The Supreme Court of South Carolina

Adam Corey Rabon, as Guardian, for Erik Randall Rabon, Appellant,

v.

Huggins Beach Service, Inc., the City of Myrtle Beach and Craig J. Risbourg, Respondents.

Appellate Case No. 2012-208066

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court. Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.

C.J.

FOR THE COURT

Columbia, South Carolina
August 31, 2012

cc:
Robert N. Richardson, Jr.
Jimmy Carlton Powell, Jr.
Jeffrey Edwin Johnson
James Richard Battle
The Honorable Jenny Kitchings

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August 1, 2012

Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Rabon v. Huggins Beach Service, et. al.
C/A No.: 2010-CP-26-6873/Court of Appeals tracking #2012208006

Dear Ms. Kitchings:

I have enclosed for filing the unbound original and fifteen (15) copies of the Respondent's Final Brief and Certificate of Counsel on Behalf of The City of Myrtle Beach, as well as our Proof of Service.

By copy of this letter to all counsel involved in this Appeal, I am serving them with a copy of this Brief and Certificate of Counsel and enclose a Proof of Service to that effect.

Please return a "clocked" copy of the Proof of Service. I have enclosed and extra copy of Proof of Service, as well as a self-addressed, stamped envelope for your convenience.

I appreciate your assistance in this matter.

Sincerely,

James R. Battle

C Jimmy Powell
Jeffrey E. Johnson
Robert N. Richardson, Jr.

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Conway, South Carolina 29528

August 2, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

RE: Adam Corey Rabon, as Personal Representative for the Estate of Erik Randall Rabon v. Huggins Beach Service, Inc., The City of Myrtle Beach and Craig J. Risbourg
Case Number: 2010-CP-26-6873
Court of Appeals Case Number: 2012208006

Dear Ms. Kitchings:

Enclosed within the following shipping box is the following:

1. Fourteen (14) bound copies of the Record on Appeal and one (1) unbound original to be filed;

2. Fourteen (14) bound copies of the Appellant's Final Brief and Certificate of Counsel and one (1) unbound original to be filed; and

3. Fourteen (14) bound copies of the Appellant's Final Reply Brief and Certificate of Counsel and one (1) unbound original to be filed.

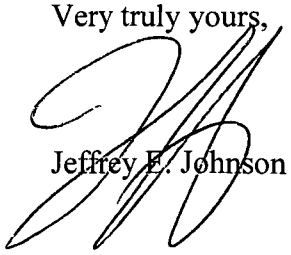
I have also enclosed one original and three copies of the Proof of Service (Appellant's Final Brief and Appellant's Final Reply Brief).

Please file the originals with your office and return the clocked copies to me in the self addressed stamped envelope enclosed.

By copy of this correspondence I am hereby serving all counsel of record with the Appellant's Final Brief and the Appellant's Final Reply Brief and a Proof of Service for same.

With kind regards, I remain

Very truly yours,



Jeffrey E. Johnson

JEJ/dp
Enclosures

cc: James R. Battle, Esq.
Jimmy C. Powell, Esq.
Robert N. Richardson, Jr., Esq.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-6873
(Court of Appeals Case No. 2012208006)

Adam Corey Rabon, as Personal Representative
For the Estate of Erik Randall Rabon .....Appellant,

v.

Huggins Beach Service, Inc., The City of Myrtle Beach
and Craig J. Risbourg.....Respondents.

APPELLANT'S REPLY BRIEF

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Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPLY

Appellant's legal position and authorities are set forth and cited more fully in his original brief. However, Appellant would like to reply to the arguments outlined below that Respondent made in its brief.

I. The City's argument that its failure to require Beach Service employees to successfully complete a beach safety driving course does not constitute gross negligence because the City purposefully chose not to require the course is not supported by the evidence.

The City states "Risbourg had not taken the beach safety driving course at the time of the accident because the City did not offer the course until June 2010, 1 month after the accident." **(Respondent's Brief p.12).** The City goes on to state that the reason the course was offered in June rather than May is because the Beach Service does not have a full complement of employees until June. **(Respondent's Brief p.12).** The City states that it "chose to offer the driving course to Huggins Beach when it was at full employment." **(Respondent's Brief p.12).**

However, the City fails to mention that neither Risbourg nor any other employee of the Beach Service had ever been offered the beach safety driving course prior to Erik being run over on May 14, 2010. **(Dep. of Earl Henry Huggins, Jr. p.49).** At the time Erik was run over, the Franchise Agreement dated September 11, 2008, which includes the requirement that any employee of the Beach Service who operates a motor vehicle on the beach successfully complete a Police Department training course, had been in effect for almost two years. **(Franchise Agreement p.1).** Obviously, when Huggins was at full employment, the whole summer of 2009 had passed without the beach driving training

course being offered, even though the beach driving course had been contemplated and agreed to by Huggins and the City. Despite having recognized the dangers involved with allowing untrained drivers to drive on the beach, as evidenced by the inclusion of the provision in the Franchise Agreement, the City admittedly allowed Beach Service employees to drive on the beach without restriction or training. **(Respondent's Brief pp. 4,11-13).** These undisputed facts, when taken in the light most favorable to the Appellant, are evidence of gross negligence.

Moreover, there is no evidence in the record to support the City's statement in its brief that it purposely waited to offer the driving course until June for reasons unrelated to the accident. Even if that statement is later found to be supported by as yet undiscovered extant evidence or testimony of city employees, it illustrates Appellant's argument that he did not have a full and fair opportunity to complete the discovery process and the grant of summary judgment was premature.

II. The City's assertion that the Appellant did not preserve the issue of whether the City owed Erik a duty to exercise reasonable care is erroneous and misapprehends Appellant's argument.

Appellant's central argument in this case is that there is more than a scintilla of evidence on the record of the City's gross negligence, and the SCRUS does not provide immunity for such grossly negligent conduct. S.C. Code Ann. §27-3-60 (2007); **(Respondent's Brief p.15).** Thus the SCRUS does not apply to immunize the City from liability for its gross negligence. The Appellant raised the issue of the City's gross negligence in its Complaint, Plaintiff's Memorandum in Opposition to Defendant City of Myrtle Beach's Motion for Summary Judgment, and at the Motion hearing. **(Complaint,**

Memorandum, Transcript of Summary Judgment Motion Hearing). As discussed more fully in Appellant's brief, gross negligence is the failure to exercise even slight care. Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988)(citations omitted). Since the Appellant has repeatedly offered evidence the City failed to exercise slight care, it is contradictory to assert that the Appellant has not argued that the City failed to use reasonable care, which is a higher standard of care. Thus the issue is preserved for review.

CONCLUSION

Based upon the foregoing and the arguments set forth in his original brief, Appellant asks this court to rule in his favor and reverse the grant of summary of summary judgment.

Respectfully Submitted,

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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-6873
(Court of Appeals Case No. 2012208006)

Adam Corey Rabon, as Personal Representative
For the Estate of Erik Randall Rabon .....Appellant,

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Huggins Beach Service, Inc., The City of Myrtle Beach
and Craig J. Risbourg.....Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief on the Respondent The City of Myrtle Beach by depositing a copy of them in the United States Mail, postage prepaid, on June 21, 2012, addressed to its attorney of record, James R. Battle, Battle & Vaught, P.A., P.O. Box 530, Conway, South Carolina 29528, and on Huggins Beach Service, Inc. and Craig J. Risbourg by depositing a copy of them in the United States Mail, postage prepaid, on June 21, 2012, addressed to their attorney of record, Jimmy C. Powell, Jr., Turner, Padget, Graham & Laney, 2411 North Oak Street, Ste. 301, Myrtle Beach, South Carolina 29577.

June 21, 2012

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June 21, 2012

Via U.S. Mail & Facsimile: 803-734-1839
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Adam Corey Rabon, as Personal Representative for the Estate of Erik Randall Rabon v. Huggins Beach Service, Inc., The City of Myrtle Beach and Craig J. Risbourg
Case Number: 2010-CP-26-6873
Court of Appeals Case Number: 2012208006

Dear Ms. Kitchings:

Please find enclosed for filing in the above-referenced case the original and three (3) copies of the following:

1. Appellant's Reply Brief; and
2. Proof of Service.

Please file the original with your office and return the clocked copies to me in the self addressed stamped envelope enclosed. By copy of this correspondence I am hereby serving all counsel of record with same.

With kind regards, I remain

Very truly yours,

Jeffrey E. Johnson

JEJ/dp
Enclosures

cc: James R. Battle, Esq.
Jimmy C. Powell, Esq.
Robert N. Richardson, Jr., Esq.

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July 17, 2012

Via U.S. Mail & Facsimile: 803-734-1839
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Adam Corey Rabon, as Personal Representative for the Estate of Erik Randall Rabon v. Huggins Beach Service, Inc., The City of Myrtle Beach and Craig J. Risbourg
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Very truly yours,

Jeffrey E. Johnson

JEJ/dp
Enclosures

cc: James R. Battle, Esq.
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THE STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I certify that I have served three copies of the Record on Appeal on the Respondent The City of Myrtle Beach via hand delivery on July 17, 2012 addressed to its attorney of record, James R. Battle, Battle & Vaught, P.A., P.O. Box 530, Conway, South Carolina 29528, and one copy of the Record on Appeal on Huggins Beach Service, Inc. and Craig J. Risbourg by depositing a copy of them in the United States Mail, postage prepaid, on July 17, 2012, addressed to their attorney of record, Jimmy C. Powell, Jr., Turner, Padget, Graham & Laney, 2411 North Oak Street, Ste. 301, Myrtle Beach, South Carolina 29577.

