* doesn't say *Only The Spaces In The Back, Spaces Thirty-Two Through Forty-five*, or whatever. There is no way to tell what's public parking and what's BB&T parking.

So it's our contention that that lot was held out to the public, it says *Public Parking*, and the Davidsons parked there. Where else would be a safer parking lot than a bank parking lot that should be lit a night with an ATM in it?

Id., pg. 415, lines 5 - 25.

Clearly in a tort case which arises out of criminal activity, until discovery can be completed regarding the criminal activity, all other discovery is secondary. While it may relevant where the

Davidsons parked their car that night, it is even more relevant on whose property the assailants hid while waiting for their victims, and from whose property the assailants launched their assault. The parties in this case expressly stipulated before Judge Mullen "that it would be **impossible** to take all the depositions **required** in this litigation" until the criminal case was concluded. In reliance on this stipulation, only cursory discovery was done while the criminal case was pending. It is respectfully submitted that the Court of Appeals overlooked the fact that the Appellants were, in essence, ambushed when Judge Mullen "clarified" her Order to allow Judge Dukes to rule on the pending summary judgment motions, which he had previously concluded he would not grant, and then Judge Dukes, without holding another hearing, and only days after Judge Mullen's "clarification" Order, granted the summary judgment motions. This was fundamentally unfair to the Davidson, who had in good faith relied upon the agreement of the parties as set forth in Judge Mullen's Order.

2. The South Carolina Court of Appeals, in concluding that the Beaufort County Master in Equity properly granted summary judgment to Tidal Wave on the ground that the Appellants presented no evidence that Tidal Wave invited or gave consent for the Appellants to enter and use the parking lot in question, misapprehended or overlooked the fact that there was evidence that the Appellants were public invitees.

The Court of Appeals correctly noted there are two (2) types of invitees, one of which is a public invitee, who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. In this case, the Court of Appeals overlooked the fact that there is evidence in this case that a public parking sign invited the Appellants into the subject parking lot, and the subject parking lot was customarily used at night by members of the public.

This issue was expressly raised and argued to the Master in Equity, with the Appellants'

counsel stating:

Now with regard to their classification as an invitee, it is our position that they are. And under - - it's our position that they are an invitee, in that they entered as a member of the public for a purpose for which the land was held open to the public through courses of dealing and just past custom. That parking lot after hours, after 5:00 o'clock, has been used as a parking lot for the restaurant, Saltus, and that's just local custom.

...

So it's our contention that that lot was held out to the public, it says *Public Parking*, and the Davidsons parked there.

ROA, pg. 415.

In its Opinion, the Court of Appeals emphasizes the fact that photographs of the public parking sign were not included in the Record on Appeal. Opinion, fn.7. The absence of the photographs, however, is not a fatal defect, inasmuch as there is ample testimony concerning these photographs. Lamar Taylor twice confirmed that these photographs depicted a "public parking" sign. ROA, pg. 612, lines 4-18 and pg. 618, lines 6-13. Mr. Taylor testified in his deposition as follows:

Q. Mr. Taylor, my name is Edward Pritchard. I represent BB&T in connection with this action, and I'm going to turn your attention here to Plaintiff's Exhibit 16. Do you remember this picture?

A. You just pointed it out to me.

Q. Yeah, the one with the public parking?

A. Uh-huh (affirmative).

ROA, pg. 618, lines 6-13.

Mr. Taylor further testified as follows:

Q. Okay. Now, I've got a picture here from 6-2006 and it says there - - it's got a sign up, it says public parking. Is that a City of Beaufort sign there?

A. Could be. I don't know.

Q. Okay. It's right there as you go into the BB&T parking lot.

A. I know prior to construction there was public parking, you know, adjacent to the waterfront; but once construction started, that was fenced off where public parking was eliminated.

Q. But the sign was still there?

A. If that's there, I guess it is, uh-huh (affirmative).

ROA, pg. 612, lines 4-18.

Mr. Taylor, accordingly, agreed that the sign said public parking and it was located "right there as you go into the BB&T parking lot." Once the construction started, the public parking spaces were eliminated, but the sign remained. It is respectfully submitted that it is immaterial who actually owned the public parking sign, and on whose property the public parking sign was located. What is material in this case, is that the Respondent Tidal Wave 23, LLC allowed and consented to a sign to remain in existence, even after the public parking spaces were eliminated by the construction, which labeled its parking lot as "public parking." This, obviously, is an express invitation to the public to park in its parking lot. Admittedly, there was conflicting evidence that this parking lot was for BB&T customers only, but it is respectfully submitted that it is just this type of conflicting

evidence that renders summary judgment inappropriate.

The evidence concerning the Appellants' status as public invitees, however, is stronger than simply the foregoing. There was also evidence in the record that Tidal Wave's restriction of use of its parking lot to BB&T banking customers applied only while the bank was open, and that it was the custom in the evenings (which is when the Davidsons were there) for the public to park in this lot. Mr. White, a construction supervisor, testified that during the day only bank customers were allowed to park in the parking lot, [ROA, pg. 644, lines 9-10], but that the bank closed at 5:00 and the one time that he was in the parking lot at night, the parking lot was full. [ROA, pg. 646, lines 2-16].

Additionally, Mr. White testified that he actually had an argument with the manager of Saltus restaurant concerning the fact that the public was parking in this parking lot at night and then walking to the restaurant, and in the process, some of the orange safety fencing was constantly being knocked down. [ROA, pg. 640, line 5 to pg. 641, line 9 and ROA, pg. 667, line 4 to pg. 669, line 4]. More specifically, Mr. White testified that this orange plastic safety fencing was erected "to keep people from coming from this parking lot to his restaurant", [ROA, pg. 668, lines 16-17] and that he personally witnessed people "stepping over" the fence [ROA, pg. 669, line 4], which resulted in the fence being "torn down nightly" so that it was "just a daily thing that we had to go out and fix." [ROA, pg. 641, lines 5-9].

In sum, there was at least a "scintilla" of evidence that the Respondent Tidal Wave 23, LLC allowed its parking lot to be labeled by the City of Beaufort as a "public parking" lot, and that at least at nighttime, it customarily allowed the public to utilize its lot for public parking.

Accordingly, it is respectfully submitted that the Court of Appeals misapprehended or

overlooked the evidence tending to establish the Appellants status as public invitees on the Respondent Tidal Wave 23, LLC's parking lot.

3. The South Carolina Court of Appeals, in concluding that the Beaufort County Master in Equity properly granted summary judgment to Collins Engineering, Inc. and Brantley Construction Company, Inc. on the ground that there existed no legal duty on their part to the Appellants, misapprehended or overlooked the evidence that it was these Respondents who were responsible for cutting off the lights to the parking lot from which the Appellants were abducted.

In its Opinion, it is respectfully submitted 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 Appellants were abducted. In his deposition, Curtis Brantley testified as follows:

Q: ... There were certain lights in this parking lot, for instance, and who turned those off or who cut off the electricity?

A. Well, in the area that we were responsible for on the inside of your yellow line, we were required to go in and rework all the lighting, rework all the power feeds, so we had to turn power off as part of our contract.

