THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean Hoefer Toal, Circuit Court Judge

Case No: 2016-CP-40-00067

Earl Kinley, ... Respondent,

v.

Waste Management of South Carolina, Inc., and
Chambers Richland County Landfill, Inc., ... Appellants.

MOTION TO DISMISS APPEAL AND FOR EXPEDITED REVIEW

The motion is made pursuant to Rule 240 of the South Carolina Appellate Court Rules, which governs motions and petitions generally. Respondent Earl Kinley moves this Court to dismiss the appeal that was served on June 23, 2017. The appeal is from an unappealable order denying Appellants' motion for summary judgment and is being taken solely to delay the trial of this matter. For the reasons stated below, this Court should expedite its review of this matter and dismiss this appeal to avoid any undue delay of this case proceeding at the trial court level.

BACKGROUND

On May 29, 2012, Earl Kinley was a garbage truck driver for the City of Columbia. That day, he was operating his garbage truck at the Richland County landfill owned and operated by the Appellants. As alleged in the Complaint and Amended Complaint on file, Kinley unloaded his

truck at the tipping point and was driving down the landfill road toward the exit when his truck hit a hole or washout, causing him to be thrown about the cab of the truck and hit his head on the roof. *See* Amended Complaint, attached hereto as Exhibit A. As a result of the incident, Kinley incurred significant medical treatment and expenses, including neck surgery on March 27, 2013 for anterior cervical discectomy and arthrodesis at C5-C6 and C6-C7 and installation of hardware at those levels. Kinley filed this civil action on July 7, 2014 alleging premises liability and other claims of negligence.[1]

Appellants denied liability and moved for summary judgment on the grounds that (1) they owed no duty of care to Plaintiff, (2) there was no breach of duty, (3) proximate causation is lacking, and (4) Plaintiff assumed the risk of injury by entering the landfill. *See* Motion for Summary Judgment, attached hereto as Exhibit B. Kinley opposed the motion for summary judgment, and filed a memorandum in opposition. *See* Memorandum in Opposition to Motion for Summary Judgment, attached hereto as Exhibit C.[2]

The trial court heard argument on the motion for summary judgment on December 16, 2016. Kinley's primary argument in opposition to summary judgment was that discovery was

[1] Plaintiff's original Complaint was filed against the wrong defendant, and Appellants were added by Amended Complaint filed May 26, 2015.

[2] Kinley's memorandum in opposition was filed with the clerk of court on August 25, 2016, which was the date the motion for summary judgment was scheduled to be heard. However, at the beginning of that hearing, the motion was continued. The undersigned counsel for Kinley planned to give a copy of the memorandum in opposition to Appellants' counsel in person at the August 25 hearing, but Appellants' counsel was delayed in traffic and did not appear prior to the continuance being granted (Appellants' counsel appeared via telephone while the court considered and granted the request for continuance). Following the hearing, the undersigned counsel for Kinley returned to his office and, through oversight on his part, neglected to mail a copy of the memorandum to Appellants' counsel. The motion was later scheduled to be heard on December 16, 2016, and the trial judge had the filed copy of Kinley's memorandum at that hearing and cited it and its attachments in discussing the issues from the bench. It did not occur to the undersigned counsel that the memorandum had not been served on Appellants' counsel, and Appellants' counsel did not indicate he did not have a copy at the hearing. After the hearing, counsel for Appellants sought a copy of the memorandum and it was provided via email. Also, at the December 16 hearing, counsel for Appellants produced a memorandum in support of their motion, which is dated August 22, 2016. Presumably, it was intended to be provided to Kinley's counsel in person at the August 25 hearing but, like Kinley's memorandum, was not provided at that time due to the continuation of the hearing and travel delay of Appellants' counsel.

incomplete, rendering the motion premature. *See, e.g.,* Memorandum in Opposition, p. 4. In fact, Kinley sought a continuance of the December 16, 2016 motion hearing due to a conflict of counsel and the status of discovery, to which Appellants opposed. *See* Correspondence, attached hereto as Exhibit D. At the hearing, counsel for Kinley made substantive arguments in opposition to the motion for summary judgment, which are generally outlined in the memorandum in opposition.

After hearing oral argument from counsel, the trial judge made certain findings on the record, denied the motion for summary judgment, and asked counsel for Kinley to prepare a proposed order. The trial court entered an Order denying the motion for summary judgment on January 23, 2017. The parties received notice of the court's order via email on January 30, 2017. On or about February 8, 2017, the Appellants served a Rule 59(e) motion to alter or amend the court's order denying summary judgment. *See* Motion for Reconsideration, attached hereto as Exhibit E. The motion to reconsider was denied by form order filed June 13, 2017.

