IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III, Presiding 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Unpublished Opinion No. 2011-UP-199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, Defendants

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

Philip Davidson, Petitioner,

vs.

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

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

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Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on August 24, 2011.

QUESTIONS PRESENTED

I. Did the South Carolina Court of Appeals err in concluding that the Beaufort County Master in Equity properly granted summary judgment to the Respondents despite the fact that discovery had not yet been completed, particularly where discovery had been impeded by an Order partially staying discovery, as well as by the non-cooperation of the Respondents in scheduling and taking depositions?

II. Did the South Carolina Court of Appeals err in concluding that the Beaufort County Master in Equity properly granted summary judgment to the Respondent Tidal Wave 23, LLC on the ground that the Petitioners presented no evidence that the Respondent Tidal Wave invited or gave consent for the Petitioners to enter and use the parking lot in question, where there was evidence that the Petitioners were public invitees?

STATEMENT OF THE CASE

This is a tort action. It arises out of an incident which occurred on May 26, 2006 when the Petitioners, who are husband and wife, were kidnaped, robbed and assaulted. During the assault, the Petitioner-Wife was raped.

These companion cases were commenced by the filing of Summonses and Complaints in the Beaufort County Court of Common Pleas on October 23, 2006. Although the Petitioners initially filed separate suits, these cases were consolidated by Order dated May 24, 2007, since they involve identical parties and arise out of the same set of operative facts.

In their Complaints, the Petitioners allege that on the evening of May 25, 2006 they parked their car in a parking lot located at 706 Bay Street in the City of Beaufort, South Carolina, and walked to an adjoining restaurant, Saltus Restaurant, in order to have dinner with friends. Upon returning to their car around 1:00 a.m. on May 26, 2006, they observed that it was totally dark. Two (2) men approached them, and forcibly carjacked and abducted them, taking them to another location where they were robbed and assaulted. During the assault, the Petitioner Amy Davidson was raped. [ROA, pp. 36-44 and pp. 69-77].

The Petitioners allege in their Complaint that the parking lot located at 706 Bay Street in which they parked was operated, maintained and controlled by the Respondents. The Respondent Tidal Wave 23, LLC ("Tidal Wave"), owned the building and a portion of the parking lot, which it had leased to the co-Defendant Branch Banking and Trust of South Carolina ("BB&T"). The remainder of the parking lot was owned by the co-Defendant City of Beaufort. Pursuant to a contract with the City of Beaufort, the Respondent Brantley Construction Company, Inc. ("Brantley Construction") was engaged in a large construction project located immediately adjacent to the

parking lot, and which encompassed a portion of the parking lot. The Respondent Collins Engineers, Inc. ("Collins Engineers") had been hired by the City of Beaufort to supervise the construction project being undertaken by Brantley Construction. The Petitioners allege that the Respondents failed to adequately illuminate the parking lot, and in fact provided no lighting to said premises, and as a result, the parking lot was a dangerous, high crime area, and that with the knowledge of the Respondents, a string of criminal attacks had occurred in the area during the month of May 2006, including the robbery and rape of a woman from the same parking lot just days earlier, on May 11, 2006. The Complaint alleges that the Respondents, knowing of this criminal activity, were negligent in failing to provide adequate lighting or other security for this parking lot. [ROA, pp. 36-44 and 69-77].

The Respondent Brantley Construction filed its Answer on November 21, 2006. [ROA, pg. 65]. The Respondent Collins Engineers filed its Answer and Cross-Claim against Brantley Construction and the City of Beaufort on December 4, 2006. [ROA, pg. 55]. The Respondent Tidal Wave filed its Answer on December 15, 2006. [ROA, pg. 83].

On December 14, 2006, the Respondent Tidal Wave filed a Motion to Dismiss pursuant to *SCRCP Rule 12(b)(6)*, addressing the legal classification of the Plaintiffs as either trespassers, licensees, or invitees, based upon the factual allegations asserted in the Petitioners' Complaint. [ROA, pg. 274]. On May 8, 2007, the Honorable Carmen T. Mullen, Circuit Judge for the Beaufort County Court of Common Pleas denied this motion. [ROA, pg. 34].

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

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

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

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

However, it is understood by the Court and among the parties, that **discovery shall progress to the degree possible** without the disclosure of the subject criminal file.

In light of the foregoing**, it is therefore ordered that this matter will be stayed** pending the release of the criminal investigative file Case No. 2006 05 2633 by the Beaufort County Solicitor's Office and/or the City of Beaufort Police

Department. However, **discovery is to proceed to that degree possible** without the release of the above referenced investigative file.

IT IS SO ORDERED.

ROA, pg. 31 (emphasis added).