Q. Okay. So you had to work all of the power feeds, and **did it also include lights that were in this parking lot here**, that is, the one we're talking about where the yellow line is?

Ms. Lohr: Object to the form.

Mr. Moss: You can answer it.

Ms. Lohr: You can answer it; go ahead.

The Witness: We turned the power off in order to do our work, **it would have cut power off to lights that were in there.**

ROA, pg. 516, lines 3-23 (emphasis added). In other words, when asked who turned off the lights “in this parking lot,” Mr. Brantley confessed that his company had to turn the power off as part of its contract. When asked, again, if that termination of power would have included lights that were in the parking lot, Mr. Brantley admitted that when his company cut the power off in order to do its work, it would have included cutting the power off to the lights that were in there, i.e., in the parking lot. *Id.*

Later in his deposition, when asked specifically who would have cut the power off in this area, Mr. Brantley testified that it would have been his subcontractor, and further testified as follows:

Q. Okay. So they would have been the one turning the electricity off in that area?

A. Yes.

Q. Okay. And by area, I mean area in **and outside** of the construction area.

A. Again, I want to emphasize that what they did was in accordance with the plans and specs.

ROA, pg. 519, lines 18-25 (emphasis added).

Accordingly, when specifically asked if he cut off the power to areas both inside and outside of his construction site, Mr. Brantley tacitly agreed, and justified his action by simply emphasizing that it was in accordance with his contract.

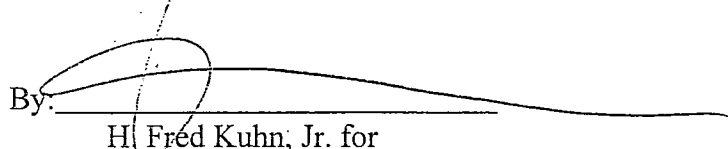
In any event, looking at the foregoing testimony in the light most favorable to the Appellants, and drawing all inferences from the foregoing testimony in the light most favorable to the

Appellants, there is at least a "scintilla" of evidence that these Respondents were responsible for cutting off the lights that had previously illuminated the parking lot from which the Appellants were abducted. It is respectfully submitted that the Court of Appeals overlooked this fact in affirming the Master in Equity's granting of summary judgment in favor of these Respondents.

It is accordingly respectfully requested that the South Carolina Court of Appeals rehear and reconsider its Unpublished Opinion No. 2011-UP-199 and reverse the Order of the Beaufort County Master in Equity granting summary judgment to these Respondents and remand this case back to the Beaufort County Court of Common Pleas.

Respectfully submitted,

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By: 

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July 7, 2011

CERTIFICATE OF SERVICE

Undersigned certifies that the **Motion for Rehearing**, to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

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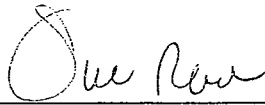
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in a post office or official depository under the exclusive care and custody of the United States Postal
Service, on July 7, 2011.

By: 
Sue Radford
Secretary for H. Fred Kuhn, Jr.

3031.002
8-26-11



The South Carolina Court of Appeals

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August 24, 2011

James H. Moss, Esquire
H. Fred Kuhn, Jr., Esquire and Kimberly L. Smith, Esquire
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Beaufort, SC 29901-0507

Re: Davidson, Amy v. City of Beaufort

Dear Counsel:

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing and the Motion to Dismiss in the above case.

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b).

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S. C. Court of Appeals, in the amount of \$7.50, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of.

Sincerely,

A handwritten signature in black ink, appearing to read "Renee S. Johnson".

Renee S. Johnson
Administrative Specialist

VCA/rj



cc: Edward K. Pritchard, III, Esquire
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R. Patrick Flynn, Esquire
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The South Carolina Court of Appeals

Amy Davidson,

Appellant,

v.

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

Defendants,

of whom Collins Engineering Inc.,
Brantley Construction Company, Inc.,
and Tidal Wave 23, LLC, are

Respondents.

Phillip Davidson,

Appellant,

v.

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

Defendants,

of whom Collins Engineering Inc.,
Brantley Construction Company, Inc.,
and Tidal Wave 23, LLC are

Respondents.

The Honorable James W. Johnson, Jr.
Lexington County
Trial Court Case No. 2004-CP-32-01773

ORDER DENYING RESPONDENTS' MOTION TO DISMISS
AND APPELLANTS' PETITION FOR REHEARING

PER CURIAM: Respondents have filed a joint motion to dismiss Appellants' petition for rehearing on the ground that this court lacks jurisdiction to consider the petition. The motion to dismiss is denied.

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

H B W J. Williams

John D. Geathers J. Geathers

James E. Lockemy J. Lockemy

FILED

AUG 24 2011

THE STATE OF SOUTH CAROLINA
In The 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

RECEIVED

OCT 17 2011

S.C. Supreme Court

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.

**RESPONDENT COLLINS ENGINEERS, INC.'S
RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**JURISDICTIONAL CHALLENGE AND COUNTERSTATEMENT OF
QUESTIONS PRESENTED**

- I. DOES THE SUPREME COURT HAVE 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 IMPROPERLY RECALLED THE REMITTITUR?
- II. DID THE TRIAL JUDGE CORRECTLY GRANT RESPONDENT COLLINS ENGINEERS, INC'S SUMMARY JUDGMENT WHERE PETITIONERS: (1) WERE DILATORY IN SEEKING DISCOVERY; AND (2) HAVE MADE NO SHOWING THAT FURTHER DISCOVERY WOULD UNCOVER EVIDENCE THAT WOULD HAVE DEFEATED SUMMARY JUDGMENT?
- III. DID THE TRIAL JUDGE ERR IN GRANTING RESPONDENT COLLINS ENGINEERS INC'S MOTION FOR SUMMARY JUDGMENT WHEREIN, AS A MATTER OF LAW, RESPONDENT OWED NO DUTY OF CARE TO PETITIONERS?

PROCEDURAL HISTORY

The lawsuits at issue were filed by the Petitioners on October 23, 2006, each alleging negligence against the City of Beaufort ("Beaufort"), Branch Banking and Trust of South Carolina ("BB&T"), Collins Engineering, Inc. ("Collins"), Brantley Construction Company, Inc. ("Brantley"), and Tidal Wave 23, LLC ("Tidal Wave") in connection with the May 26, 2006 abduction and assault of Petitioners by third-party criminal assailants. (R. pp. 36-44; 90-108; 113-119).

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 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. It also did not restrict any party from filing or the trial court from entertaining any dispositive or discovery motions. (R. pp. 31-33)

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 filed (or 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. 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 such rulings. (R.

¹ Petitioners herein did not make any motion or other request to continue this hearing and did not object on the ground that the motions hearing was inappropriate under the Stay Order.

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).

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).

Petitioners then appealed Judge Dukes' decision 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, 2010 Order (Unpublished Opinion No. 2011-UP-199). On that same day, the opinion was sent to all counsel of record. (Exhibit 1).

