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Unpublished Opinion No. 2011-UP-199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, SECOND AMENDED RETURN TO PETITION FOR CERTIORARI

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

INDEX

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 trail 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 trail 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. (Suppl. Appendix pp. 1-18).

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. (Suppl. Appendix p. 19). On May 20,

2011, apparently having received Petitioners' late petition, the Clerk issued a letter returning the original Petitioners' Motion/Petition for Rehearing and filing fee to the Petitioners' counsel advising that the Petitioners' Motion/Petition for Rehearing was filed out of time. (Suppl. Appendix p. 20). On May 25, 2011, Petitioners filed a Motion to Recall Remittitur and Accept Motion for Rehearing for Filing. (Suppl. Appendix pp. 21-31). On June 16, 2011, the Court of Appeals recalled the remittitur and advised Petitioners that their Petition for Rehearing was due on or before July 1, 2011. (Suppl. Appendix p. 32). On June 28, 2011, Respondents filed their Joint Motion/Petition for Reconsideration and Motion to Dismiss for Lack of Jurisdiction. (Suppl. Appendix pp. 33-43). While this motion was still pending, Petitioners filed their Motion for Rehearing on or after July 7, 2011. (Suppl. Appendix pp. 44-49). The Court of Appeals denied Respondents' June 28, 2011 Motion and issued an Order denying Petitioners' Petition for Rehearing on August 24, 2011. (Suppl. Appendix pp. 66-67). 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 pf 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 (Suppl. Appendix pp. 19-20), 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, SCRCP, 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 noting more then 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. If fact, its 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 complacence.'" 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 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 felonry 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

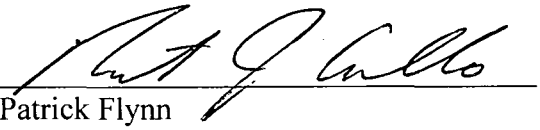
are unable to support their allegations that Brantley in any way negligently or intentionally created any risk which would create a duty to warn the Petitioners or to control the acts of others.

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,

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

By: 

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

Charleston, South Carolina
December 30, 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

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

The undersigned certifies that foregoing SECOND 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.

James H. Moss, Esquire
Kimberly L. Smith, Esquire
Moss, Kuhn & Fleming, P.A.
1501 North Street
P.O. Drawer 507
Beaufort, SC 29902
Attorneys for Amy Davidson and Phillip Davidson

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

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

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

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

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

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

Charleston, South Carolina
December 30, 2011