July 17, 2012

Desiree Perzan

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Paralegal to Jeffrey E. Johnson
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THE STATE OF SOUTH CAROLINA
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RESPONDENT CITY OF MYRTLE BEACH'S DESIGNATION OF MATTER ON APPEAL

Respondent City of Myrtle Beach proposes that the following matters be included in the Record on Appeal:

1. Appellant's Complaint

2. City's Answer

3. City's Memo in Support of Its Motion for Summary Judgment

4. Circuit Court Order granting the City's Motion for Summary Judgment

5. Appellant's Motion to Alter or Amend the Order Granting the City's Motion for Summary Judgment

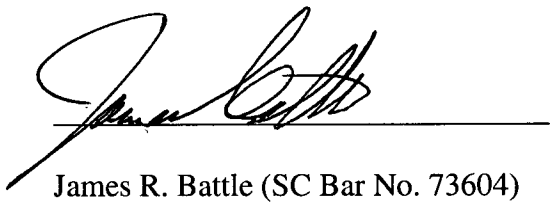
6. Franchise Agreement

7. Craig Risbourg Statement

8. Deposition of Earl Henry Huggins, Jr.

9. Transcript of hearing for City's Motion for Summary Judgment

I certify that this designation contains no matter which is irrelevant to this appeal.



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Attorney for Respondent City of Myrtle Beach

Conway, SC
June 12, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
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Benjamin H. Culbertson, Circuit Court Judge

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for the Estate of Erik Randall Rabon.....Appellant.

PROOF OF SERVICE

Sherri Benninga certifies that she is an employee with the law firm of Battle & Vaught, P.A., attorneys for Respondent City of Myrtle Beach, and that she has mailed the Initial Brief and Designation of Matter on behalf of City of Myrtle Beach to the addressees shown this 12th day of June, 2012, with proper postage attached thereto.

ADDRESSEES:

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Jimmy Powell, Esq.
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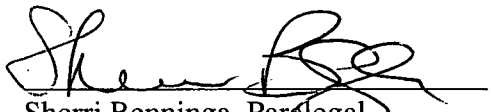

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June 12, 2012

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Rabon v. Huggins Beach Service, et. al.
C/A No.: 2010-CP-26-6873/Court of Appeals tracking #2012208006

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James R. Battle

C Jimmy Powell
Jeffrey E. Johnson
Robert N. Richardson, Jr.
Thomas E. Ellenburg

THE STATE OF SOUTH CAROLINA
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for the Estate of Erik Randall Rabon.....Appellant.

RESPONDENT CITY OF MYRTLE BEACH'S INITIAL BRIEF

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Attorney for Respondent City of
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court properly ruled that the City of Myrtle Beach was immune from Appellant's claims under the South Carolina Recreational Use Statute?

II. Whether the Circuit Court properly granted the City's summary judgment motion after over a year of litigation?

STATEMENT OF THE CASE

This is an appeal from the Circuit Court's grant of summary judgment to the City of Myrtle Beach ("City") on the basis of the City's immunity under the South Carolina Recreational Use Statute ("RUS"). The underlying lawsuit in this appeal involves a motor vehicle accident that occurred on May 14, 2010 on the public beach in the City when Craig Risbourg, an employee for Huggins Beach Service ("Huggins Beach"), struck Erik Rabon with his car while Rabon was on the seashore. Plaintiff sued the City primarily because it allowed Huggins Beach to provide lifeguard services and drive vehicles on the public beach under a franchise agreement.

On July 29, 2010, Appellant filed his lawsuit against the City, Huggins Beach, and Risbourg, alleging negligence and gross negligence on the part of the Defendants. On October 6, 2010, the City answered Appellant's complaint and asserted, inter alia, that it did not owe Rabon a duty under the RUS and the South Carolina Tort Claims Act ("TCA"). See City's Answer. On April 28, 2011, the City moved for summary judgment, and on September 29, 2011 the Circuit Court granted the City's motion on the basis that the City was immune from Appellant's lawsuit under the RUS. See Order.

On October 18, 2011, Appellant filed a motion to alter or amend the order granting the City's motion for summary judgment. On January 30, 2012, the Circuit Court denied Appellant's motion, and on February 16, 2012, the City received Appellant's notice of appeal.

On February 1, 2012, Appellant filed an amended complaint due to Erik Rabon's passing and substituted Adam Corey Rabon as Personal Representative of the Estate of Erik Randall Rabon as Plaintiff and added claims for wrongful death and conscious pain and suffering. On April 16, 2012, the City and Appellant filed a consent order staying Appellant's amended complaint until the conclusion of Appellant's appeal.

STATEMENT OF THE FACTS

On May 14, 2010 at approximately 1:27 PM, Erik Rabon was relaxing and lying on the sandy portion of the beach between 8th and 9th Avenues North in the City. See Complaint, ¶ 6. This area is patrolled by Huggins Beach, a water safety franchisee who contracted with the City as an independent contractor to provide lifeguard and water safety services to the beach going public. See Franchise Agreement. At or about the same time and location, Craig Risbourg, a manager for Huggins Beach, patrolled the beach in a Huggins Beach truck. See Risbourg Statement. When Risbourg made a right-hand U-turn on the public beach, he struck Rabon causing him bodily injury. See Risbourg Statement & Complaint, ¶ 7. No City employees were present during the accident.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard required of the Circuit Court under Rule 56(c), SCRCP." *Bass v. Gopal,*

Inc., 395 S.C. 129, 133, 716 S.E.2d 910, 912 (2011) (*citing Edwards v. Lexington County Sheriff's Dep't*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010)). "Rule 56(c), SCRCP, provides that summary judgment may be granted if a review of all documents submitted to the court shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* "In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Id.* (*citing Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009)). "In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment." *Id. (citing Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

ARGUMENT

I. Whether the Circuit Court properly ruled that the City of Myrtle Beach was immune from Appellant's claims under the South Carolina Recreational Use Statute?

A. The City was entitled to immunity under the RUS.

In its order granting summary judgment, the Circuit Court held that the City was not liable to Appellant pursuant to the RUS. See Order. The RUS provides that a landowner owes no duty of care to keep his premises safe for those who have his permission to use his land free of charge for recreational purposes. S.C. Code Ann. § 27-3-30. The landowner has no duty to warn such persons of dangerous conditions on

the land; extends no assurance that the premises are safe; and does not confer the legal status of an invitee or licensee on the people permitted to use the land. S.C. Code Ann § 27-3-30, 40.

At the summary judgment hearing, Appellant did not dispute that the RUS's prerequisites applied to the City: (1) that the City owned the beach where Plaintiff's accident occurred; (2) that the City did not charge Plaintiff admission for entry onto the beach; and (3) that Erik Rabon was a recreational user of the City's beach. Therefore, pursuant to the RUS's broad language, the City owed Erik Rabon no duty of care to protect him from, or warn him of, any hazards connected with lying on the beach. Id.

B. The City did not breach the RUS's exception for grossly negligent conduct.

The RUS contains an exception to its limitation on a landowner's liability for a grossly negligent, willful, or malicious failure to guard or warn against a dangerous condition. S.C. Code Ann. § 27-3-60(a). Essentially, to overcome the RUS's limitation on liability, Appellant must present evidence that the City's acts were grossly negligent, willful, or malicious. Appellant's complaint alleged gross negligence on the part of the City but did not allege willfulness or malice. See Complaint, ¶ 9.

Gross negligence is defined as the "intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do...[G]ross negligence connotes the failure to exercise even *slight care*." *Clyburn v. Sumter County School Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994) (emphasis added). Gross negligence ordinarily is a mixed

question of law and fact. *See Rogers v. Atlantic Coast Line R.R. Co.*, 222 S.C. 66, 71 S.E.2d 585 (1952). When the evidence supports but one reasonable inference, however, the question becomes a matter of law for the court. *See Foster v. South Carolina Dep't of Highways and Public Transportation*, 306 S.C. 519, 413 S.E.2d 31 (1992).

In its motion, the City noted South Carolina's long history of routinely applying the RUS's broad language to protect owners of recreational property. *See Cole v. SCE&G, Inc.*, 362 S.C. 445, 608 S.E.2d 859 (2005) (Court affirmed grant of summary judgment for landowner under the RUS and held that landowner did not violate duty to swimmer by failing to have lifeguards and lifesaving equipment on the property.); *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 521 S.E.2d 276 n. 1 (Ct.App. 1999) (Plaintiff's husband drowned while swimming in the ocean and sued the City and Johns Beach Service, a City franchisee contracted to provide lifeguard services. The Circuit Court dismissed the City pursuant to the RUS, and plaintiff did not appeal ruling.); *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 489 S.E.2d 647 (Ct.App. 1997) (Spectator sued defendants after stepping in a hole during a T-ball game, and court dismissed spectator's claims under the RUS.); *Mena v. City of Myrtle Beach, et al.*, No. 4:06-cv-2536-TLW (D.S.C. April 16, 2008) (Plaintiff's son drowned while swimming in the ocean, and U.S. District Court dismissed City under the RUS.); *Kimsey v. City of Myrtle Beach*, 109 F.3d 194 (4th Cir. 1997) (City did not owe duty of care under the RUS to plaintiff who fell from bottom step of wooden dune walkover that City installed on public beach.); *Chrisley v. U.S.*, 620

F.Supp. 285 (D.S.C. 1985) (Government did not owe a duty under the RUS to plaintiff's child who drowned in the Savannah River.).

The City also emphasized that it "is known for its strong tourist population" and depends on the beach to attract those tourists. *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 166, 547 S.E.2d 862, 867 (2001). In short, the City relies on the protections provided by the RUS to keep its beaches free and open to the public. See City Memo, p. 5.

In its order, the Circuit Court found that "although [Appellant's] Complaint [alleged] the City breached a duty to Plaintiff by hiring Huggins Beach to provide services on its beaches," Appellant had not presented "any evidence by way of affidavit or other evidence of gross negligence on the part of the City." See Order, p. 4. Importantly, the Circuit Court noted that the S.C. legislature passed the RUS "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." S.C. Code Ann. § 27-3-10. "Therefore, the RUS's explicit purpose [was] to protect landowners from liability such as the case at bar." See Order, p. 4.