Pursuant to SCACR 221, Petitioners' Petition for Rehearing must have been actually received by the Court of Appeals no later than May 18, 2011 in order for the court to retain jurisdiction to consider the petition or any other matter.² On May 19, 2011, having not received a Petition for Rehearing, the Court issued its Remittitur to the lower court. (Exhibit 2). On May 20, 2011, apparently then having received Petitioners' tardy petition, the Clerk issued a letter returning the original Petitioners' Motion/Petition for Rehearing and filing fee to the Petitioners' counsel, specifically advising that the Petitioners' Motion/Petition for Rehearing was filed out of time. (Exhibit 3). On May 25, 2011, Petitioners filed a Motion to Recall Remittitur and Accept Motion for Rehearing. (Exhibit 4). 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. (Exhibit 5). On June 28, 2011, Respondents filed a Joint Motion/Petition for Reconsideration and Motion to Dismiss for Lack of Jurisdiction. (Exhibit 6). While this

² Petitioners conceded that their Petition for Rehearing deadline was May 18, 2011 in their Motion to Recall the Remittitur filed with the Court of Appeals (See Appellant's Motion to Recall the Remittitur attached as Exhibit 4).

motion was still pending, Petitioners filed their Motion to Accept Petition for Rehearing for Filing on or after July 7, 2011. (Exhibit 7).³ On July 19, 2011, Respondents filed their Joint Opposition to Appellants' Motion for Rehearing. (Exhibit 8). The Court of Appeals denied Respondents' June 28, 2011 Motion and issued an Order denying Petitioners' Petition for Rehearing on August 24, 2011. (Exhibit 9). Petitioners filed the Petition for Writ of Certiorari on or after September 15, 2011.

STATEMENT OF FACTS

According to their 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 near the waterfront area in downtown Beaufort, South Carolina. From there, Petitioners proceeded to the Saltus Riverfront Bar and Grill ("Saltus") located at 820 Bay Street. (R. p. 42, ¶32, and p. 105, ¶32). When the couple left Saltus and returned to their car at approximately 1:00 a.m., two men attacked, car jacked, abducted, and robbed Petitioners, and sexually assaulted Petitioner Amy Davidson. (R. p. 42, ¶33-34, and p. 105, ¶33-34). The alleged perpetrators of these crimes were later identified as Lorenzo Hicks and Alfonzo Jerome Heyward. Upon information and believe, these alleged perpetrators were convicted of crimes against Petitioners 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 parking lot from which Petitioners were allegedly abducted. Sometime in or prior to 2004, Beaufort undertook a

³ 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 previously instructed.

renovation project at the Henry C. Chambers Waterfront Park (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. 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. (R. pp. 244-246, pp. 344-357; R. p. 39, ¶5, and p. 101, ¶5).

With regard to Collins, Petitioners’ Complaints 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. 40, p. 104). 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). Petitioners served discovery requests on Collins, which were answered on July 13, 2007. (Exhibit 10). In its responses to these requests, Collins named two witnesses to testify regarding the issues on Collins’ behalf, James O’Connor and David McSweeney. 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.

The only documentary evidence before Judge Dukes at the time of the hearing was the Engineering Contract between Beaufort and Collins, which read as follows:

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) and the Contractor Agreement which mandated that "Contractor will be responsible for on-site safety of the public as well as construction personnel." R. p. 229, ¶A.1.03.2-q. Collins also presented deposition testimony in support of their 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 opposing testimony or affidavits in opposition to Collins' motion. 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. Instead, 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).

ARGUMENTS

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 IMPROPERLY RECALLED THE REMITTITUR

The South Carolina Appellate Court Rules and cases applying them are clear – a petition for rehearing must be *actually received* by the Court of Appeals no later than fifteen (15) days after the filing of the affected opinion.⁴ The sole and narrow exception to this is that a remittitur may be recalled in extremely unusual and limited circumstances of mistake, error or inadvertence of the appellate court itself. Rules 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....

⁴ The actual timely receipt of the Petition for Rehearing by the Court of Appeals is a jurisdictional requirement.

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.

SCACR 221(a)-(b); SCACR 240(g). 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 (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.”

372 S.C. at 174, 642 S.E.2d at 551. 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”) 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 in both citations).

This Court’s decision in Wise is binding here. The uncontested fact is that the Court of Appeals received Petitioners’ Motion to Recall Remittitur after the mandatory receipt date. There is no evidence of any mistake, error or inadvertence by the Court of Appeals or its staff. There is simply no evidence in the Record to support a recall of the Remittitur in this case. To the contrary, the Clerk’s letters attached as Exhibit 2 and 3 (and the Clerk’s certification if the Court requests the Clerk to issue a Certification for the Record⁵) establish that the Court did not receive the Motion/Petition for Rehearing until May 19th, one day after the mandatory receipt date. The only mistake or inadvertence was Petitioners’ own in assuming that a petition sent regular mail would reach the Court of Appeals in time⁶. As a matter of law, however, the Petitioners’ own negligence or mistake is not a sufficient reason to recall the remittitur⁷. Accordingly, 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, it did so erroneously as it lacked the jurisdiction both to hear Petitioners’ motion and to rule on it. Because the

⁵ In Respondents’ Motion to Dismiss (Exhibit 6), Respondents respectfully requested that the Court of Appeals require the Clerk to certify for the record when the Clerk received Petitioners’ Motion. To Respondents’ knowledge, the Court of Appeals did not request the Court of Appeals clerk to make the requested certification.

⁶ Petitioners could have utilized an overnight mailing service, but chose not to do so.

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 (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'

⁷ No reason for the recall of the remittitur was given in the Court of Appeals order.

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. (Exhibit 5). 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

Time and time again, Petitioners have flaunted and ignored 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. DID THE TRIAL JUDGE CORRECTLY GRANT RESPONDENT COLLINS ENGINEERS, INC'S SUMMARY JUDGMENT WHERE PETITIONERS: (1) WERE DILATORY IN SEEKING DISCOVERY; AND (2) HAVE MADE NO SHOWING THAT FURTHER DISCOVERY WOULD UNCOVER EVIDENCE THAT WOULD HAVE DEFEATED SUMMARY JUDGMENT?⁸

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,

⁸ By making the arguments in (II) and (III), Respondent Collins does not waive its jurisdictional arguments.

Petitioners have sought to shift blame to the Respondents for their own failure to conduct discovery, alleging (albeit vaguely) that Respondents failed to cooperate in discovery. The Court of Appeals summarily rejected this argument. The newest iteration of Petitioners' is that the Court of Appeals "misapprehended or overlooked" the impact of Judge Mullen's August 10, 2007 Stay Order, as well as the "non-cooperation" of Respondents.

Petitioners continually and willfully 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 or seek any written discovery they wished. In fact, Petitioners noticed and took four (4) depositions, despite their 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.⁹ Instead, Petitioners merely restated the points set forth in their pleadings, baldly accused Respondents of refusing to cooperate in discovery, and argued that it was premature for the Court to issue a decision as they wanted to take other unspecified depositions. 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.

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 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 (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

⁹ Again, Petitioners’ counsel did not request a continuance of the motions or object to the

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. 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. 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 that they were prevented from taking by the Stay

hearing on the ground that the Stay Order prohibited it.