According to the Notice of Appeal in this matter, Appellants are attempting to appeal the trial court's order denying their motion for summary judgment, and the subsequent order denying their motion to reconsider. For the reasons set forth below, the Court should dismiss this appeal.

ARGUMENT

A. Orders denying summary judgment are not appealable.

It is widely recognized in South Carolina that orders denying motions for summary judgment are not appealable. As noted by the Supreme Court, "This Court has repeatedly held that the denial of summary judgment is not directly appealable. Further, this Court has held that the denial of summary judgment is not reviewable even in an appeal from final judgment." *Ballenger v. Bowen*, 313 S.C. 476, 476-77, 443 S.E.2d 379, 380 (1994). Although the Supreme Court may, as a matter of discretion, consider an unappealable order that contains an appealable

constitutional issue, the Court does so sparingly and limits its review to the appealable issue as opposed to the denial of summary judgment. *See, e.g., Morris v. Anderson Cty.*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002). In this instance, the trial court's order simply denies the Appellants' motion for summary judgment, which is not appealable, and the order does not create any constitutional or other appealable issues.

There is no legitimate basis for Appellants' attempt to appeal the trial court's order denying summary judgment in this matter, and this Court should dismiss this appeal as frivolous and/or taken solely for the purpose of delay.

B. The orders in this case are not appealable under S.C. Code § 14-3-330.

The orders specified in Appellant's Notice of Appeal are interlocutory and not appealable under South Carolina Code § 14-3-330. "An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in section 14-3-330 of the South Carolina Code (1976 & Supp. 2009)." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 300, 705 S.E.2d 475, 477 (Ct. App. 2011) (citing *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006)). As noted in Rule 72, SCRCP, appeals may only be taken when provided by law from a final judgment or appealable order. The Official Notes to Rule 72 state that the rule "parallels, in part, S.C. Code § 14-3-330, but is designed to reduce appeals from interlocutory or intermediate orders in an action."

Section 14-3-330 allows for appeal of the following:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas ... and final judgments in such actions ...;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any

action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code § 14-3-330.

Given that Appellants do not specify which section of § 14-3-330 their appeal is taken, Kinley presumes the is appeal is taken under sections (1) and/or (2), and addresses each section below. Sections (3) and (4) of § 14-3-330 are seemingly not implicated by this appeal.

(1) The order denying summary judgment does not involve the merits.

The trial court's order does not involve the merits of this action and is therefore not appealable under S.C. Code § 14-3-330(1). Generally, an order "involves the merits" when it finally determines a substantial matter forming the whole or a part of some cause of action or defense. *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993).

The order denying summary judgment finds that the Appellants owed Kinley a duty of care as an invitee of the landfill. *See* Order, ¶ 1. "In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff." *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276-77 (2003) (citing *Faile v. South Carolina Dept. of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536 (2002)). Thus, it was within the trial court's province to issue a finding as to the existence or absence of a duty based on the record before it. Indeed, if the trial court determined there was no duty, as sought by Appellants in their motion but seemingly conceded in their memorandum, then the court would have likely granted summary judgment. The order denying summary judgment is not appealable as "affecting the merits" simply

because it makes a finding that a duty exists. Both sides remain able to pursue their claims and defenses. If, after final judgment is entered in the case, Appellants still desire to challenge the finding that a duty existed, then that would be the proper time to appeal. An appeal at this point is premature and improper, primarily because the need for such appeal may never arise.

The trial court's order also finds "that there is sufficient evidence in the record supporting Plaintiff's claim that he was injured on the Defendants' property/landfill" and "that triable issues of fact exist as to the issues of breach of duty and proximate causation, and that Plaintiff has met his burden of presenting 'a scintilla of evidence' in order to withstand Defendants' motion for summary judgment." *Id.* at ¶ 2, ¶ 5. In making these findings, the trial court found that it was reasonably foreseeable to the Appellants that *if* the landfill roadway was unsafe, then such condition *could* result in injury to garbage truck drivers like Kinley. *Id.* at ¶ 3. Likewise, the trial court found that the evidence submitted by Kinley in opposition to summary judgment indicated a pattern where erosion and washouts would occur following rain events, which was or should have been known to the Appellants. *Id.* at ¶ 4. Thus, the trial court found that the Appellants had a duty to act reasonably with regard to foreseeable risks of harm, and declined to grant summary judgment to the Appellants. *Id.*