C. Appellant's Theories for Liability

Appellant asserts 3 theories for liability. First, Appellant alleges that the City was grossly negligent in its management of Huggins Beach's drivers. Second, Appellant alleges that because the City voluntarily provided lifeguard services to Erik Rabon, the City owed Erik Rabon the duty owed to an invitee; i.e. a "duty to exercise reasonable care." See Appellant Brief, p. 13. And third, Appellant alleges the City was liable for Risbourg's acts under the non-delegable duty rule.

i. Management of Huggins Beach's Drivers

Huggins Beach employees are permitted to drive motor vehicles on the City's public beaches pursuant to the Water Safety Franchise Agreement ("Franchise Agreement"). See Franchise Agreement, p. 3-4. The Franchise Agreement is a contract between the City and Huggins Beach to provide water safety services along the City's oceanfront. The S.C. Code allows the City to enter into agreements with private beach safety companies to provide lifeguard services along its public beaches. See S.C. Code Ann. § 5-7-145(B). The Franchise Agreement covers a wide range of topics such as periods of operation, standards of performance, and lifeguard equipment. It also provides "[Huggins Beach] is authorized to operate, in a safe and prudent manner, various types of motor vehicles in support of its water safety and beach concession operations." See Franchise Agreement, p. 5. The general public is prohibited from driving on the beach. See City Ordinance Sec. 5-29(a).

Appellant alleges that the City was grossly negligent in its management of Huggins Beach drivers. In particular, Appellant alleges the City was grossly negligent in: (1) allowing vehicles on the beach, (2) not placing limitations on the vehicles driven on the beach or time of day or year a vehicle can be driven, and (3) allowing Risbourg to drive on the beach without first taking a driver safety course.

a. Vehicles on the Beach

Appellant's argument is actually 2 pronged. The first is that the City was grossly negligent because it did not warn Erik Rabon there would be vehicles on the beach. See Appellant's Brief, p. 16. The second is that the RUS should not apply to the instant case because the RUS was intended to protect recreational landowners

from liability caused by natural conditions on the land, and a moving truck is not a natural condition. Id. at 15.

Addressing the first prong, lifeguards have been driving motor vehicles on the City's public beaches for years. Moreover, almost every public beach in America allows lifeguards or emergency personnel to drive on the beach. They are an open and obvious condition on almost every public beach.

Additionally, according to Earl Huggins, Erik Rabon worked on the Boulevard in the City and was an acquaintance of Huggins. See Huggins Depo, p. 100-101. Therefore, the City and its public beaches would have been familiar territory for Rabon. Given the ubiquity of motor vehicles on public beaches, the City's allowing Huggins Beach to use motor vehicles was not grossly negligent.

Addressing the second prong, a case involving the RUS and motor vehicle accidents is novel to South Carolina. However, South Carolina courts have upheld the RUS when a condition "perpetrated" by the landowner caused the plaintiff's injuries. For example in *Kimsey*, plaintiff sued for "injuries that she sustained when she fell from the bottom step of a wooden dune walkover that the City had installed on the beach." 109 F.3d at 195. Notwithstanding that the plaintiff's mechanism of injury was a structure added by the City, the 4th Circuit ruled "the City owed [plaintiff] no duty of care to keep the walkover safe or to warn of dangerous conditions." *Id.* at 197. Similarly, in *Harris v. U.S.C.*, the Court of Appeals ruled the Circuit Court properly charged the jury on the RUS even though plaintiff sustained her injuries when she "fell on the boardwalk stairs as she was returning to the house." 391 S.C. 518, 522, 706 S.E.2d 45, 47 (Ct.App. 2011).

More importantly, the RUS itself does not distinguish between natural and owner perpetrated conditions on the land, and its immunity extends to "use, structure, or activity on such premises." S.C. Code Ann. § 27-3-30.

b. Limitations on the Vehicles and Time of Day

Appellant alleges the City's failure to place "contractual limitations on the type of vehicle that can be driven on the beach, the purpose for which a specific type of vehicle can be driven on the beach, or the time of day or year a specific type of vehicle can be driven on the beach" are evidence of gross negligence. See Appellant's Brief, p. 14. The vehicle involved in the accident was an '05 or '06 Chevrolet Colorado truck. See Huggins Depo, p. 24, 61. The time of the accident was about 1:27 PM. See Appellant's Brief, p. 7. Regarding the purpose for driving, the Franchise Agreement restricted Huggins Beach to driving on the beach "in support of its water safety and beach concession operations." See Franchise Agreement, p. 5. These facts are not evidence of gross negligence.

c. Driver Safety Course

The Franchise Agreement provided "any [Huggins Beach] employee who operates a motor vehicle in the performance of this franchise agreement shall possess a valid motor vehicle operator's license, and successfully complete a Police Department offered training course for the type of vehicle driven on the beach." See Franchise Agreement, p. 3-4.

Risbourg had not taken the City's driving course at the time of the accident because the City did not offer the course until June of 2010, 1 month after the accident. See Huggins Depo, p. 47, 22. At the time of the accident, May 14, 2010,

there were very few people on the beach and very little need for lifeguards. See Huggins Depo, p. 30, 8-19. In May, Huggins Beach only had 3 employees; whereas in June, July and August, Huggins Beach had 14. Id. at 30, 4; 29, 8-10. Therefore, the City chose to offer the driving course to Huggins Beach when it was at full employment.

Despite not yet providing the driving course, the City monitored who Huggins Beach hired. For example at the time of the accident, the City required Huggins Beach to provide an information sheet on each employee. Id. at 44. This information sheet included the employee's time in the swim, Social Security number, driver's license number, and emergency contact information. Id. Regarding the City's involvement with questionable Huggins Beach employees, Earl Huggins stated:

> [T]hey have called me about a specific lifeguard, asked me some questions and saying they had happened to have heard some stuff or got some stuff on them...It's just been through the years...I stay in contact with those guys a lot. I mean, it's a day in and day out thing. It's not like I don't see them.

Id. at 45, 16-25. In general, the City "came on the beach every day and reviewed the operations." Id. at 49, 10-11.

Appellant has not presented any evidence that Risbourg had a history of bad driving or that the City knew or should have known that Risbourg would be involved in an accident. Indeed, Risbourg worked for Huggins Beach from 1992 until 2010, and Appellant did not present any evidence of misconduct during his employment. Id. at 32, 9-11. Moreover, the record is devoid of any evidence that accidents such as the instant case occur with any frequency. S*ee Cody P. v. Bank of America, N.A.*, 395

S.C. 611, 720 S.E.2d 473 (Ct.App. 2011) (The legal cause requirement of a negligence claim is proved by establishing the plaintiff's injury was foreseeable.).

Furthermore, Appellant did not present any evidence that Risbourg's not taking the driving course caused the accident. *Id.* (The cause-in-fact requirement of a negligence claim is proved by showing the injury would not have occurred but for the defendant's negligence.).

That Risbourg had not taken the City's driving course at the time of the accident is not evidence of gross negligence.

d. Covington v. U.S.

Appellant argues that *Covington v. US*, 902 F.Supp. 1207 (D.Haw. 1995) is analogues to the instant case. In *Covington*, the district court ruled that there was an issue of fact whether the government created and willfully failed to guard or warn against a potentially dangerous condition and therefore denied the Government's motion to dismiss.

However, the facts in *Covington* are strikingly different from the instant case. In *Covington*, plaintiff's son was swimming at Bellows Air Force Station when he was knocked down by a large wave and did not resurface. At first plaintiff did not find a lifeguard at the nearest tower – evidence showed the lifeguard assigned to this tower was "wandering the beach in a distracted manner." *Id.* at 1215. When plaintiff did find a lifeguard, the lifeguard told him, "Don't bother me, I'm eating." She later told other adults to check the restroom for the missing child. A second lifeguard who came to help was told to go back to her tower. When the lifeguards did help, they failed to follow Government safety regulations. In addition, the Government had only

posted half the lifeguards required by its own regulations. As the court described it, the Government lifeguards were "a façade of safety." *Id.* at 1212. Notwithstanding this opinion, at the subsequent bench trial, the judge held that pursuant to Hawai'i's RUS, the Government was not liable to plaintiff. *See Covington v. US*, 916 F.Supp. 1511 (D.Hawai'i 1996).

By contrast the facts in the instant case are markedly different. Risbourg, a Huggins Beach employee independent of the City, accidently caused Erik Rabon's injuries when he made a right-hand U-turn on the beach. See Risbourg Statement. As the Circuit Court ruled, these are not the facts associated with gross negligence.

ii. Voluntary Assumption of Duty

Appellant asserts that because the City voluntarily provided lifeguard services to the beach going public, the City's duty to these people, who Appellant categorized as "invitees," switched to one of "reasonable care." See Appellant Brief, p. 13.

First, Appellant did not preserve this issue for appeal. In Appellant's brief in support of his motion to alter or amend judgment at paragraph 28, Appellant mentions that the City "assumed the duty of providing such services and protections by entering into a Franchise Agreement." However, Appellant failed to argue that Erik Rabon was entitled to "invitee" status or that the City owed him a duty of "reasonable care." Therefore, the Circuit Court did not have an opportunity to rule on this issue, and it has not been preserved for appeal. *See Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939) (the question presented for appellate review must first have been fairly and properly raised in the lower court and passed upon by that court); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) ("An objection must be

sufficiently specific to inform the trial court of the point being urged by the objector.").

Second, the RUS specifically states that an owner of recreational land who allows a person onto his property free of charge does not "confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed." S.C. Code Ann. § 27-3-40(b). Therefore, the RUS specifically eliminates Appellant's argument.

Third, Appellant's argument discourages the City from making its beaches safer and providing lifeguard services. *See Mena*, slip op. at 11-12 (*citing Palmer v. U.S.*, 945 F.2d 1134 (9th Cir. 1991) (The court noted that an exception to the RUS should not be made when a landowner gratuitously undertakes to make his recreational land safer. The result of such an exception might be to discourage efforts to make recreational facilities safer.).

Therefore, the Court should reject Appellant's assertion that the City is liable under a voluntary assumption of duty.

iii. Non-Delegable Duty

Appellant argues that the City delegated a duty to Huggins Beach, and the City is liable for Huggins Beach's breach of that duty. See Appellant Brief, p. 17. In other words, the City is "vicariously liable" for the negligence of its "independent contractor," Huggins Beach. Id. at 18.