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 are not entitled to a second oral argument as Petitioners' Petition suggests.¹⁰

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. 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

¹⁰ 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).

judgment.”).

III. DID THE TRIAL JUDGE ERR IN GRANTING RESPONDENT COLLINS ENGINEERS INC’S MOTION FOR SUMMARY JUDGMENT WHEREIN, AS A MATTER OF LAW, RESPONDENT OWED NO DUTY OF CARE TO APPELLANTS?

Appellants only other articulated ground for appeal against Collins is 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.” (Petition for Writ at 22)¹¹. 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 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). 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

¹¹ This “argument” is not delineated in the heading of the section in which it is contained, but rather, is a passing statement—nevertheless, one which Collins will address.

lot,¹² owed no duty to anyone on it. Nesbitt v. Lewis, 335 S.C. 441, 517 S.E.2d 11 (Ct. App. 1999).

CONCLUSION

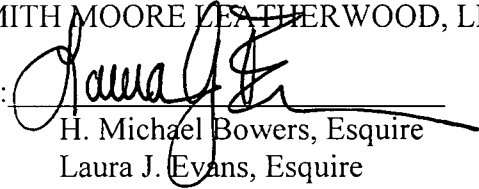
Petitioners' repetitive failure to meet deadlines set by appellate court rules stripped the Court of Appeals and this Court of jurisdiction to entertain the present petition. If this Court chooses to entertain the current petition, it still must fail. Petitioners have demonstrated no reason for this 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. Therefore, if the Court entertains Petitioners' current petition, it should be denied.

¹² Petitioners have never alleged that Collins owned or operated the parking lot at issue.

Respectfully submitted,

SMITH MOORE LEATHERWOOD, LLP

By:

A handwritten signature in black ink, appearing to read "Laura J. Evans", is written over a horizontal line.

H. Michael Bowers, Esquire

Laura J. Evans, Esquire

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Counsel for Collins Engineers, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondents' Joint Return to Petition for Certiorari has been sent to all counsel of Record via U.S. Mail, correctly addressed with sufficient postage, this 17 day of October, 2011.

Christina B. Nator
Legal Assistant

RECEIVED

OCT 25 2011

S.G. SUPREME COURT

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

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,
AMENDED RETURN TO PETITION FOR CERTIORARI**

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JURISDICTIONAL CHALLENGE AND COUNTER-STATEMENT OF

QUESTIONS PRESENTED

- I. Does the Supreme Court have 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 where the Court of Appeals improperly recalled the remittitur?
- II. Did the trial court properly grant summary judgment in favor of Brantley when the Petitioners failed to put forth any evidence to create an issue of fact against Brantley's Motion, and when Petitioners made no showing that further discovery would uncover evidence that would have defeated summary judgment?
- III. Did the trial court properly grant summary judgment in favor of Brantley when the Petitioners were dilatory in seeking discovery?
- IV. Did the trial court properly grant summary judgment in favor of Brantley when the Petitioners' admissions and the other established facts of record wherein, as a matter of law, show Brantley owed no duty of care to Petitioners under a premises liability theory, or any other theory, and when Brantley owed no duty to provide security in or around the BB&T parking lot to protect Petitioners from the criminal acts of third parties?

STATEMENT OF THE CASE

On October 23, 2006 Petitioners each filed the underlying civil lawsuits against the Respondents (R. pp. 65-68, and pp. 130-134) alleging negligence claims in connection with the incident involving an abduction and assault of Petitioners by third-party criminal assailants on May 26, 2006. (R. pp. 36-44; 90-108; 113-119). The negligence claims against 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." (R. 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. (R. 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 for these cases on May 7, 2007. (R. pp. 326-337). On May 8, 2007, the trial court, the Honorable Carmen T. Mullen, heard outstanding motions, including Brantley's Motion for Summary Judgment. (R. p. 436-480). During that hearing, the trial court heard lengthy oral arguments on the pending motions, and decided to take the Brantley's motion under advisement and afford the parties the opportunity to conduct further discovery. (R. p. 478). On May 24, 2007, the

trial court issued an Order allowing 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 (R. 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 Petitioners and 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. (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 Respondents' Notice of Motion and Motion to Alter, Amend and/or Clarify Previous Order of Stay. (R. 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 (R. 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). (R. pp. 26-27). (Emphasis added).

After considering Brantley's Motion and Memoranda in Support, and after receiving Judge Mullen's clarifying order, Judge Dukes issued an order on April 8, 2008 granting Brantley's Motion. (R. pp. 03-25). Petitioners moved for reconsideration on April 17, 2008 (R. pp. 167-174). The Respondents filed their Joint Memorandum Opposing the Motion for Reconsideration on June 19, 2008. (R. pp. 156-166). Judge Dukes denied Petitioners' motion on August 27, 2008 issuing 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, 2010 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.

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. 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. On May 25, 2011, Petitioners filed a Motion to Recall Remittitur and Accept Motion for Rehearing for Filing. 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. On June 28, 2011, Respondents filed their Joint Motion/Petition for Reconsideration and Motion to Dismiss for Lack of Jurisdiction. While this motion was still pending, Petitioners filed their Motion for Rehearing on or after July 7, 2011. The Court of Appeals denied Respondents' June 28, 2011 Motion and issued an Order denying Petitioners' Petition for Rehearing on August 24, 2011. The Petition for Writ of Certiorari was filed on or after September 15, 2011.

STATEMENT OF FACTS

Plaintiff-Petitioners, Amy and Phillip Davidson ("Petitioners") brought the underlying lawsuits against the City of Beaufort ("Beaufort"), Branch Banking and Trust of South Carolina ("BB&T"), Collins Engineers ("Collins"), Brantley Construction Company, Inc. ("Brantley"), and Tidal Wave 23, LLC ("Tidal Wave") (Collins, Tidal Wave, and Brantley are collectively referred to as "Respondents") 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 to visit with friends for the evening. (R. p. 42, ¶32, and p. 105, ¶32). When the couple 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 Appellant Amy Davidson. (R. p. 42, ¶33-34, and p. 105, ¶33-34). The perpetrators of these crimes were later identified as Lorenzo Hicks and 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. (R. 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. (R. pp. 244-246, pp. 344-357; R. 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 they were serving as

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.

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

contractors 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. (R. p. 39, ¶5, and p. 101, ¶5).

ARGUMENTS

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

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. South Carolina law, however, allows for a recall of the remittitur in extremely unusual and limited circumstances of mistake, error or inadvertence of the appellate court itself. 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 at least ensured that his petition was received within the 15 days as mandated by the rules). Respondents also recognize 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.)

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

II. The Trial Judge Correctly Granted Brantley's Motion for Summary Judgment Because Petitioners Failed to Put Forth Any Evidence to Create an Issue of Fact Against Brantley's Motion and Because Petitioners Made No Showing That Further Discovery Would Uncover Evidence That Would Have Defeated Summary Judgment

A. Petitioners Failed To Put Forth Any Evidence To Create An Issue of Fact Against Brantley's Motions for Summary Judgment.