These findings do not affect the merits of the case, but rather indicate that Kinley is entitled to a jury trial on his claims. It remains Kinley's burden to prove the elements of his causes of action, and Appellants are free to defend against such claims. Indeed, Appellants have asserted numerous affirmative defenses in this case. Although one argument for summary judgment was that Kinley assumed the risk of injury by entering the landfill premises (*see* Motion for Summary Judgment), the trial court held that such defense has been subsumed by the general framework of comparative negligence. *See* Order, ¶ 6. Although the trial court found that the required elements

of assumption of risk are lacking, the Appellants are left with their general comparative negligence defense, if they are able to introduce sufficient evidence for support. The only reference to "assumption of risk" in the Appellants' Answer to the Amended Complaint is under the heading "Open and Obvious." *See* Answer to Amended Complaint at p. 5, attached hereto as Exhibit F. Presumably, Appellants contend that the defective condition of the roadway – which they deny was present – was open and obvious to Kinley, therefore making him solely responsible for his own injuries under the doctrine of comparative negligence. Appellants remain free to make this argument despite the trial court's order denying summary judgment. The order does not involve the merits of this action is therefore not appealable under S.C. Code § 14-3-330(1).

(2) The order denying summary judgment does not affect a substantial right of Appellants and either determine the action or strike any part of Appellants' pleading.

The order denying summary judgment does not affect any substantial rights of the Appellants. As set forth above, the Appellants remain able to defend against Kinley's allegations and introduce evidence of any affirmative defenses they seek to prove. The orders attempting to be appealed do not determine the action or strike any part of Appellants' pleadings. Thus, the orders are not appealable under § 14-3-330(2). When analyzing this subsection, "an appellate court should look to the effect of an interlocutory order to determine its appealability." *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479. "An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." *Id.* The order denying summary judgment in this case does not meet this standard and is therefore unappealable.

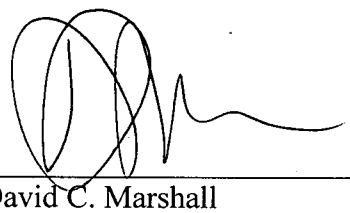
CONCLUSION

This Court should expedite its review of this mater and dismiss this appeal. Appellants seek to appeal an order denying summary judgment, which is not appealable – either at this stage of the litigation or after final judgment is entered. Moreover, the order does not affect the merits of the case or any substantial rights of Appellants by either determining the action or striking part of a pleading. Thus, there is no basis for this appeal under Rule 72, SCRCP, or South Carolina Code § 14-3-330. The trial court's order simply finds that a legal duty exists and that Kinley has satisfied the "scintilla of evidence" standard regarding his claims, which entitles him to a jury trial.

CERTIFICATION OF COUNSEL

The undersigned counsel for Kinley hereby certifies that he has consulted with opposing counsel in an effort to resolve the subject of this motion. *See* Correspondence, attached hereto as Exhibit G.

Respectfully submitted,

June 27, 2017 By: 

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ATTORNEYS FOR RESPONDENT EARL KINLEY

INDEX OF EXHIBITS TO MOTION TO DISMISS APPEAL

Exhibit A	Second Amended Summons and Complaint
Exhibit B	Appellant's Motion for Summary Judgment
Exhibit C	Memorandum in Opposition to Motion for Summary Judgment
Exhibit D	Correspondence Regarding Request for Continuance of Motion Hearing
Exhibit E	Appellants' Motion for Reconsideration
Exhibit F	Appellants' Answer to Second Amended Complaint
Exhibit G	Correspondence Regarding this Motion to Dismiss Appeal

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

EARL KINLEY)
Plaintiff(s)) CIVIL ACTION COVERSHEET

vs.) 2016 -CP - 40 - 0067

WASTE MANAGEMENT OF SOUTH CAROLINA, INC., AND CHAMBERS RICHLAND COUNTY LANDFILL, INC.,)
Defendant(s))

Submitted By: Shane M. Burroughs
Address: PO Drawer 2789
Orangeburg, SC 29116

SC Bar #: 70346
Telephone #: 803-268-9800
Fax #: 803-531-3465
Other:
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NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20____-NI-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☒ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799) _____