To support his argument, Appellant points to the Franchise Agreement itself and alleges this agreement created a special relationship whereby the City contracted Huggins Beach to provide "the necessary government function" of water safety. See Appellant Brief, p. 17. Moreover, the Franchise Agreement required Huggins Beach

lifeguards to wear the City seal on their sleeve; thus further linking the City and Huggins Beach. Id. at 19.

However, providing water safety to the beach going public is not a "necessary government function." According to S.C. Code Ann. § 5-7-145, the City *may*, but is not required, to provide lifeguard and other safety services on its public beaches. *If* it decides to provide lifeguard services along its public beaches, it may do so by an agreement with a private beach safety company. Id.; *see Cole*, 362 S.C. 445 (failing to provide lifeguards and lifesaving equipment is not evidence of gross negligence).

Moreover, under the Tort Claims Act ("TCA"), the City cannot be liable for the negligence of an independent contractor. In *Smith v. Regional Med. Ctr. of Orangeburg and Calhoun Counties*, the Court of Appeals ruled that the TCA, specifically S.C. Code Ann. § 15-78-30(c), "provides immunity to governmental entities...from the negligence of its independent contractors." 394 S.C. 110, 116, 713 S.E.2d 656, 659 (Ct.App. 2011).

In general, Appellant's argument is intended to skirt the RUS by introducing theories of liability based upon mere negligence. However, the RUS immunizes the City from mere negligence. In *Mena*, the U.S. District Court cited *Ervin v. City of Kenosha*, 159 Wis.2d 464, 464 N.W.2d 654 (1991) to support its order dismissing the City of Myrtle Beach. Slip op. at 11-12. In *Kenosha* the plaintiffs' 2 children drowned at a beach owned by Kenosha, and plaintiffs sued alleging Kenosha: (1) maintained a hazardous condition at the beach, (2) failed to warn of condition, (3) failed to properly train and instruct its lifeguards, and (4) that Kenosha was vicariously liable for the negligence of the lifeguards. 159 Wis.2d 464, 464 N.W.2d 654 (1991). The

Court affirmed the dismissal of Kenosha and held "as a matter of law, that the City cannot be liable for active negligence under [Wisconsin's RUS], the fact that the City and its lifeguards may have been negligent is irrelevant to a determination of liability under the recreational use statute." *Id.* at 479, 661.

The U.S. District Court in *Mena* also cited *Stann v. Waukesha County*, which noted regarding the application of Wisconsin's RUS that "when a legislative mandate is 'clearly expressed and there is no warrant for alternative construction, a court may not impose its view of what the law should be.'" 161 Wis.2d 808, 827, 468 N.W.2d 775, 783 (Wis.Ct.App. 1991) (citations omitted).

II. Whether the Circuit Court properly granted the City's summary judgment motion after over a year of litigation?

A. Additional Discovery

"The grant of summary judgment is proper only in those cases where it is clear further inquiry into the facts is not desirable to clarify the application of the law to the facts presented." *Corbett*, 336 S.C. at 609 (*citing Rice v. School Dist. of Fairfield*, 317 S.C. 87, 452 S.E.2d 352 (Ct.App. 1994) (summary judgment appropriate because further development of facts could not create duty on the part of defendant)).

Appellant alleges that the Circuit Court should not have granted the City's motion for summary judgment because Appellant did not have the opportunity to depose Risbourg or City employees. See Appellant's Memo, p. 21.

As to Risbourg, Appellant had Risbourg's transcribed statement of what occurred at the time of the accident. See Risbourg Statement. According to Earl

Huggins, Risbourg is currently in the Philippines with his fiancée and adopted child. See Huggins Depo, p. 31, 6-11. It is not known when he will return, if ever, to the U.S., and it is not known what steps Appellant took to serve Risbourg with a subpoena or get him back to the U.S.

As to City employees, from the day Appellant filed his complaint, July 29, 2010, to the day the Circuit Court granted the City's motion for summary judgment, September 29, 2011, Appellant had 1 year and 2 months to conduct discovery. In that time, although the parties conducted extensive written discovery, Appellant never contacted the City regarding the scheduling of a deposition.

The numerous documents the City produced to Appellant defined the duties of the City and Huggins Beach. There were no City employees present when Plaintiff was struck by Risbourg. Appellant has failed to show how further discovery would create a duty on the part of the City or show how the City was grossly negligent in allowing Huggins Beach to be its franchisee. Therefore, after over a year of litigation, summary judgment was appropriate.

CONCLUSION

For the forgoing reasons, the City respectfully requests that the Summary Judgment Order of the Honorable Benjamin H. Culbertson be affirmed and that Appellant's appeal be dismissed.

(signature to follow)

James R. Battle (SC Bar No. 73604)
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Attorney for Respondent City of Myrtle Beach

Conway, SC
June 12, 2012

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-6873
(Court of Appeals Case No. 2012208006)

Adam Corey Rabon, as Personal Representative
For the Estate of Erik Randall Rabon .....Appellant,

v.

Huggins Beach Service, Inc., The City of Myrtle Beach
and Craig J. Risbourg.....Respondents.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following to be included in the Record on Appeal:

1. Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment, dated September 29, 2011
2. Form 4 Order, denying Plaintiff's Motion to Alter or Amend, dated January 30, 2012
3. Amended Form 4 Order, denying Plaintiff's Motion to Alter or Amend, dated February 7, 2012
4. Form 4 Order, granting Plaintiff's Motion to Amend Complaint, dated January 30, 2012
5. Transcript of Record pp.1-23, July 25, 2011
6. Subpoena and Notice of Taking Deposition (Craig J. Risbourg)
7. City's Motion for Summary Judgment

8. Plaintiff's Memorandum in Opposition to Defendant City of Myrtle Beach's Motion for Summary Judgment
9. Notice of Motion and Motion to Alter or Amend Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment
10. Plaintiff's Brief in Support of His Motion to Alter or Amend Judgment
11. Notice of Motion and Motion to Amend Complaint
12. Amended Summons and Complaint
13. Summons and Complaint
14. Answer of the City of Myrtle Beach
15. Defendant's Exhibit A, Water Safety Franchise Agreement
16. Deposition of Earl Henry Huggins, Jr. pp.1-1-2

We certify this designation contains no matter which is irrelevant to this appeal.

May 15, 2012

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal on the Respondent The City of Myrtle Beach by depositing a copy of them in the United States Mail, postage prepaid, on May 15, 2012, addressed to its attorney of record, James R. Battle, Battle & Vaught, P.A., P.O. Box 530, Conway, South Carolina 29528; and on Huggins Beach Service, Inc. and Craig J. Risbourg by depositing a copy of them in the United States Mail, postage prepaid, on May 15, 2012, addressed to their attorney of record, Jimmy C. Powell, Jr., Turner, Padget, Graham & Laney, 2411 North Oak Street, Ste. 301, Myrtle Beach, South Carolina 29577.

May 15, 2012

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May 15, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Adam Corey Rabon, as Personal Representative for the Estate of Erik Randall Rabon v. Huggins Beach Service, Inc., The City of Myrtle Beach and Craig J. Risbourg
Case Number: 2010-CP-26-6873
Court of Appeals Case Number: 2012208006

Dear Ms. Kitchings:

Please find enclosed for filing in the above-referenced case the original and three (3) copies of the following:

1. Appellant's Initial Brief;
2. Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

Please file the original with your office and return the clocked copies to me in the self addressed stamped envelope enclosed. By copy of this correspondence I am hereby serving all counsel of record with same.

With kind regards, I remain

Very truly yours,

Jeffrey E. Johnson

JEJ/dp
Enclosures

cc: James R. Battle, Esq.
Jimmy C. Powell, Esq.
Robert N. Richardson, Jr., Esq.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-6873
(Court of Appeals Case No. 2012208006)

Adam Corey Rabon, as Personal Representative
For the Estate of Erik Randall Rabon .....Appellant,

v.

Huggins Beach Service, Inc., The City of Myrtle Beach
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APPELLANT'S INITIAL BRIEF

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STATEMENT OFISSUES ON APPEAL

I. Did the trial court err in granting summary judgment to the City of Myrtle Beach when the Appellant presented evidence the City was grossly negligent in its conduct?

II. Did the trial court err in granting summary judgment to the City when discovery was incomplete, and the Appellant had not been afforded a full and fair opportunity to complete discovery?

STATEMENT OF THE CASE

This appeal results from a horrific personal injury case whereby Erik Rabon **("Erik")** was run over by a truck being driven by an employee of Huggins Beach Service, Inc. **("Beach Service")** while he was sunbathing on the beach in Myrtle Beach, South Carolina. Erik initially survived but was left in a comatose state. He eventually succumbed to his injuries on July 30, 2011.

On May 28, 2010 Adam Corey Rabon **("Adam")**, as Erik's biological brother and closest living next of kin, made an application to the Horry County Probate Court for appointment as both guardian and conservator to protect his brother's interests. Adam was duly appointed guardian and conservator for his brother on August 13, 2010. On July 29, 2010, Adam, as court appointed guardian for Erik, filed his summons and complaint, alleging causes of action for negligence, gross negligence, and tort claims act remedies against the Beach Service, The City of Myrtle Beach **("the City")**, and Craig J. Risbourg **("Risbourg")**, seeking damages for injuries Erik received as a result of this accident. The City filed its Answer on October 6, 2010, asserting general denials of the allegations contained in the Complaint and affirmative defenses, including defenses based on the Recreational Use Statute and contributory negligence. Both the Beach Service and Risbourg filed their separate Answers on October 18, 2010, asserting general denials and affirmative defenses, including Failure to State a Claim, Qualified General Denial, Recreational Use Statute, Tort Claims Act, Third Party/Intervening Cause, Comparative Negligence, Contractual Indemnification, and Equitable Indemnification.