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, Petitioners' original Opposition to Brantley's Motion for Summary Judgment was devoid of any affidavits, 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. (R. pp. 18-19). Rather, Petitioners responded to the Motion by resting on the allegations in their Complaints, and on arguments by counsel for 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.").

B. No Amount of Discovery or Further Factual Inquiry Would Have Salvaged Petitioners' Claims Against Brantley

Petitioners main argument that the trial court's grant of Summary Judgment was premature is fatally flawed because in light of Petitioners' pleadings and their admissions on record, no amount of additional discovery could have salvaged their claims and their self-declared main issues concerning lighting in the BB&T Parking Lot. The Petitioners argue that the key fact issues in this case are: (1) who was responsible for ensuring proper lighting; (2) who was responsible for turning off the lights; (3) and who had control of the lighting and safety. However, in light of Petitioners' pleadings and admissions, these issues are irrelevant to the premises liability issues before this Court and, furthermore, Petitioners are unable to articulate any relevant theory of liability against Brantley which would be furthered by additional factual inquiry on these issues.

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 (R. pp. 436-480), as well as in the January 31, 2008 summary judgment hearing (R. pp. 394-435), 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 Tidal Wave's Request to Admit served on Petitioners on June 13, 2007 (R. pp. 365-368), a failure that Petitioners' counsel acknowledged

during hearings before the trial court are binding admission by the Petitioners. Pursuant to Respondent Tidal Wave's Request to Admit, Petitioners have 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 Tidal Wave or BB&T on May 26, 2006;
- (4) That the "public parking" signs referred to in 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 (R. pp. 365-368).

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 Respondent Tidal Wave's Request to Admit either before, at, or after the January 31, 2008 hearing (R. pp. 394-435). Pursuant to Rule 36, SCRCF, these Requests to Admit were conclusively deemed admitted, and in light of these admissions no amount of additional factual inquiry 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 improperly using the BB&T parking lot.

III. The Trial Judge Correctly Granted the Respondents Summary Judgment Motions Because Petitioners Were Dilatory in Seeking Discovery.

Petitioners' primary argument against Brantley in the current Petition to this Court concerns Petitioners' assertion 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 appeals process in this case, Petitioners have sought to wrongfully shift blame for their failure to conduct discovery to the Respondents alleging that Respondents failed to cooperate in discovery – an argument which the Court of Appeals summarily rejected. The newest reiteration of Petitioners' argument contained within their Petition to this Court now attempts to place blame on the trial court for allegedly “ambushing” Petitioners in its Orders and placing Petitioners in a position whereby they were unable to properly contest the Respondents' Motions. Petitioners' focus on Judge Mullen's March 26, 2008 “Order Clarifying Order of Stay filed August 10, 2007,” which reaffirmed that the court retained jurisdiction to entertain any discovery and/or dispositive motions during the pendency of the stay. The Petitioners assert that the Court of Appeals “misapprehended or overlooked” the impact of Judge Mullen's Stay Order, as well as the “non-cooperation” of Respondents.

Its important to note for this Court's benefit that Petitioners argument continues to ignore that Judge Mullen's March 26, 2008 “Order Clarifying Order of Stay filed August 10, 2007” clearly established that discovery shall progress, with only one limitation as to disclosure of the subject criminal file.” From the institution of the litigation in October of 2006 until August 10, 2007, Petitioners were free to take any discovery depositions of the Respondents (or any other witness) they desired to take. Likewise, Petitioners were free to submit any Affidavit on their behalf or take their own depositions, yet they failed to do so. After Judge Mullen's August 10th Order, Petitioners continued to be able to take any deposition they wanted of either of themselves, 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, yet they again 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 re-stated the points set forth in their pleadings, wrongfully accused 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 take other unspecified depositions. The truth of the matter is that each and every Respondent made every effort to cooperate in discovery.

Regarding Brantley's efforts to conduct discovery, 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. (R. 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 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 responsible for turning power on and off in isolated sections of the Project during construction. (R. p. 519 (4-24)). Despite the fact Petitioners declared key legal issues in these cases to be the lighting in the BB&T Parking Lot, and who may have turned that power on or off, Petitioners never attempted to take the deposition of Tri-M representatives, or otherwise subpoena Tri-M's project file documents, demonstrating another example of Petitioners repeated pattern of dilatory conduct.

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. (R. 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.

To the extent that Petitioners make this argument as to the representatives of other Respondents, Petitioners had more than a fair opportunity to take timely depositions, but chose not

to take any depositions of representatives of Tidal Wave or Collins. Tidal Wave and Collin's respective Returns to this Court will set forth in greater detail the efforts those respective parties made to answer discovery, identify witnesses, and provide Petitioners with access to its documents and take the deposition of its representatives. Once again, Petitioners chose to take no action, and in one significant instance, even failed to Answer Requests to Admit served on Petitioners by Tidal Wave, which amount to a series of admissions by Petitioners that are fatal to its claims against all Respondents. (R. pp. 365-368).

Petitioners next attempt to garner this Court's sympathies is based on its argument 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." It is inconceivable that any testimony from the criminal defendants or investigating officers could shed any light on Petitioners primary point of contention against Brantley - who had control of turning off the lighting in the BB&T Parking Lot; or which would contradict the overwhelming evidence on record that already existed that Brantley had absolutely no control over the subject BB&T Parking Lot or that Parking Lot's lighting. The absence of such evidence implicating Brantley to the BB&T Parking Lot is even more conspicuous upon examining the testimony elicited from Gary Brantley, Louis White, and City representatives (Isaiah Smalls and Lamar Taylor). (R. p. 481-674). There was no testimony by any of these deponents which supported Petitioners' speculation as to who may or may not have had control of the lighting in the BB&T Parking Lot. In fact, it is important to note that Petitioners misrepresent Mr. Brantley's testimony in its Petition to this Court by arguing Mr. Brantley conceded Brantley turned the power off in the BB&T Parking Lot - a total untruth.

The decisions by this Court have been clear, 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)). Petitioners here had ample opportunity to conduct the discovery to defend 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 Trial Judge Did Not Err in Granting Brantley's Motion for Summary Judgment Based on Petitioners' Admissions and the Other Established Facts of Record Wherein, as a Matter of Law, Brantley Owed No Duty of Care to Petitioners under a Premises Liability Theory, or any other theory, and Where Brantley Owed No Duty to Provide Security in or Around the BB&T Parking Lot to Protect Petitioners from the Criminal Acts of Third Parties

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).

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

The lower court was justified in granting summary judgment to Brantley because the Petitioners were unable to point to any applicable legal authority which would tend to establish that Brantley had a 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.

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). Petitioners' vague description of a legal duty allegedly owed by Brantley appears to have been based upon a premises liability theory, coupled with Petitioners' allegation that they were "invitees" to the Parking Lot.

In the present case, Petitioners contend they were "clearly" 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, Petitioners' tenuous position that they were owed a duty by Brantley is eviscerated by Petitioners' own deemed admissions with respect to Tidal Wave's Requests to Admit to Plaintiff dated June 13, 2007. (R. 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 single most important aspect of the definition of invitee, which is to establish that they were on the subject property for the purpose for which the property was held open to the public.