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: _____ **Date:** 3-4-16

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South C

EXHIBIT A

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

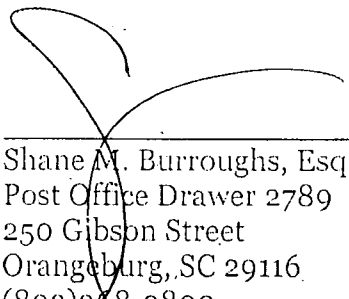
STATE OF SOUTH CAROLINA COUNTY OF RICHLAND EARL KINLEY, Plaintiff v. WASTE MANAGEMENT OF SOUTH CAROLINA, INC., AND CHAMBERS RICHLAND COUNTY LANDFILL, INC., Defendants	IN THE COURT OF COMMON PLEAS C/A NO.: 2016-CP-40-0067 **SECOND AMENDED** SUMMONS (Jury Trial Demanded)

TO: WASTE MANAGEMENT OF SOUTH CAROLINA, INC., AND CHAMBERS RICHLAND COUNTY LANDFILL, INC.:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices located at 250 Gibson Street, Orangeburg, SC 29115, within thirty (30) days after the service hereof, exclusive of the date of such service; and if you fail to answer the Complaint within the aforesaid time, the Plaintiff in this action will apply to the Court for the relief demanded in this Complaint, and a judgment by default will be rendered against you for the relief demanded in this Complaint.

~Signature Page to Follow~

LANIER & BURROUGHS, LLC



Shane M. Burroughs, Esquire
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And

SAVAGE ROYALL & SHEHEEN
Vincent A. Sheheen, Esquire
1111 Church St.
Camden, SC 29020

ATTORNEYS FOR THE PLAINTIFF

Date: 3.4.16

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	C/A NO.: 2016-CP-40-0067
)	
EARL KINLEY,)	
Plaintiff)	**SECOND AMENDED COMPLAINT (Jury Trial Demanded)**
)	
v.)	
)	
WASTE MANAGEMENT OF SOUTH CAROLINA, INC., AND CHAMBERS RICHLAND COUNTY LANDFILL, INC.,)	
)	
Defendants)	

Now comes the Plaintiff complaining of the Defendants herein would allege:

1. That the Plaintiff is a citizen and resident of Orangeburg County, State of South Carolina.

2. That the Defendant, Waste Management of South Carolina, Inc., is a corporation existing, operating and conducting business in the County of Richland, State of South Carolina, and owns and operates a landfill in Richland County, South Carolina.

3. That the Defendant, Chambers Richland County Landfill, Inc., is a corporation existing, operating and conducting business in the County of Richland, State of South Carolina, and owns and operates a landfill in Richland County, South Carolina.

4. That on or about May 29, 2012, Plaintiff, while operating a garbage vehicle, was exiting the landfill owned and operated by the Defendants in Richland County, South Carolina, when suddenly and without warning the Plaintiff's garbage

vehicle struck a large hole/wash out which caused him to be slammed into the roof of the cab striking his head on the roof, causing the Plaintiff severe injuries.

5. That as a result of the aforementioned incident, the Plaintiff was given medical treatment and has suffered serious, permanent and debilitating bodily injury.

FOR A FIRST CAUSE OF ACTION
(Negligence as to all Defendants)

6. That each and every allegation of Paragraphs 1 through 5 above is hereby realleged and reiterated as if fully set out herein.

7. That the aforementioned damage to the Plaintiff was a direct and proximate result of the Defendants, individually and by and through the acts and/or omissions of its' agents, servants and/or employees', negligent, careless, reckless, grossly negligent, wilful and wanton conduct at the time and place above mentioned in the following particulars, to wit;

a. In failing to notify the invitee of the potential hazard that the invitee would likely encounter;

b. In failing to notify the invitee of the expected harm that the Defendants knew or should have reasonably expected the invitee to encounter due to a diversion or distraction of the invitee's attention so that he would likely not discover same;

c. In negligently creating a condition or activity on the premises that would prevent a reasonable person to apprehend a defect which would potentially cause injuries to someone on its premises and did so;

d. In failing to keep it's property, including but not limited to it's entrances and exits, in a reasonably safe condition;

e. In failing to prevent the injury caused to the Plaintiff that the Defendants caused by a specific act by the Defendants and/or its' agents which created a dangerous

condition that the Defendants had actual or constructive knowledge of such condition and failed to remedy it;

f. In operating the business and maintaining its premises in utter disregard of the safety of its invitees;

g. In failing to properly hire, train, and supervise its' employees;

h. In failing to adequately supervise and review personnel to insure that they were carrying out their responsibilities in a reasonable fashion;