As a result of motions for summary judgment filed by the Respondents Tidal Wave, Brantley Construction and Collins Engineering, a hearing was held before Judge Dukes on January 31, 2008. At that hearing Petitioners' counsel opposed summary judgment on the ground that, *inter alia*, it was premature inasmuch as discovery was incomplete, citing the scheduling difficulties involved with so many lawyers, as well as the roadblock posed by the pending criminal investigation. [ROA, pp. 409-415]. It was also noted that Judge Mullen's Stay Order stayed the case except for discovery to a limited extent, which would include a stay on the hearing of dispositive motions. Judge Dukes agreed and on March 7, 2008 he issued an Order concluding that Judge Mullen's Stay Order did not "allow a motion that would result in a disposition of the case prior to the release of the (Solicitor's and Police Department) file . . . and concluding that "the motions for summary judgment . . . are stayed by prior Order . . . ." [ROA, pp. 26-27].

On March 26, 2008, at the request of the Respondents Tidal Wave, Collins Engineers and Brantley Construction, Judge Mullen issued an Order captioned "Order Clarifying Order of Stay filed August 10, 2007." In this Order, Judge Mullen "clarified" her Order of Stay and "confirmed" that the hearing that had been held before Judge Dukes on January 31, 2008 on the Respondents' summary judgment motions was "properly scheduled and heard" and finding that Judge Dukes was "authorized to rule on the aforementioned dispositive motions of Tidal Wave 23, LLC, Collins Engineers, Inc., and Brantley Construction Company, Inc. as he deems just and proper." [ROA, pg.

27].

On April 8, 2008, Judge Dukes, without holding another hearing, issued his Order Granting Summary Judgment in favor of the Respondents. [ROA,pg. 3].

On April 17, 2008 the Petitioners filed their Motion to Reconsider the Order Granting the Respondents' Motion for Summary Judgment. [ROA, pg. 113].

On September 2, 2008 Judge Dukes issued his Order denying the Petitioners' Motion to Reconsider. [ROA, pg. 1].

On September 8, 2008, Petitioners filed their Notice of Intent to Appeal to the South Carolina Court of Appeals.

On May 3, 2011 the South Carolina Court of Appeals, in Unpublished Opinion No. 2011-UP-119 the South Carolina Court of Appeals affirmed the grant of summary judgment to the Respondents.

On August 24, 2011 the South Carolina Court of Appeals denied the Petitioners' Petition for Rehearing. The Petitioners now file, pursuant to *Rule 242, SCACR*, their Petition to issue a writ of certiorari to review the aforesaid final decision of the South Carolina Court of Appeals.

ARGUMENTS

I. DID THE SOUTH CAROLINA COURT OF APPEALS ERR IN CONCLUDING THAT THE BEAUFORT COUNTY MASTER IN EQUITY PROPERLY GRANTED SUMMARY JUDGMENT TO THE RESPONDENTS DESPITE THE FACT THAT DISCOVERY HAD NOT YET BEEN COMPLETED, PARTICULARLY WHERE DISCOVERY HAD BEEN IMPEDED BY AN ORDER PARTIALLY STAYING DISCOVERY, AS WELL AS BY THE NON-COOPERATION OF THE RESPONDENTS IN SCHEDULING AND TAKING DEPOSITIONS?

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

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

> Counsel have raised concerns over the rate in which the discovery was progressing in this matter. The parties were in agreement that this was the result, primarily, of an ongoing criminal investigation of a related matter to the assault of the Plaintiffs giving claims raised (sic, giving rise to the claims raised) by the Plaintiffs. The parties, as well as this Court, wish to do nothing that may jeopardize any criminal proceeding or investigation, through the forced disclosure by either the Beaufort County Solicitor's Office or the City of Beaufort Police Department of information contained in the criminal investigation.
>
> Additionally, the parties agreed that until the full investigative file could be released by the City of Beaufort Police Department and/or the Beaufort County

Solicitor's Office, that **it would be impossible to take all the depositions required in this litigation**.

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

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On March 26, 2008, at the request of the Respondents Tidal Wave, Collins Engineers and Brantley Construction, Judge Mullen issued an Order captioned "Order Clarifying Order of Stay filed August 10, 2007." In this Order, Judge Mullen "clarified" her Order of Stay and "confirmed" that the hearing that had been held before Judge Dukes on January 31, 2008 on the co-Defendants' summary judgment motions was "properly scheduled and heard" and finding that Judge Dukes was "authorized to rule on the aforementioned dispositive motions of Tidal Wave 23, LLC, Collins Engineers, Inc., and Brantley Construction Company, Inc. as he deems just and proper." [ROA, pg. 27]. A few days later, on April 8, 2008, Judge Dukes, without holding another hearing, issued his Order Granting Summary Judgment in favor of the Respondents, which Order is the subject of this appeal.