On July 30, 2011, Erik Rabon died from his injuries while residing in a nursing home care facility. Thereafter, Adam Corey Rabon filed an application with the Horry County Probate Court for appointment as personal representative for his brother's estate. On September 30, 2011, Appellant was formally appointed by the Horry County Probate Court as personal representative for the Estate of Erik Randall Rabon. Adam Corey Rabon, as Personal Representative of the Estate of Erik Randall Rabon, filed his Notice of Motion and Motion to Amend its Complaint on November 28, 2011 to substitute "Adam Corey Rabon, as Personal Representative of the Estate of Erik Randall Rabon" rather than "Adam Corey Rabon, as Guardian for Erik Randall Rabon," as the Plaintiff and to assert causes of action for wrongful death and conscious pain and suffering.[1]

The City filed a motion for Summary Judgment on April 28, 2011, and a hearing was held on July 25, 2011. On September 29, 2011, the Honorable Benjamin H. Culbertson signed an "Order Granting the City's Motion for Summary Judgment." **(Order).** The Appellant received written notice of entry of the Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment on October 12, 2011. Appellant filed his Notice of Motion and Motion to Alter or Amend Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment on

[1] Because Erik's death occurred while this case was being actively litigated, as a practical matter there was a period of time from the date of Erik's death on July 30, 2011 to the formal entry of an Order on January 30, 2012 by the circuit court allowing Adam to amend the pleadings when Adam was in the process of switching from being Erik's guardian to being his personal representative. For the sake of simplicity in this appeal, Adam Corey Rabon, whether acting as Guardian for Erik Randall Rabon or as Personal Representative of Erik Randall Rabon is simply referred to as "Adam" or the "Appellant" throughout.

October 18, 2011, and simultaneously delivered a copy of this motion to the Honorable Benjamin H. Culbertson. **(Motion).**

A Form 4 Judgment Denying Plaintiff's Motion to Alter or Amend Order Granting Defendant City of Myrtle Beach's Summary Judgment Motion was issued by the Honorable Benjamin H. Culbertson reflecting a date of January 30, 2012. **(Order).** On February 7, 2012, the Honorable Benjamin H. Culbertson subsequently issued an Amended Form 4 Judgment Denying Plaintiff's Motion to Alter or Amend Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment. **(Form 4 Order).**

On January 30, 2012, the Honorable Larry B. Hyman heard Appellant's Motion to Amend its Complaint. During the hearing, Judge Hyman granted Appellant's motion to amend the caption of the summons and complaint to change the Plaintiff from Adam Corey Rabon, as Guardian for Erik Randall Rabon, Plaintiff to Adam Corey Rabon, as Personal Representative for the Estate of Erik Randall Rabon, and to allow the Appellant to allege causes of actions for wrongful death and survivorship for conscious pain and suffering.

On February 14, 2012, Appellant as Personal Representative for the Estate of Erik Randall Rabon appealed the above referenced Orders granting summary judgment to the City, by filing a Notice of Appeal with the clerk for the South Carolina Court of Appeals on February 16, 2012. **(Notice of Appeal).** The Appellant issued his Amended Notice of Appeal on February 28, 2012, which was filed with the clerk for the South Carolina Court of Appeals on March 1, 2012, and this appeal follows. **(Amended Notice of Appeal).**

STATEMENT OF THE FACTS

On May 14, 2010, at approximately 1:27 p.m., Erik Randall Rabon **("Erik")** was relaxing and lying on the sandy portion of the beach near the ocean located between 8th and 9th Avenues North in Myrtle Beach, South Carolina. **(Complaint p.4).** At the same time, Craig Risbourg **("Risbourg")** was driving a 2004 Chevrolet truck owned by Huggins Beach Service, Inc. **("the Beach Service")** along the sandy portion of the beach where Erik and many others were sunbathing and enjoying a day at the beach. **(Complaint p.4).** Risbourg, and employee of the Beach Service, drove the truck over Erik, causing him severe and permanent injuries. **(Complaint p.4).** Risbourg was unaware of Erik Rabon being pinned under the beach service truck and continued to drive forward and pushed and dredged Erik Rabon forward by his body for a distance through the beach sand until the truck could no longer continue to travel forward. **(Complaint p.4).** Risbourg got out of the truck and, at that time, saw Erik's legs sticking out from under the front portion of the truck. **(Complaint p.4).** Risbourg and witnesses saw that Erik Rabon was conscious and screaming and begging for the vehicle's removal while he was pinned under the vehicle. **(Complaint p.4).**

As a result of being run over by the Beach Service while sunbathing, Erik suffered devastating injuries to his brain, head, neck, back, arms, legs, and spinal cord. The muscles, nerves and sinews of his body were stretched, torn, bruised and damaged, his spinal cord was permanently damaged, several cervical vertebras were crushed, and his brain was swelling. **(Complaint p.5).** These injuries left him in an unconscious and coma-like state, until he succumbed to them more than a year later.

Risbourg came to be driving a full sized truck on the beach that day because the City allows Beach Service employees to drive vehicles on the beach.

The area known as the Grand Strand, of which the City is a part, has miles of sandy beaches that daily attracts thousands of people during the summer who come to enjoy the sun, sand, and water. The City, who controls a twelve mile stretch of beach, including the portion of the beach where Erik lay, adopted a system whereby the city entered into franchise agreements, giving privately owned companies or individuals the exclusive right to rent beach equipment and to provide beach concessions to beachgoers within a delineated geographical territory in exchange for providing water safety services, including lifeguard services, in the territory and the payment of a franchise fee to the City. **(Franchise Agreement pp.1-6).**

In this case, the City entered into such an agreement titled, "Water Safety Franchise," dated September 11, 2008, **(the "Franchise Agreement")** with Huggins Beach Service, Inc. granting the Beach Service a franchise for the territory where Erik was laying on May 14, 2010. **(Franchise Agreement pp.1-16).** Pursuant to the language of the Franchise, the City determined "the successful implementation of a Water Safety Program is imperative along the City's twelve miles of oceanfront" and "these goals can be optimally achieves through the cooperation of the City of Myrtle Beach and the Concessionaires of beach equipment." **(Franchise Agreement p.1).**

The Franchise Agreement is detailed in its requirement relating to the implementation of the Water Safety Program, including standards of lifeguard training and performance. **(Franchise Agreement pp.2-5).** The Franchise Agreement reserves to the City certain rights and duties to ensure its requirements are met to the

City's satisfaction. The City took measures to ensure that the requirements of the lifeguard swimming test were properly met, and the City attended the tests. **(Franchise Agreement pp.2-5; Dep. of Earl Henry Huggins, Jr. pp.38-9, 44-6).**

The Franchise Agreement explicitly authorizes the Beach Service to operate motor vehicles in support of its beach concessions and water safety operations, provided and required the "[f]ranchisee and any franchise employee who operates a motor vehicle in the performance of this franchise agreement shall possess a valid motor vehicle operator's license, and successfully complete a Police Department offered training course for the type of vehicle driven on the beach." **(Franchise Agreement pp.3-4).** [2]

Earl Henry Huggins, Jr., the owner and sole shareholder of Huggins Beach Service, Inc., unequivocally stated in his deposition testimony that the City did not require any employee of the Beach Service to participate in or complete the City's police training course for driving on the beach, and neither he nor any other employee of the Beach Service had done so prior to the day Erik was run over. **(Dep. of Earl Henry Huggins, Jr. p.49).**

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[2] The right to drive a motorized vehicle on the beach in Myrtle Beach is limited by law and the public is not generally allowed to do so. MYRTLE BEACH, S.C., CODE OF ORDINANCES ch. 5, section 5-1 and section 5-29.

STANDARD OF REVIEW

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the circuit court. Evening Post Publ. Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 81, 708 S.E.2d 745, 748 (2011). A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and 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; Regions Bank v. Schmauch, 354 S.C. 648, 659, 582 S.E.2d 432, 438 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences, which can reasonably be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 324, 566 S.E.2d 536, 539 (2002). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376, 597 S.E.2d 181, 183 (Ct. App. 2004). Summary judgment is inappropriate when facts are presented on which reasonable minds could differ. Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 428-29, 505 S.E.2d 354, 357-58 (Ct. App. 1998). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ARGUMENT

I. Did the trial court err in granting summary judgment to the City of Myrtle Beach when the Appellant presented evidence the City was grossly negligent in its conduct?

The trial court found that the Appellant did not present any evidence of gross negligence on the part of the City and found "as a matter of law, no finding of gross negligence is appropriate, and the City is entitled to the RUS's protection." **(Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment p.4).** However, in making this ruling, the trial court failed to take the facts in the light most favorable to the Appellant, overlooked important evidence of gross negligence presented by Appellant, and failed to correctly apply the SCRUS's exception for gross negligence.

The Limitation on Liability of Landowner Act, known as the South Carolina Recreational Use Statute **(the "SCRUS")**, exists for the public policy purpose of making "land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." S.C. Code Ann. §27-3-10 (2007). The SCRUS operates by relieving the landowner of the duty to "keep the premises safe for recreational users" or to "give any warning of a dangerous condition, use, structure, or activity on such premises to such person entering for such purposes." S.C. Code Ann. §27-3-30 (2007). Under the SCRUS a landowner who permits recreational use on his property without charge does not extend any assurance that the premises are safe for any purpose, confer the legal status of an invitee or

licensee to whom a duty of care is owned, or assume responsibility for or incur liability for any injury. S.C. Code Ann. §27-3-40 (2007).

However, the SCRUS does not provide immunity for all conduct. The SCRUS does not abrogate a landowner's duty to a recreational user to guard or warn against a dangerous condition, use, structure, or activity when the landowner's conduct in breaching the duty constitutes gross negligence. S.C. Code Ann. §27-3-60 (2007)("Nothing in this chapter limits in any way any liability which otherwise exists: (a) For grossly negligent, willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."); see also Kimsey v. City of Myrtle Beach, S.C. 109 F.3d 194, 195 (4th Cir. 1997) (affirming the trial court's grant of summary judgment to the landowner because the Plaintiff failed to refute the City's evidence of slight care, thus the gross negligence exception did not apply); Brooks v. Northwood Little League, 327 S.C. 400, 402, 489 S.E.2d 647, 648 (Ct. App. 1999) (applying the SCRUS to provide the School District with immunity from liability because the record was devoid of any evidence of an intentional, conscious failure on the part of the Respondent).