The Petitioners' claims against Brantley is further attenuated because the Petitioners never even alleged that they ever entered the Project, 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 control, the BB&T Parking Lot in which the criminal activity occurred. The Parking Lot was strictly "off limits" to Brantley personnel at all relevant 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 design professional for the Project provided drawings and plans that Brantley was bound to follow pursuant to its contract. 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. (R. 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. Further, the Petitioners have not alleged that the incident took place on, nor have Petitioners alleged that they even entered onto Brantley's Project site at any time.

Further, In light of the absence of any legal duty based upon any premises liability legal classification, Petitioners final effort is to assert that Brantley is somehow responsible for insufficient

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.

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.

B. Brantley Did Not Breach Any Common Law Duty to Petitioners Because Petitioners Were Injured by Criminal Acts of Third Parties for Which Brantley Is Not Liable.

Petitioners also incorrectly argue 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 patrol 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); and *Militec v. Wal-Mart*, 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000) (Wal-Mart was not liable for criminal activity on property under its control and it had no duty to protect the plaintiff from the attack, despite the fact that other criminal activity occurred previously in or near the shopping center at issue, because the other crimes were unrelated and because the crime happened quickly).

In the present case, Brantley had no duty to protect these Petitioners from the criminal acts of third parties. First, 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 contractor, 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 pursuant to the 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 and Appeal phases of these cases, the Petitioners offered absolutely no support that Brantley's performance at the Project turned off the BB&T Parking Lot lights. Yet, now that this matter is presented before this 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. (R. pp. 516 - 522; see also Materials Plan Part E filed as Exhibit D to Brantley's Motion for Summary Judgment. (R. 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 i8n 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.

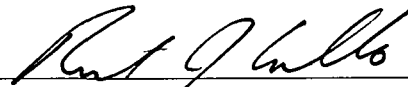
CONCLUSION

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

Respectfully Submitted,

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By: _____


R. Patrick Flynn
Robert J. Cardillo
**Attorneys for Brantley Construction
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Charleston, South Carolina
October 24, 2011

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

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 SERVICE

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(843) 723-6470
**Attorneys for Brantley Construction
Company, Inc.**

The undersigned certifies that foregoing AMENDED Return to Petition for Certiorari by Respondent, Brantley Construction Company, Inc., was served upon the counsel set forth below, by electronic email, and by depositing the same in the U.S. Mail, postmarked on the date set forth below.

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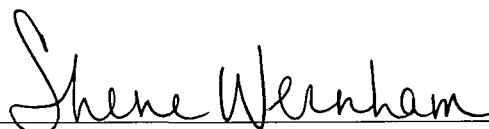
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By: 
Shene Wernham
Legal Assistant to R. Patrick Flynn and
Robert J. Cardillo

Charleston, South Carolina
October 24, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

OCT 31 2011

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

S.C. Supreme Court

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

Case No. 06-CP-07-2682/2683

Amy Davidson Appellant,

v.

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

and

Phillip Davidson Appellant,

v.

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

**RESPONDENTS' JOINT MOTION
TO SUPPLEMENT RETURNS AND APPENDIX**

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723-6470

Counsel for Brantley Construction
Company, Inc.

Respondents Tidal Wave 23, LLC, Collins Engineers, Inc. and Brantley Construction Company, Inc. hereby respectfully file Respondents' Joint Motion to Supplement Returns and Appendix.¹ Respondents respectfully file this motion because each Respondent filed its respective Return to the Petitioners' Petition and attached the exhibits identified below to each respective Return. These exhibits include letters from the Clerk of Court of the Court of Appeals (including scheduling deadlines), motions filed with the Clerk of Court of the Court of Appeals, and Orders or other actions taken by the Court of Appeals that are relevant to the Respondents' jurisdictional challenge concerning the filing of this current Petition. Specifically, Respondents attached the following exhibits to each Respondent's respective Return, though the exhibits may have been numbered differently in each respective Return:

1. Letter from Renee Johnson, Court of Appeals Administrative Specialist, to Petitioners' counsel dated May 3, 2011 (enclosing May 3, 2010 Unpublished Opinion No. 2011-UP-199);
2. Letter from Court of Appeals Clerk to lower court dated May 19, 2011 issuing Remittitur to trial court;
3. Letter from Court of Appeals Clerk to Petitioners' counsel dated May 20, 2011, returning Petitioners' Motion/Petition for Rehearing and filing fee;
4. Motion to Recall Remittitur and Accept Motion for Rehearing dated May 25, 2011;
5. Letter from Court of Appeals Clerk to Petitioners' counsel dated June 16, 2011 recalling remittitur and setting Petition for Rehearing deadline;

¹ Respondents seek supplementation of the Returns and the Appendix pursuant to SCACR Rule 240 and 242.

6. Respondents' Joint Motion/Petition for Reconsideration and Motion to Dismiss for Lack of Jurisdiction dated June 28, 2011;
7. Petitioners' Motion to Accept Petition for Rehearing for Filing dated July 7, 2011;
8. Respondents' Joint Opposition to Appellants' Motion for Rehearing dated July 19, 2011;
9. Court of Appeals Order denying Petitioners' Petition for Rehearing dated August 24, 2011.

The Respondents believe that the above exhibits are relevant and dispositive issues in the present Petition; however, the Petitioners did not include such documentation (with the exception of Exhibit No. 9) in the Appendix. Moreover, the Supreme Court Clerk of Court advised Respondents that it would not accept any exhibits attached to the Respondents' Returns and, in fact, demanded that each Respondent physically remove all exhibits from its respective Return. Respondents followed the Clerk of Courts direction have since removed those exhibits.²

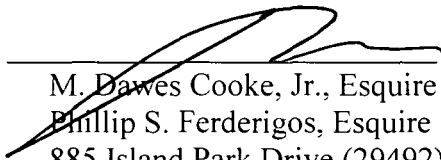
The South Carolina Appellate Court rules do not set forth the precise manner in which such documentation may be presented to the Supreme Court. However, South Carolina Appellate Court Rule 242(e)(2) sets forth that "if the matter was dismissed by the Court of Appeals for procedural or other reasons, the appendix shall include any documents relevant to the dismissal including any Motion to Dismiss and any Return or Reply that may have been filed." As the Court of Appeals issued a Remittitur, Respondents assert that the Remittitur documentation, the letters from the Court

² Further, Brantley filed its Amended Return on October 24, 2011 which deletes any reference to the exhibits 1-8 that were physically removed from its initial Return.

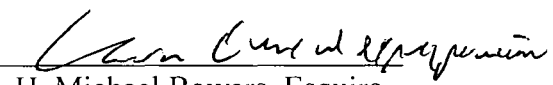
concerning the Remittitur, and Motions and Returns of the parties surrounding the Remittitur should properly be included in the Appendix. Respondents believed that attaching such documentation as exhibits to the Returns was reasonable and not prohibited by the rules; however, Respondents now jointly file this present motion to request that this Court order/allow such documentation to be added to the Appendix so this Court may be able to issue a decision as to the Respondents' threshold jurisdictional challenge.³ In addition, Respondents request that this Court allow each Respondent to further amend its Return in order to delete any reference to the exhibits they originally attached, and to cite the exhibit itself with the appropriate Appendix pages (once the above documentation has been added to the Appendix).