I. In failing to maintain proper policies and procedures to insure that its' employees were carrying out their responsibilities in a reasonable fashion;

j. In failing to institute proper policies and procedures to protect innocent business invitees like the Plaintiff, or if such policies and procedures existed, in failing to follow or abide by such policies and procedures;

k. In failing to follow or abide by the internal polices and procedures, implemented by the Defendants , to protect innocent business invitees like the Plaintiff;

l. In failing to maintain a reasonably safe environment for its business invitees;

m. In operating its' business in utter disregard for the safety of others on the premises;

n. In failing to exercise the degree of care that a reasonably prudent person would have exercised under the same or similar circumstances;

o. In such other and further particulars that the evidence in trial may show;

All of which combined and concurred as a direct and proximate cause of the injuries and damages suffered by Plaintiff herein, said acts being in violation of the statutes and laws of the State of South Carolina.

8. That as a direct and proximate cause of the aforementioned negligence, carelessness, recklessness, wilfulness, and wantonness of the Defendants, the Plaintiff was caused to sustain severe, permanent and debilitating injuries, including great pain and suffering, past, present and future, causing him to incur medical expenses past, present, and future, shock, embarrassment, and mental distress past, present and future, that his injuries are permanent in nature and pursuant to Section 19-1-150 of the Code of Laws of the State of South Carolina, he will continue to incur damages into the future all to the Plaintiff's damages in an amount to be determined by the trier of fact.

WHEREFORE, your Plaintiff prays for judgment against your Defendants in a sum sufficient to adequately compensate for actual damages, for such punitive damages as the jury may reasonably award, for the cost of this action, and for such other and further relief as this Honorable Court may deem just and proper.

LANIER & BURROUGHS, LLC

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Post Office Drawer 2789
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(803)268-9800

And

SAVAGE ROYALL & SHEHEEN
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Camden, SC 29020
ATTORNEYS FOR THE PLAINTIFF

Date: 3.4.16

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF Richland	CASE NO.: 2016-CP-40-0067
Earl Kinley ☐ Plaintiff vs. Loveless and Loveless, Inc.; Waste Management of South Carolina, Inc.; and Chambers Richland County Landfill, Inc. ☒ Defendants Check box above indicating submitting party	MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Name, SC Bar No. and Address of Plaintiff's Attorney	Name, SC Bar No. and Address of Defendant's Attorney
Vincent A. Sheheen, Esquire Savage, Royall & Sheheen P.O. Drawer 10 Camden, SC 29020	Duke R. Highfield SC Bar #:64224 Young Clement Rivers, LLP Post Office Box 993 Charleston, SC 29402-0993 Telephone: (843) 720-5456 fax: (843) 579-1330 e-mail: dhighfield@ycrlaw.com

☒ MOTION HEARING REQUESTED (attach *written* motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (COMPLETE SECTIONS II and III)

SECTION I: HEARING INFORMATION

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: 20 min Court Reporter Needed?: ☒ YES ☐ NO

SECTION II: MOTION TYPE

☒ Written Motion Attached
☐ Form Motion –
I hereby move for relief or action by the Court as set forth in the attached proposed order.

Dated: June 24, 2016

Signature of Attorney for Defendants Waste Management and Richland County Landfill

SECTION III: MOTION FEE

☒ PAID – AMOUNT $ 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency w. Indigent Party
☐ Sexually Violent Predator Act
☐ Post-Conviction Relief
☐ Motion for Stay Bankruptcy
☐ Motion for Publication
☐ Motion for Execution (Rule 69, *SCRCP*)
☐ Proposed order submitted at request of the Court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other:

JUDGE'S SECTION	JUDGE:
☐ Motion Fee to be paid upon filing of the attached order ☐ Other: _____	CODE: _____ DATE: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
(print name)
☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11/03)

EXHIBIT 3

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO. 2016-CP-40-0067
EARL KINLEY , PLAINTIFF, vs. WASTE MANAGEMENT OF SOUTH CAROLINA, INC.; AND CHAMBERS RICHLAND COUNTY LANDFILL, INC., DEFENDANTS.	)	MOTION FOR SUMMARY JUDGMENT

TO: SHANE M. BURROUGHS, ESQUIRE AND VINCENT A. SHEHEEN, ESQUIRE, COUNSEL FOR PLAINTIFF:

You will please take notice that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, Defendants Waste Management of South Carolina, Inc. and Richland County Landfill, Inc. will move before the Court of Common Pleas, Richland County, for an Order granting Defendants summary judgment against the allegations and cause of action asserted by Plaintiff pursuant to *South Carolina Rules of Civil Procedure*, Rule 56. This motion is taken in accordance with the *Rules* and is based upon the grounds that pleadings and depositions previously taken, or taken hereto, along with all written discovery and any affidavits that may be served upon counsel prior to the hearing, are insufficient to create a genuine issue of material fact as to the lack of any relevant duty owed by Defendants to Plaintiffs; the absence of any breach of duty by Defendants; the assumption of risk by Plaintiff; and the lack of proximate cause of Plaintiff's alleged damages. Plaintiff has set forth no evidence upon which to maintain

any cause of action against Defendants. As a result, Defendants are entitled to judgment as a matter of law.