The South Carolina Supreme Court defines gross negligence as the "intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988)(citations omitted). The court has explained that "gross negligence connotes the failure to exercise even slight care." Id.

In South Carolina a landowner owes a duty to an invitee to guard or warn against a dangerous condition, use, structure, or activity that exists even when the danger is an open and obvious defect if the owner should anticipate that the invitee will nevertheless encounter the dangerous condition, or the invitee is likely to be distracted. Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997). A duty to guard or warn against a dangerous condition, use, structure, or activity can also be voluntarily undertaken. Our courts have stated that one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care to avoid increasing the risk of harm. Sherer v. James, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986)(citing the Restatement (Second) of Torts, Section 324(a) (1965)). Additionally, "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him for doing such harm." Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121, 125 (4th Cir.1976), cert. denied sub nom. Folliard v. Semler, 429 U.S. 827, 97 S.Ct. 83, 50 L.Ed.2d 90 (1976); Crowley v. Spivey, 285 S.C. 397, 329 S.E.2d 774 (Ct. App.1985)(one who undertakes to protect another from harm by a third party has a duty to exercise reasonable care).

In this case, the City was grossly negligent in breaching the duty it owed Erik as an invitee and in the duty the City voluntarily undertook to guard him against the dangerous conditions created by allowing vehicles to drive on the beach. The City has the authority to allow or disallow vehicles from driving on the beach it owns, to require safety precautions for the protection of beachgoers, and to enforce those

requirements for the protection of beachgoers. S.C. Code Ann. §5-7-150 (2007). In accordance with that authority, the City entered into a Franchise Agreement with the Beach Service.

The Franchise Agreement specifically provides that the "[City] requires the protection of its tourist and residential population through an efficient and effective Water Safety Program; and . . . these goals can be optimally achieved through the cooperation of the [City] and the Concessionaires of beach equipment." **(Franchise Agreement p.1).** The City and Huggins thereby contracted with one another to jointly protect beach visitors. **(Franchise Agreement p.1-16; Transcript of Summary Judgment Motion Hearing p. 11).** The Franchise Agreement explicitly authorizes the Beach Service to operate motor vehicles on the beach. **(Franchise Agreement pp.3-4).** However, the City reserved to itself "the right to inspect and approve or disapprove the use of any motor vehicle" and the right and duty to require that any Beach Service employee who drives a vehicle on the beach shall successfully complete a police department offered training course for the type of vehicle the employee of the Beach Service is to drive on the beach. **(Franchise Agreement pp.3-4, 6, 10).** The City failed to place any other contractual limitations on the type of vehicle that can be driven on the beach, the purpose for which a specific type of vehicle can be driven on the beach, or the time of day or year a specific type of vehicle can be driven on the beach.

The inclusion of these provisions in the Franchise Agreement shows the City's recognition of the inherent danger of allowing the Beach Service to drive motor vehicles in close proximity to distracted persons lying on the beach. The

provision requiring the beach driving safety course is intended to protect beachgoers, and the City had a duty to ensure any Beach Service employees, including Risbourg, participated in and completed the police department driving course before the City allowed that person to drive a motorized vehicle on the beach.

According to the deposition testimony Huggins, the owner of the Beach Service, the City failed, for an extended period of time, to require any employee of the Beach Service to participate in any type of police department driving course prior to the day Erik was run over. **(Dep. of Earl Henry Huggins, Jr. p.49).**

Although South Carolina Courts have not had the occasion to address the application of the SCRUS's gross negligence exception in cases where the landowner's actions perpetrate the danger, the case of Covington v. U.S., 902 F. Supp. 1207 (D. Hawaii 1995), decided by the U.S. District Court for the District of Hawaii is analogous to the case at bar and instructive. In Covington, a boy drowned at an Air Force Station beach. 902 F. Supp. at 1209. The plaintiff alleged causes of actions for negligence and gross negligence against the U.S., as landowner, and the U.S. moved for summary judgment on the basis that Hawaii's recreational use statue barred the claims. Id. at 1213. The court held the plaintiff's simple negligence claims were barred by Hawaii's recreational use statue. Id. at 1213-14. However, in addressing the allegation of gross negligence, the Court stated that "a false appearance of safety created by the placement of inadequate or untrained lifeguards on the beach, might result in a Potentially (sic) dangerous condition above and beyond the natural danger created by the ocean currents and surf." Id. at 1213. Accordingly, the court found that "the government may be held liable to the extent it

created, and willfully or maliciously failed to guard or warn against, this danger." Id. In determining that evidence of gross negligence was presented, the court noted that the 'government's failure to observe its own safety standards . . . is important evidence in determining that it possessed constructive knowledge that injury would occur." Id. at 1214. The court found there was a genuine issue of material fact as to whether the government consciously failed to act to avoid the danger of potential injury by providing additional lifeguards. Id. at 1415.

Similarly, in the case at hand, the dangerous condition created by untrained Beach Service employees driving on the beach would not have existed but for the City's allowing it to occur. Of course, the City knew it was allowing untrained drivers to engage in the dangerous activity of driving through the sandy area of the beach in a full-sized trucks while unsuspecting vacationers and residents lay on the beach sunbathing. The City also knew or should have known those sunbathers would be distracted and likely to encounter the dangerous condition, which could cause injury or death. The City's failure to take any action whatsoever to guard against or warn of the dangerous condition it knowingly created, shows an intentional, conscious failure to do something, which the City has the right and obligation to do.

In addition to the evidence discussed above, evidence of the gross negligence of the Beach Service's employee, Risbourg, was also presented. "Where a person is so indifferent to the consequences of his conduct as not to give slight care to what he is doing, he is guilty of gross negligence." Etheredge v. Richland School District I, 330 S.C. 447, 455, 499 S.E.2d 238, 242 (1998). In his recorded statement, which was made a part of the trial court's record by the City, Risbourg stated that he was stopped

on the beach observing the water when he took off and made a turn. **(Recorded Statement Craig Risbourg p.1).** By Risbourg's own admission, he did not observe the conditions immediately around him. Risbourg stated, "I made a right turn and just within a few- after I took off, I heard a noise, so I got out of the truck and then I had rolled over the guy. Obviously you know, he was in my blind spot in my truck when I took the right turn and I just didn't see him." **(Recorded Statement Craig Risbourg p.1).** Obviously, Risbourg knew he had a blind spot when driving and turning the vehicle into his blind spot when people are normally laying on the sand below his normal field of vision.

The City is liable for the Beach Service and Risbourg's gross negligence pursuant to the nondelegable duty doctrine. The nondelegable duty doctrine renders certain duties nondelegable when a special relationship exists and states that "a person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach." Smith v. Reg'l Med. Ctr., 394 S.C. 110, 113, 713 S.E.2d 656, 658 (Ct. App. 2011). When viewing the facts in the light most favorable to the Appellant, the Franchise Agreement shows the City was allowing Huggins to perform its necessary governmental functions as stated in the Agreement: "the City of Myrtle Beach requires the protection of its tourists and residential population through an efficient and effective Water Safety Program; and . . . is imperative along the City's twelve miles of oceanfront." **(Franchise Agreement p.1).** Clearly, the City either created or acknowledged its duty to sunbathers though its Franchise Agreement's affirmative declarations.

Further, our Supreme Court discussed in Quality Towing, Inc., v. City of Myrtle Beach, that a franchise has been defined as a special privilege granted by the government to particular individuals or companies to be exploited for private profits. 345 S.C. 156, 165-66, 547 S.E.2d 862, 867 (2001) (citing City of Cayce v. AT & T Comms., 326 S.C. 237, 486 S.E.2d 92 (1997)). Government franchisees are traditionally service-type businesses that are willing to pay the municipality for the privilege of doing business with its citizens. Id. A "franchise" is a privilege of doing that which does not belong to citizens generally by common right. State ex. rel Daniel v. Broad River Power Co., 157 S.C. 1, 35, 153 S.E. 537, 548 (1929). A person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000). It actually is the liability, not the duty, that is not delegable. Id. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor. Id.

The case at hand clearly shows a Franchise Agreement that involves the Beach Service contracting to perform a specialized service that a general business cannot perform without authority from the City, which is to provide beach safety services and beach equipment rentals to the public. The City requires protection of beach visitors, such as Erik, as provided in the Franchise Agreement. The City's and the Beach Service's relationship is a special relationship as read from the Franchise Agreement as a whole and is akin to the example recited by our Supreme Court that a municipality has a nondelegable duty to provide safe streets even when maintenance

is undertaken by the state Highway Department and remains vicariously liable for injuries caused by defective repairs. Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 391, 611 S.E.2d 235, 238 (2005). When the City gave the Beach Service the Franchise Agreement to perform services and functions that only the City could perform but for this Agreement, the City remains vicariously liable for the negligent or grossly negligent acts of Beach Service employees as though they were the City's employees. In fact, the City requires all Beach Service employees to wear the City of Myrtle Beach Seal on the right sleeve of their lifeguard uniform thus conveying the message to ordinary beachgoers that the Beach Service derives its authority from the City and giving the impression the Beach Service is directly run or managed by the City. **(Franchise Agreement p.4;"The City of Myrtle Beach Seal shall be on the right sleeve.").**

Therefore, a genuine issue of material fact exists as to whether a nondelegable duty existed between the City and Huggins and whether the City is able to escape liability for the Beach Service's acts.

In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence standard, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid-South Mgt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Moreover, "since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (Ct. App. 1991)(citations omitted); see also Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986)("an extreme

remedy to be cautiously invoked").