Respectfully submitted,

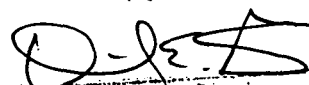
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By: 
H. Michael Bowers, Esquire

GRANTED.


Jean H. Tool C.J.
For the Court
By 
Clerk

November 16, 2011

³ Respondents assert that the recall of the Remittitur by the Court of Appeals was improper and, as such, the Court of Appeals lacked the jurisdiction to recall the Remittitur. In addition, Respondents further assert that the Supreme Court has the ability to review the Court of Appeals decision to recall the Remittitur in order to determine if there is any evidence or a strong showing that the Appellate Court itself or the Appellate Court staff made a mistake, thereby justifying the recall. As the Record in the Appendix is devoid of any mistake on behalf of the Court of Appeals or its Clerk in issuing the Remittitur, the recall of the Remittitur was improper and the Court of Appeals did not have jurisdiction to recall the Remittitur. Likewise, as the Court of Appeals lacked the jurisdiction to recall the Remittitur, this Honorable Court, respectfully, does not have jurisdiction to entertain the Petitioners' current Petition.

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THE STATE OF SOUTH CAROLINA
In The 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.

PROOF OF SERVICE

The undersigned certifies that on the 27th day of October, 2011, Respondents' Joint Motion to Supplement Returns and Appendix was served upon counsel of Record as set forth below by depositing the same in the U.S. Mail, with sufficient postage:

James H. Moss, Esquire
Kimberly L. Smith, Esquire

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OCT 31 2011

S.C. SUPREME COURT

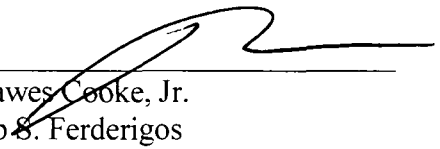
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since 1938

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October 27, 2011

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OCT 31 2011

S.C. SUPREME COURT
PM 10-27-11

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Amy Davidson and Phillip Davidson v. City of Beaufort, et al.
Case Tracking Number 2011-199428
Case Nos. 2006-CP-07-2682 and 2006-CP-07-2683
Our File No. 3031.002

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Respondents' Joint Motion to Supplement Returns and Appendix. Also enclosed are the original and seven copies of the Proof of Service and our check for \$25. Please file the original and six copies of each and return one clocked copy of each to me in the envelope I have provided herein.

By copy of this letter, and pursuant to the Proof of Service, I am serving counsel of Record with copies of the same.

Thank you for your assistance.

With kind regards,


Phillip S. Ferderigos

Enc.

Cc w/enc.: James H. Moss, Esquire, Kimberly L. Smith, Esquire
Edward K. Pritchard, III, Esquire
H. Michael Bowers, Esquire, Laura Evans, Esquire
R. Patrick Flynn, Esquire, Robert J. Cardillo, Esquire

PSF/bbm

check # 14961
\$25.00

{Client
Matter\003031\0002\CSP\00333675.DOC}
William C. Helms, III

M. Dawes Cooke, Jr.

B.C. Killough*

Randell C. Stoney, Jr.

Phillip S. Ferderigos

K. Michael Barfield

Ernest B. Lipscomb, III*

J. Gail Rahn

Todd M. Musheff

Craig E. Burgess

Lucinda Gardner Wichmann

John W. Fletcher

John A. Jones

Alissa DeCarlo

Barbara J. Wagner, Ph.D.

Jeremy E. Bowers

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H. FRED KUHN, JR.

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KIMBERLY L. SMITH

EVE M. FLEMING

1501 North Street P.O. Drawer 507 - Beaufort, South Carolina 29901-0507

TELEPHONE 843-524-3373

FAX 843-524-1302

*ALSO MEMBER OF GA BAR

October 25, 2011

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NOV -1 2011

S.C. Supreme Court

pm 10/25/11 DJ

Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
1231 Gervais Street
Post Office Box 11330
Columbia, South Carolina 29201

RE: Amy Davidson v. City of Beaufort, Branch Banking & Trust of South Carolina, Collins Engineering, Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC

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

Dear Mr. Shearouse:

Enclosed please find the original and one (1) copy of the corrected Appendix regarding the above-referenced matter.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.



H. Fred Kuhn, Jr.

HFKjr:sr

Enclosures

cc: H. Michael Bowers, Esquire
Laura C. Johnson Evans, Esquire
Dawes Cooke, Jr., Esquire
Phillip S. Ferderigos, Esquire
R. Patrick Flynn, Esquire
Mary Bass Lohr, Esquire
William B. Harvey, III, Esquire
Edward K. Pritchard, III, Esquire

ROBERTSON & HOLLINGSWORTH
ATTORNEYS AT LAW
WACHOVIA CENTER
177 MEETING STREET, SUITE 300
CHARLESTON, SOUTH CAROLINA 29401

Claron A. Robertson, III
Dunn D. Hollingsworth
R. Patrick Flynn
Theodore L. Manos
Paul R. Rahn
Robert J. Cardillo (SC, IL, MI)
Michael E. Wright
Christopher M. Ramsey (SC, GA)

(843) 723-6470
Fax (843) 853-9045
E-mail: info@roblaw.net

October 24, 2011

Ms. Brenda F. Shealy
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *Amy Davidson v. City of Beaufort, Branch Banking and Trust of S.C. Collins Engineers, Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC*
Civil Action No.: 2006-CP-07-2682
Phillip Davidson v. City of Beaufort, Branch Banking and Trust of S.C., Collins Engineers, Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC
Civil Action No.: 2006-CP-07-2683

Dear Ms. Shealy:

Enclosed please find the original and seven (7) copies of Respondent, Brantley Construction Company, Inc.'s, Amended Return to Petition for Certiorari. Please file the original with the Court and return one of the copies to me in the envelope provided.

By copy of this letter, I am serving this document upon all counsel of record. If you have any questions, please do not hesitate to contact me. With best regards, I am

Thanking you in advance for your assistance in this regard, I remain

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OCT 25 2011

S.G. SUPREME COURT

pm 10-24-11

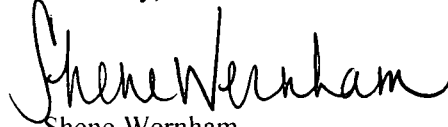
/sw

Enclosures

cc (w/enc.):

James H. Moss, Esquire
Kimberly L. Smith, Esquire
H. Michael Bowers, Esquire
William B. Harvey III, Esquire
Phillip S. Federigos, Esquire
M. Dawes Cook, Jr., Esquire
Edward K. Pritchard III, Esquire
Mary Boss Lohr, Esquire

Sincerely,



Shene Wernham

Legal Assistant to R. Patrick Flynn and
Robert J. Cardillo

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

Phillip S. Ferderigos, Partner
pferderigos@barnwell-whaley.com

October 17, 2011

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

OCT 19 2011

S.C. Supreme Court
pm 10-17-11

RE: Amy Davidson and Phillip Davidson v. City of Beaufort, et al.
Case Tracking Number 2011-199428
Case Nos. 2006-CP-07-2682 and 2006-CP-07-2683
Our File No. 3031.002

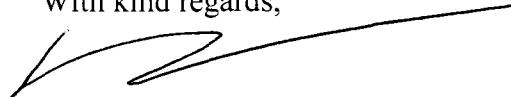
Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Respondent tidal Wave 23, LLC's Return to Petition for Certiorari. Also enclosed is the original and seven copies of the Proof of Service. Please file the original and six copies of each and return one clocked copy of each to me in the envelope I have provided herein.