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

"Summary judgment is a drastic remedy which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. American*

Telephone and Telegraph Company, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "An Appellate Court reviews the grant of summary judgment under the same standard applied by the Circuit Court." *David v. McLeod Regional Medical Center, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).*

The Circuit Court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rule 56(c), SCRCP.* See also, *Guinan v. Tenant Healthsystems of Hilton Head, Inc.*, *383 S.C. 48, 53, 677 S.E.2d 32, 36 (Ct. App. 2009).* In determining whether any triable issues of fact exists, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Law v. South Carolina Department of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).* "A Court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Regional Medical Center, 367 S.C. 242 at 250, 626 S.E.2d 1, 5 (2006).*

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

to complete discovery." *Guinan v. Tenant Healthsystems of Hilton Head, Inc., supra, 383 S.C. at 53-54, 677 S.E.2d at 35-36.*

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

In the instant case, it is respectfully submitted that the Court of Appeals overlooked or misapprehended the fact that as a result of the stay order issued by Judge Mullen on August 10, 2007, which was compounded by the non-cooperation on the part of the Respondents, the Petitioners had not had a full and fair opportunity to complete discovery at the time summary judgments were entered.

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

> **MS. SMITH**: First of all, they've given you kind of a factual background and a procedural background. This case is sixteen months old. It was recently stayed by Judge Mullen, because right now we are not entitled to the criminal file.
>
> They want to prosecute the criminal case first before they release the file, before we can take depositions of our clients or any member of law enforcement. So part of the

case is stayed, which is why it is sixteen months old.

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

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

We have not been able to take the managing partner of Tidal Wave, nor have we been able to take the Construction Manger for Collins Engineering, who was hired as the Construction Manager for the City. We have taken depositions of Gary Brantley and another member of his company and two members from the City.

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

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

So at this point, we find that it is very premature, not to mention as far as discovery from BB&T, I got a list of two hundred pages of documents that I'm to come to Charleston and look at. I mean, we're not trying to unreasonably delay this, but I mean if we're going to look at project files of Brantley, Collins Engineers, and

---

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

BB&T, whatever documents they aren't producing, but if we come look at them, then they'll produce them, I mean, you know, we're' talking about it takes time. But at this point, we do not think summary judgment is even appropriate to heard.

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

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

The first issue was who controlled the parking lot and was responsible for seeing that it was lit at night. She explained that one of the main issues in the case was lighting of the parking lot, inasmuch as it was "pitch black dark" at the time of the assault upon the Petitioners. *Id.,* pg. 410, line 24 to pg. 411, line 1. As noted earlier, all power to the parking lot had been cut as a result of the nearby construction, and none of the lights were functioning. [ROA, pg. 515, lines 4 - 22, pg. 520, lines 2 - 25; pg. 519, lines 4 - 20; pg. 516, lines 3 - 24; pg. 518, lines 17 - 39 and ROA, pg. 659, line 20 - pg. 660, line 15]. Discovery was accordingly needed in order to ascertain "who had control over that parking lot?" *Id.*, pg. 683, lines 21 - 23. In other words, "what we are trying to find out is who had control over the maintenance and safety of that parking lot, who controlled that parking lot with respect to lighting. . . . With respect to lighting and whatnot, because right now BB&T says, "Oh, Tidal Wave is responsible for it," and Tidal Waves says, "BB&T is responsible." So that's what we are trying to get to the bottom of. *Id.*, pg. 647, line 18 - pg. 648, line 2.

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

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

Id, pg. 413, lines 6 - 11.

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

> Gary Brantley in this deposition testified that the power was turned off during the time they were doing construction there. Who turned it off? We don't know. From that deposition we've got to depose someone else to find out who authorized that.

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

> In previous, I think at the last hearing, they actually probably four days after this incident, a light pole was put up in the parking lot that we are talking about. Prior to that, there was no light there. We have records from that. We deposed the City on that. It looks like maybe the City put it in. The City Officials didn't know

> if they ordered it, who ordered it. We are still trying to get to the bottom of that, and from there, we got more names to depose.

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

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

> THE COURT: . . . [w]hat is your opinion as to what the status of the Plaintiffs was in that parking lot? Was it licensee, or?
>
> MS. SMITH: It's our position they were invitees.
>
> THE COURT: Okay. For what purpose?
>
> MS. SMITH: For the purpose that the parking lot was held open to the public for public parking, and through use of custom, was used by the public to park in there to go to the restaurants downtown.