As discussed above, the Appellant presented evidence in the form of the Franchise Agreement and the deposition testimony of Huggins demonstrating facts on which reasonable minds could differ as to gross negligence, thus creating a question of fact for the jury rather than a purely legal question to be determined by the court. Brooks v. Northwood Little League, 327 S.C. 400, 402, 489 S.E.2d 647, 648 (Ct. App. 1999)("[g]ross negligence ordinarily presents a hybrid question of law and fact, but when evidence supports but one inference, the question becomes one of law for the court."). In making its ruling, the trial court either overlooked or ignored this evidence even though the Appellant handed a copy of Huggins's deposition to the trial court to include in the record at the summary judgment motion hearing and directed the trial court's attention to the Franchise Agreement and Huggins's deposition both during his oral argument and in his "Plaintiff's Memorandum in Opposition to Defendant City of Myrtle Beach Motion for Summary Judgment." **(Transcript of Summary Judgment Motion Hearing pp. 11-13; Plaintiff's Memorandum in Opposition to Defendant City of Myrtle Beach Motion for Summary Judgment p.5; Transcript of Summary Judgment Motion Hearing pp.13).**

Taking the facts in the light most favorable to the Appellant, a tragic accident occurred on May 14, 2010 that led to the death of Erik Rabon. The City and the Beach Service entered into the Franchise Agreement in September of 2008, giving the City more than a year and half to conduct the driving course to comply with its obligation to guard against and warn Erik of the dangerous conditions created by

allowing driving on the beach. **(Deposition of Earl Henry Huggins, Jr. p. 41).** Huggins's testimony that a police operated training course was not engaged, conducted or completed until this after tragic event occurred, is at the very least a scintilla of evidence. **(Deposition of Earl Henry Huggins, Jr. p. 41).** It raises a genuine issue of material fact as to whether the City was grossly negligent by failing to guard or warn beach visitors of a dangerous condition created by the City in allowing untrained drivers to drive in close proximity to persons lying on the beach. When considering the evidence in the light most favorable to the Appellant and against the City, evidence of gross negligence was produced and raised a genuine issue of material fact to the court.

II. Did the trial court err in granting summary judgment to the City when discovery was incomplete, and the Appellant had not afforded a full and fair opportunity to complete discovery?

The trial court judge failed to take into account that discovery was ongoing at the time he granted the City's motion for summary judgment, and the Appellant did have not a full and fair opportunity to complete the discovery process.

Summary judgment is an extreme remedy to be cautiously invoked. Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). "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." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (Ct. App. 1991)(citations omitted). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Evening Post Publ. Co.v. Berkley

County Sch. Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011)(citing Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002)).

On May 23, 2011, Appellant served all parties of record with Notice of Deposition of Craig J. Risbourg and Huggins for June 10, 2011. Huggins's deposition was held, but Defendant Risbourg did not appear as he notified his attorneys that he had traveled to Thailand. **(Pl. Memo. p. 4)**. To comply with the intent of SCRCP, Rule 56(f), the Court should not have granted summary judgment in detriment to Appellant when discovery was incomplete, especially when it was previously noticed and did not occur through the fault of the Appellant.

Obviously, Appellant will not know Risbourg's qualifications in off-road driving or his full account of the events leading to the accident until his deposition is completed. Additionally, City employee depositions need to be held after Risbourg's to discover the reason for the City not requiring the driving course to evaluate the Beach Service drivers' qualifications and safety operation of motor vehicles on the beach. Further, the depositions of certain City employees were planned to be performed. Thus, it is likely further discovery will uncover additional facts relating to the City's gross negligence.

CONCLUSION

The trial court erred in its finding the Appellant presented no evidence of the City's gross negligence. The law requires only that the Appellant submit a mere scintilla of evidence in order to withstand a motion for summary judgment, and the record shows the Appellant met his burden in doing so. The Appellant presented

evidence that the City created a dangerous condition by allowing driving on the beach and failed to take any precaution to guard or warn against that danger, including failing to enforce its own safety precaution that beach drivers participate in a police department safety course. The City knew or should have known that allowing Beach Service employees to drive motor vehicles on the beach could lead to serious injury or death, which is exactly what happened to Erik Rabon. Appellant further contends the City's duty to protect beachgoers from the dangerous condition of driving on the beach is a nondelegable duty, which subjects the City to vicarious liability for the negligence and gross negligence of the Beach Service and its employee. Although discovery is incomplete, Risbourg's account of the events in his recorded statement presents evidence of gross negligence.

Accordingly, the trial court erred in finding the SCRUS's exception to immunity from liability for grossly negligent conduct inapplicable to this case and thereby granting summary judgment in favor of the City. Appellant asks this court to reverse the trial court's decision and remand the case for trial on the facts.

Even if this court finds no evidence of the City's negligence has been presented thus far, the Appellant asks this court to consider the grant of summary judgment was premature because the Appellant did not have the opportunity to complete discovery. Appellant asks this court to reverse the trial court grant of summary judgment and to remand the case for adequate time to conduct further discovery.

Respectfully Submitted,

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Attorneys for Appellant

The South Carolina Court of Appeals

Adam Corey Rabon, as Guardian, for
Erik Randall Rabon, Appellant,

v.

Huggins Beach Service, Inc., the City
of Myrtle Beach and Craig J. Risbourg, Respondents.

The Hon. Benjamin H. Culbersto
Horry County
Trial Court Case No. 2010-CP-26-06873

ORDER

For good cause having been shown and no Return filed in opposition from opposing counsel, the time for serving and filing the Appellant's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until May 16, 2012.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: Jeffrey Edwin Johnson, Esquire
Robert N. Richardson, Jr, Esquire
James R. Battle, Esquire
Jimmy C. Powell

FILED
4/13/12 (ST)

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-6873
(Court of Appeals Case No. 2012208006)

Adam Corey Rabon, as Personal Representative
For the Estate of Erik Randall Rabon .....Appellant,

v.

Huggins Beach Service, Inc., The City of Myrtle Beach
and Craig J. Risbourg.....Respondents.

Motion of Appellant to Extend Time to File Initial Brief

Pursuant to Rule 240 of the Appellate Court Rules, the Appellant above-named hereby moves for an Order from this Honorable Court granting the Appellant an extension of time to file his Initial Brief in the above-captioned matter. Said Motion is based upon the following grounds:

(1) Due to a busy Court schedule and time devoted to certain other cases for Court, the Appellant's attorneys have not completed the Initial Brief of the

Appellant. However, said attorneys do not foresee any difficulty in completing said Initial Brief within sixty (60) days from today's date.

(2) Appellant's counsel is informed and believes that there would be no prejudice to this case in the granting of this Motion and believes that the matters set forth above constitute good cause for the granting of said Motion.

(3) Furthermore, counsel respectfully requests that all time limits concerning this appeal be held in abeyance pending a ruling on this Motion.

(4) Counsel for all parties have consented to this Motion.

WHEREFORE, Appellant prays that this Honorable Court inquire into the matters set forth herein and issue its Order granting the Motion of Appellant to Extend Time to File Initial Brief and holding all time limits concerning this appeal in abeyance pending a ruling on this Motion.

JEFFREY E. JOHNSON, ATTORNEY AT LAW, L.L.C.

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AND

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Attorneys for Appellant

March 14, 2012

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-6873
(Court of Appeals Case No. 2012208006)

Adam Corey Rabon, as Personal Representative
For the Estate of Erik Randall Rabon .....Appellant,

v.

Huggins Beach Service, Inc., The City of Myrtle Beach
and Craig J. Risbourg.....Respondents.

PROOF OF SERVICE

I certify that I have served the Motion of Appellant to Extend Time to File Initial Brief on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on March 14, 2012, addressed to their attorneys of record James R. Battle, Battle & Vaught, PA. P.O. Box 530, Conway, South Carolina 29528 and Jimmy C. Powell, Jr., Turner Padget Graham & Laney, P.A., P.O. Box 2116, Myrtle Beach, South Carolina 29578, on March 14, 2012.

March 14, 2012

Desiree Perzan

Desiree Perzan
Paralegal to Jeffrey E. Johnson
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Reply to: P.O. Drawer 1829
Conway, South Carolina 29528

March 14, 2012

Via U.S. Mail & Facsimile: 803-734-1839
The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Adam Corey Rabon, as Personal Representative for the Estate of Erik Randall Rabon v. Huggins Beach Service, Inc., The City of Myrtle Beach and Craig J. Risbourg
Case Number: 2010-CP-26-6873
Court of Appeals Case Number: 2012208006

Dear Ms. Gee:

Enclosed for filing is a Motion of Appellant to Extend Time to File Initial Brief and six (6) copies in connection with the above matter. Also enclosed are the following:

1) Proof of Service for the Motion of Appellant to Extend Time to File Initial Brief
2) A filing fee of $25.00.

By copy of this letter, I am serving the enclosed Motion of Appellant to Extend Time to File Initial Brief upon all counsel of record.

With kind regards, I am

Yours very truly,

Jeffrey E. Johnson

JEJ/dp
Enclosures

cc: James R. Battle, Esq.
Jimmy C. Powell, Esq.
Robert N. Richardson, Jr., Esq.

JEFFREY E. JOHNSON

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February 15, 2012

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Adam Corey Rabon, as Personal Representative for the Estate of Erik Randall Rabon v. Huggins Beach Service, Inc., The City of Myrtle Beach and Craig J. Risbourg
Case Number: 2010-CP-26-6873

Dear Ms. Gee:

Please find this letter informing the Court that I am in possession of the Transcript of Record for the Respondent City of Myrtle Beach's Motion for Summary Judgment hearing before Judge Benjamin H. Culbertson on July 25, 2011.

Should you have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am

Very Truly Yours,

Jeffrey E. Johnson

JEJ/dp

cc: Office of Court Administration
James R. Battle, Esq.
Jimmy C. Powell, Esq.
Robert N. Richardson, Jr., Esq.

The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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February 24, 2012

Jeffrey Edwin Johnson, Esquire
Jeffrey E. Johnson, Attorney at Law, LLC
P.O. Box 1829
1409 Second Ave.
Conway, SC 29528

Re: Rabon, Adam v. Huggins Beach Service
Case #**2012208006**

Dear Mr. Johnson:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. Failure to file in the proper court may result in the dismissal of your appeal. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the bar number and firm name of any counsel shown must be included in his or her address.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

I further wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the

responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy

Tanya A. Gee
CLERK

TAG/jt

cc: Robert N. Richardson, Jr, Esquire
James R. Battle, Esquire
Jimmy C. Powell
The Honorable Melanie Huggins

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings

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ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions,[1] documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:[2]

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.