By copy of this letter, and pursuant to the Proof of Service, I am serving counsel of Record with copies of the same.

Thank you for your assistance.

With kind regards,



Phillip S. Ferderigos

Enc.

Cc w/enc.: James H. Moss, Esquire, Kimberly L. Smith, Esquire
Edward K. Pritchard, III, Esquire
H. Michael Bowers, Esquire, Laura Evans, Esquire
R. Patrick Flynn, Esquire, Robert J. Cardillo, Esquire

PSF/bbm

{Client
Matter\003031\0002\CSP\00332494.DOC}

William C. Helms, III

M. Dawes Cooke, Jr.

B.C. Killough*

Randell C. Stoney, Jr.

Phillip S. Ferderigos

K. Michael Barfield

Ernest B. Lipscomb, III*

J. Gail Rahn

Todd M. Musheff

Craig E. Burgess

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John W. Fletcher

John A. Jones

Alissa DeCarlo

Barbara J. Wagner, Ph.D.

Jeremy E. Bowers



SMITH MOORE LEATHERWOOD

October 17, 2011

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OCT 17 2011

S.C. Supreme Court

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

Re: Amy Davidson and Phillip Davidson v. City of Beaufort, Branch Banking & Trust of
South Carolina, Collins Engineers, Inc., Brantley Construction Company, Inc., and
Tidal Wave 23, LLC
Case No.: 06-CP-07-2682/2683
Client-Matter No. 05004890.11

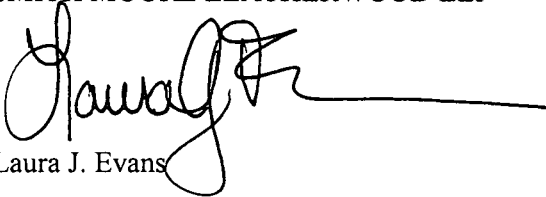
Dear Mr. Shearouse:

Please find enclosed the original and six (6) copies of Respondent Collins Engineers, Inc.'s
Return to Petition for Writ of Certiorari in the above-referenced matter.

By copy of this letter, I am serving a copy of same upon all attorneys of record.

With kindest regards, I am

Sincerely,
SMITH MOORE LEATHERWOOD LLP



Laura J. Evans

LJE/cbn

Enclosures

cc: Robert J. Cardillo, Esquire
H. Fred Kuhn, Jr., Esquire
Phillip Ferderigos, Esquire

CHARLESTON 2190.1

Direct 843.577.9888 | Fax 843.577.9666 | laura.evans@smithmoorelaw.com
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October 17, 2011

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OCT 17 2011

Ms. Tanya Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

S.C. Supreme Court

Re: *Amy Davidson v. City of Beaufort, Branch Banking and Trust of S.C. Collins Engineers, Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC*
Civil Action No.: 2006-CP-07-2682
Phillip Davidson v. City of Beaufort, Branch Banking and Trust of S.C., Collins Engineers, Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC
Civil Action No.: 2006-CP-07-2683

Dear Claire:

Enclosed please find the original and seven (7) copies of Respondent, Brantley Construction Company, Inc.'s, Return to Petition for Certiorari. Please file the original with the Court and return one of the copies to me in the envelope provided.

By copy of this letter, I am serving this document upon all counsel of record. If you have any questions, please do not hesitate to contact me. With best regards, I am

Thanking you in advance for your assistance in this regard, I remain

Sincerely,



Shene Wernham

Legal Assistant to R. Patrick Flynn and
Robert J. Cardillo

/sw

Enclosures

cc (w/enc.): James H. Moss, Esquire
Kimberly L. Smith, Esquire
H. Michael Bowers, Esquire
William B. Harvey III, Esquire
Phillip S. Federigos, Esquire
M. Dawes Cook, Jr., Esquire
Edward K. Pritchard III, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 22, 2011

H. Fred Kuhn, Jr, Esquire
Moss Kuhn & Fleming, PA
P.O. Drawer 507
Beaufort, SC 29901

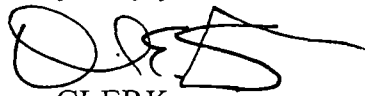
Re: Davidson, Amy v. City of Beaufort
Case Tracking No. 2011-199428

Dear Mr. Kuhn:

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,



CLERK

DES/lda

Enclosure

Davidson, Amy v. City of Beaufort
Page Two
September 22, 2011

cc: Dawes Cooke, Jr., Esquire
Phillip S. Ferderigos, Esquire
H. Michael Bowers, Esquire
R. Patrick Flynn, Esquire
Edward K. Pritchard, III, Esquire
Mary Bass Lohr, Esquire
William B. Harvey, III, Esquire
The Honorable Tanya Gee

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CORY H. FLEMING*

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KIMBERLY L. SMITH

EVE M. FLEMING

*ALSO MEMBER OF GA BAR

September 16, 2011

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SEP 19 2011

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Post Office Box 11330
Columbia, South Carolina 29211

S.C. Supreme Court

RE: Amy Davidson v. City of Beaufort, Branch Banking & Trust of South Carolina, Collins
Engineering, Inc., Brantley Construction Company, Inc. and Tidal Wave, 23
Case No.: 2006-CP-07-2682

Philip Davidson v. City of Beaufort, Branch Banking & Trust of South Carolina, Collins
Engineering, Inc., Brantley Construction Company, Inc. and Tidal Wave, 23
Case No.: 2006-CP-07-2682

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Petition for Writ of Certiorari and two (2) copies of the Appendix to the Petition for Writ of Certiorari. Also enclosed is my firm's check in the amount of \$100.00 for the filing fee of the same. By copy of this letter and the enclosures, I am serving a copy of the same on all counsel of record.

With kindest regards, I am

Very truly yours,

MOSS & KUHN, P.A.



H. Fred Kuhn, Jr.

HFKjr:sr
Enclosures

Check # 7013
\$100.00

cc: The Honorable Tanya Gee, South Carolina Court of Appeals
H. Michael Bowers, Esquire (w/enclosures)
Mary Bass Lohr, Esquire (w/enclosures)
William B. Harvey, III, Esquire (w/enclosures)
Phillip S. Ferderigos, Esquire (w/enclosures)
R. Patrick Flynn, Esquire (w/enclosures)
Edward K. Pritchard, III, Esquire (w/enclosures)