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

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

> They say, you know, that it says *BB&T Parking Only.* Well, that's right next to the BB&T sign when you pull in there off of Boundary Street, there is - - or off of Carteret, next to the BB&T sign, there's a *Public Parking Sign.* That *Public Parking Sign* doesn't say *Only The Spaces In The Back, Spaces Thirty-Two Through Forty-five,* or whatever. There is no way to tell what's public parking and what's BB&T parking.
>
> So it's our contention that that lot was held out to the public, it says *Public Parking*, and the Davidsons parked there. Where else would be a safer parking lot than a bank parking lot that should be lit a night with an ATM in it?

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

Clearly in a tort case which arises out of criminal activity, until discovery can be completed regarding the criminal activity, all other discovery is secondary. While it may relevant where the Petitioners parked their car that night, it is even more relevant on whose property the assailants hid while waiting for their victims, and from whose property the assailants launched their assault. The parties in this case expressly stipulated before Judge Mullen "that it would be **impossible** to take all the depositions **required** in this litigation" until the criminal case was concluded. In reliance on this stipulation, only cursory discovery was done while the criminal case was pending. It is respectfully submitted that the Court of Appeals overlooked the fact that the Petitioners were, in essence, ambushed when Judge Mullen "clarified" her Order to allow Judge Dukes to rule on the pending summary judgment motions, which he had previously concluded he would not grant, and then Judge Dukes, without holding another hearing, and only days after Judge Mullen's "clarification" Order,

granted the summary judgment motions. This was fundamentally unfair to the Petitioners, who had in good faith relied upon the agreement of the parties as set forth in Judge Mullen's Order.

II. DID THE SOUTH CAROLINA COURT OF APPEALS ERR IN CONCLUDING THAT THE BEAUFORT COUNTY MASTER IN EQUITY PROPERLY GRANTED SUMMARY JUDGMENT TO THE RESPONDENT TIDAL WAVE 23, LLC ON THE GROUND THAT THE PETITIONERS PRESENTED NO EVIDENCE THAT THE RESPONDENT TIDAL WAVE INVITED OR GAVE CONSENT FOR THE PETITIONERS TO ENTER AND USE THE PARKING LOT IN QUESTION, WHERE THERE WAS EVIDENCE THAT THE PETITIONERS WERE PUBLIC INVITEES?

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

This issue was expressly raised and argued to the Master in Equity, with the Petitioners' counsel stating:

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

ROA, pg. 415.

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

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

A. You just pointed it out to me.

Q. Yeah, the one with the public parking?

A. Uh-huh (affirmative).

ROA, pg. 618, lines 6-13.

Mr. Taylor further testified as follows:

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

A. Could be. I don't know.

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

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

Q. But the sign was still there?

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

ROA, pg. 612, lines 4-18.

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

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

Additionally, Mr. White testified that he actually had an argument with the manager of Saltus Restaurant concerning the fact that the public was parking in this parking lot at night and then

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

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

Accordingly, it is respectfully submitted that the Court of Appeals misapprehended or overlooked the evidence tending to establish the Petitioner status as public invitees on the Respondent Tidal Wave 23, LLC's parking lot.

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

In its Opinion, it is respectfully submitted that the Court of Appeals overlooked the fact that the Respondents Brantley and Collins were the ones responsible for cutting off the power to the lights that had previously illuminated the parking lot from which the Petitioners were abducted. In his deposition, Curtis Brantley testified as follows:

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

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

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

Ms. Lohr: Object to the form.

Mr. Moss: You can answer it.

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

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

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

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

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

A. Yes.

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

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

ROA, pg. 519, lines18-25 (emphasis added).

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

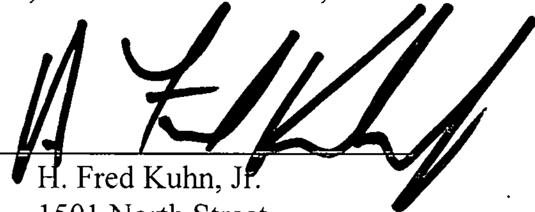
In any event, looking at the foregoing testimony in the light most favorable to the Petitioners, and drawing all inferences from the foregoing testimony in the light most favorable to the Petitioners, there is at least a "scintilla" of evidence that these Respondents were responsible for cutting off the lights that had previously illuminated the parking lot from which the Petitioners were abducted. It is respectfully submitted that the Court of Appeals overlooked this fact in affirming the Master in Equity's granting of summary judgment in favor of these Respondents.

CONCLUSION

For the reasons stated herein above, Petitioners respectfully request that the South Carolina Supreme Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.



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September 15, 2011

CERTIFICATE OF SERVICE

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

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