2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.

3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.

4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

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1 See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR; Rule 402(n), SCACR; and Rule 403(l), SCACR.

2 This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-6873

Adam Corey Rabon, as Personal Representative
For the Estate of Erik Randall Rabon .....Appellant,

v.

Huggins Beach Service, Inc., The City of Myrtle Beach
and Craig J. Risbourg.....Respondents.

NOTICE OF APPEAL

Adam Corey Rabon, as Personal Representative of the Estate of Erik Randall Rabon, appeals the Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment of the Honorable Benjamin H. Culbertson dated September 29, 2011 and Amended Form 4 Judgment Denying Plaintiff's Motion to Alter or Amend Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment of the Honorable Benjamin H. Culbertson dated February 7, 2012. Appellant received written notice of entry of this judgment on February 7, 2012 which has been filed with the Clerk of Court for Horry County South Carolina.

February 14, 2012

Jeffrey E. Johnson
P.O. Drawer 1829
Conway, SC 29528-1829
Phone: (843) 488-5333
S.C. Bar No. 16835
Attorney for Appellant

Robert N. Richardson, Jr.
1305 Third Ave.
Conway, SC 29526
Phone: (843) 248-9831
S.C. Bar No. 4720
Attorney for Appellant

Other Counsel of Record:

James R. Battle
Battle & Vaught P.A.
Post Office Box 530
Conway, SC 29528
Phone: (843) 248-4321
Attorneys for Respondents City of Myrtle Beach

Jimmy C. Powell, Jr., Esq.
Turner Padget Graham & Laney, PA
P.O. Box 2116
Myrtle Beach, SC 29578
Phone: (843) 213-5500
Attorney for Respondents Huggins Beach Service, Inc.
And Craig J. Risbourg

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-6873

Adam Corey Rabon, as Personal Representative
For the Estate of Erik Randall Rabon .....Appellant,

v.

Huggins Beach Service, Inc., The City of Myrtle Beach
and Craig J. Risbourg.....Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on February 14, 2012, addressed to their attorneys of record James R. Battle, Battle & Vaught, PA. P.O. Box 530, Conway, South Carolina 29528 and Jimmy C. Powell, Jr., Turner Padget Graham & Laney, P.A., P.O. Box 2116, Myrtle Beach, South Carolina 29578, on February 14, 2012.

February 14, 2012

Desiree' Perzan

Desiree Perzan
Paralegal to Jeffrey E. Johnson
P.O. Drawer 1829
Conway, SC 29528
(843) 488-5333

JEFFREY E. JOHNSON

ATTORNEY AT LAW, L.L.C.

1409 Second Avenue
Conway, SC 29526

Telephone (843) 488-5333
Facsimile (843) 488-4290

Reply to: P. O. Drawer 1829
Conway, South Carolina 29528

February 14, 2012

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

The Honorable Melanie Huggins-Ward
Horry County Clerk of Court
1301 Second Avenue
Conway, SC 29526

RE: Adam Corey Rabon, as Personal Representative for the Estate of Erik Randall Rabon v. Huggins Beach Service, Inc., The City of Myrtle Beach and Craig J. Risbourg
Case Number: 2010-CP-26-6873

Dear Ms. Gee and Ms. Huggins:

Please find enclosed for filing in the above-referenced case the original and three (3) copies of the following:

1. Notice of Appeal (together with Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment dated September 29, 2011 and Amended Form 4 Judgment Denying Plaintiff's Motion to Alter or Amend Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment dated February 7, 2012;
2. Proof of Service
3. $100.00 check for payment of filing fee (as required by the SC Court of Appeals)

Please file the original with your office and return the clocked copies to me in the self addressed stamped envelope enclosed. By copy of this correspondence I am hereby serving all counsel of record with same.

Sincerely,

Jeffrey E. Johnson

JEJ/dp
Enclosures
cc: James R. Battle, Esq.
Jimmy C. Powell, Esq.
Robert N. Richardson, Jr., Esq.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Adam Corey Rabon, as Guardian, for Erik Randall Rabon,

PLAINTIFF,

vs.

Huggins Beach Service, Inc., the City of Myrtle Beach and Craig J. Risbourg,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-26-6873

ORDER GRANTING DEFENDANT CITYOF MYRTLE BEACH'S MOTION FOR SUMMARY JUDGMENT

Statement of Case

This lawsuit came before me for a hearing on the City of Myrtle Beach's Motion for Summary Judgment. The hearing was held on July 25, 2011 in the Horry County Courthouse. Present at the hearing were Jeffery E. Johnson and Robert N. Richardson, Jr. as attorneys for the Plaintiff Adam Corey Rabon, as Guardian, for Erik Randall Rabon, James R. Battle and Michael W. Battle as attorneys for the City of Myrtle Beach and David R. Sligh as attorney for Huggins Beach Service, Inc. and Craig J. Risbourg.

This lawsuit involves an accident that occurred on the public beach in the City of Myrtle Beach ("City"). Plaintiff filed this lawsuit alleging Craig Risbourg, an employee for Huggins Beach Service ("Huggins"), struck Erik Rabon with his vehicle while Rabon was on the seashore. The City moved for summary judgment on the grounds that it was immune from liability under the Recreational Use Statute ("RUS"), SC Code § 27-3-10, et seq., and the public duty rule.

Standard of Review

1 / mtc

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Doe ex rel. Doe v. Wal-Mart Store, Inc.*, 2011 WL 2535565 at 2 (S.C. 2011).

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), SCRCP.

Facts

The City contracted with Huggins for Huggins to provide life guard services, beach chair and umbrella rentals and other related services for recreational users of the beach in Myrtle Beach. On May 14, 2010 at approximately 1:27 PM, Erik Rabon was lying on the sandy portion of the beach between 8th and 9th Avenues North in the City when he was run over by a vehicle owned by Huggins and driven by a Huggins employee, Defendant Craig Risbourg.

At the time of this incident, Huggins was performing its contractual services for the City. The City does not charge any fees for admission onto the beach. More specifically, the Plaintiff was not charged any fee by the City for admission onto the beach.

Analysis

A. Under the South Carolina Recreational Use Statute, S.C. Code Ann. § 27-3-10, et. seq., the City is not liable for Erik Rabon's injuries.

The City, as the landowner where Plaintiff's injuries occurred, does not owe a duty of care to Plaintiff. Under the RUS a landowner owes no duty of care to keep the premises safe for those who have his permission to use his land free of charge for recreational purposes. See *Cole v. South Carolina Elec. & Gas, Inc.* 362 S.C. 445, 608 S.E.2d 859 (2005); S.C. Code Ann. § 27-3-30. The landowner has no duty to warn such persons of dangerous conditions on the land; extends no assurance that the premises are safe; and does not confer the legal status of an invitee or licensee on the people permitted to use the land. *Id.*; S.C. Code Ann § 27-3-40.

Applying the RUS's broad language to the instant case, it is undisputed that the City owns the beach where Plaintiff's accident occurred and that the City did not charge Plaintiff admission for entry onto the beach. Plaintiff was a recreational user of the City's beach. Therefore, pursuant to the RUS, the City owed Plaintiff no duty of care to protect him from, or warn him of, any hazards connected with lying on the beach. *Id.*

B. The City did not breach the RUS's exception for grossly negligent conduct.

The RUS does not limit a landowner's liability for a grossly negligent, willful, or malicious failure to guard or warn against a dangerous condition. S.C. Code Ann. § 27-3-60(a). Therefore, to overcome the RUS's limitation on liability, Plaintiff must present evidence that the City's acts were grossly negligent, willful, or malicious. Gross negligence is defined as the "intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do...[G]ross negligence connotes the failure to exercise even slight care." *Clyburn v.*

Sumter County School Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). Gross negligence ordinarily is a mixed question of law and fact. See *Rogers v. Atlantic Coast Line R.R. Co.*, 222 S.C. 66, 71 S.E.2d 585 (1952). When the evidence supports but one reasonable inference, however, the question becomes a matter of law for the court. See *Foster v. South Carolina Dep't of Highways and Public Transportation*, 306 S.C. 519, 413 S.E.2d 31 (1992). Although Plaintiff's Complaint alleges the City breached a duty to Plaintiff by hiring Huggins to provide services on its beaches, Plaintiff did not present any evidence by way of affidavit or other evidence of gross negligence on the part of the City. Therefore, as a matter of law, a finding of no gross negligence is appropriate, and the City is entitled to the RUS's protections.

In addition, the S.C. legislature passed the RUS "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." S.C. Code Ann. § 27-3-10. Therefore, the RUS's explicit purpose is to protect landowners from liability such as the case at bar.

NOW THEREFORE, IT IS HEREBY ORDERED, the City of Myrtle Beach's Motion for Summary Judgment is hereby granted on the grounds that the City is not liable for the injuries sustained by the Plaintiff's ward pursuant to the South Carolina Recreational Use Statute.

Benjamin H. Culbertson

The Honorable Benjamin H. Culbertson
Presiding Judge, Fifteenth Judicial Circuit

Dated: Sept. 29, 2011

AMENDED FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-26-6873

Adam Corey Rabon, *et al.*
PLAINTIFF(S)

Huggins Beach Service, Inc., *et al.*
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

12 FEB -7 PM 1:54

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

The plaintiff's Motion to Alter or Amend Order dated 9/29/2011 granting the Motion for Summary Judgment as to the defendant City of Myrtle Beach is DENIED.

(This motion is decided on briefs without oral arguments.)

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	$ N/A
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Benjamin H. Culbertson, Circuit Court Judge | 2148 Judge Code | February 7, 2012 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Jeffrey E. Johnson

ATTORNEY(S) FOR THE PLAINTIFF(S)

James R. Battle
Jimmy C. Powell, Jr.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: None