THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN - 3 2012
S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

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

Unpublished Opinion No. 2011-UP-199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

Amy Davidson .... Petitioner,

v.

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

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

and

Phillip Davidson .... Petitioner,

v.

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

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

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

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

INDEX

QUESTIONS PRESENTED....1

STATEMENT OF THE CASE....1

STATEMENT OF FACTS....6

ARGUMENTS....9

I. THE SUPREME COURT LACKS JURISDICTION TO HEAR THE PETITION BECAUSE PETITIONERS FAILED TO TIMELY FILE A PETITION FOR REHEARING WITH THE COURT OF APPEALS, THE COURT OF APPEALS ISSUED A REMITTITUR, AND THE COURT OF APPEALS IMPROPERLY RECALLED THE REMITTITUR....9

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....13

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....19

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 24

CONCLUSION 25

JURISDICTIONAL CHALENGE 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 WOLD 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), SCRCP 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.

---

filed August 10, 2007, reaffirming that the court retained its jurisdiction to entertain any discovery and/or

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, SCRCP (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 (Supp. App. 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.[3] On May 19, 2011, having not received a Petition for Rehearing, the Court issued its Remittitur to the lower court (Supp. App. 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 (Supp. App. 20). On May 25, 2011, Petitioners filed a Motion to Recall Remittitur and Accept Motion for Rehearing for Filing (Supp. App. 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 (Supp.

---

[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.

App. 32). On June 28, 2011, Respondents filed their Joint Motion/Petition for Reconsideration and Motion to Dismiss for Lack of Jurisdiction (Supp. App. 33-43). While the joint motion was still pending, Petitioners filed their Motion for Rehearing on or after July 7, 2011. (Supp. App. 44-49).[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. (Supp. App. 66-67). 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 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

---

[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.

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 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

---

[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).

(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).

---

[6]As 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 (Supp. App. 1-2; 19-20) 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 in the Court of Appeals letters (Supp. App. 1-2; 19-20). 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

---

Columbia within five days.

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 things 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

---

[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

admit, Petitioners appeared in front of Judge Dukes with no affidavits in opposition to 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

---

Petitioners, not Respondent Tidal Wave.

[11]Petitioners' 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).

create an issue of fact given the dispositive admissions conceded by the Petitioners.

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.

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

---

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. 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."

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)). 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 <u>for a purpose for which the land is held open to the public</u>; also, a business visitor is a person who is invited to enter or remain on land for a <u>purpose directly</u>

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 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). 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 <u>why</u> 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 <u>why</u> 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 – <u>why</u> 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.

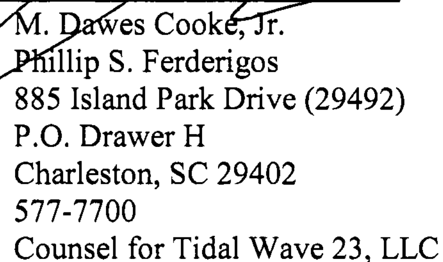
It is beyond dispute that the Petitioners had ample opportunity to provide affidavits in opposition to Respondent Tidal Wave's motion for summary judgment, but no such affidavits were submitted in response. Instead, Petitioners responded by resting on the allegations in their Complaints and on arguments 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
JAN 09 2012
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

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

---

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

Amy Davidson .... Petitioner,

v.

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

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

and

Phillip Davidson .... Petitioner,

v.

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

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

PROOF OF SERVICE

The undersigned certifies that on the ~~22nd~~ 28th day of December, 2011, Respondent Tidal Wave 23, LLC's Revised 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

{Client Matter\003031\0002\MTN\00342417.DOC}