This motion will be supported by memoranda, briefs, and evidence (inclusive of deposition transcripts, pleadings and discovery responses) which may be received and/or required by the Court.

YOUNG CLEMENT RIVERS, LLP

By: _____
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Attorneys for the Defendants
Waste Management of South Carolina, Inc.
and Richland County Landfill, Inc.

Charleston, South Carolina

6/24, 2016

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 24 day of June, 2016.

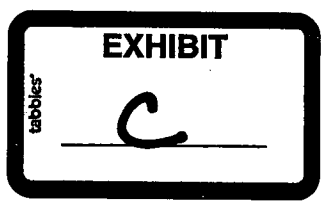
_____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Case No.: 2016-CP-40-0067
Earl Kinley,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**PLAINTIFFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
	)	
Waste Management of South Carolina, Inc. and Chambers Richland County Landfill, Inc.,	)	
	)	
Defendants.	)	

Plaintiff Earl Kinley ("Kinley") submits this memorandum in opposition to Defendants' motion for summary judgment. For the reasons set forth herein, Defendants' motion should be denied.

FACTUAL & PROCEDURAL BACKGROUND

Plaintiff was injured on May 29, 2012 as he was operating a garbage truck at a landfill owned and operated by Defendants. After dropping off his load, Plaintiff was driving down the landfill toward the exit when his truck suddenly hit a hole or washout in the road, causing Plaintiff to be thrown about the cab of the truck and hit his head on the roof. Plaintiff instituted this civil action as a result of his injuries sustained in the accident. Defendants denied liability and moved for summary judgment on the grounds that (1) Defendants owed no duty to Plaintiff, (2) there was no breach of duty, (3) proximate causation is lacking, and (4) Plaintiff assumed the risk of injury by entering Defendants' premises. The Court should deny Defendants' motion because discovery is incomplete, genuine issues of material fact exist, and Defendants' arguments are without merit.



LEGAL STANDARD

I. Summary Judgement

Summary judgment may be granted "if 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. In determining whether any triable issues of fact exist, the trial 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." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). In typical negligence cases, "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 Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"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. American Telephone & Telegraph Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (internal quotations omitted). "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." *Id.* *See also Lord v. D & J Enters.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) (same). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Lanham v. Blue Cross & Blue Shield of S.C.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002).

II. Premises Liability

To establish negligence in a premises liability action, the plaintiff must prove the following three elements: (1) a duty of care owed by the defendant to the plaintiff; (2) the defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *Hurst v. East Coast Hockey League, Inc.*, 271 S.C. 33, 37, 637 S.E.2d 560, 562 (2006). The nature and scope of duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury. *Sims v. Giles*, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001).

Here, Plaintiff was a business invitee on the Defendants' property, to which the Defendants owed the highest duty of care for someone on their premises.[1] Thus, Defendants owed Plaintiff "the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from the breach of such duty." *Larimore v. Carolina Power & Light*, 340 S.C. 438, 444, 531 S.E.2d 535, 538 (Ct. App. 2000). Plaintiff, like any business invitee, entered the premises "with the implied assurance of preparation and reasonable care for his protection and safety while he is there." *Landry v. Hilton Head Plantation Prop. Owners Ass'n*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994). The Defendants owed Plaintiff "the duty of due care to discover risks and take safety precautions to warn of or eliminate foreseeable unreasonable risks." *Id.*

Upon adoption of the *Restatement (Second) of Torts* § 343A (1965), South Carolina law made clear that a property owner is not liable to invitees for harm caused if the condition of the land constitutes an open and obvious danger, unless it is foreseeable that the invitee will

---

[1] A business visitor is "an invitee whose purpose for entering the property is either directly or indirectly connected with the purpose for which the property owner uses the land." *Singleton v. Sherer*, 377 S.C. 185, 199, 659 S.E.2d 196, 203 (Ct. App. 2008).

encounter the harm despite its obviousness. In determining such foreseeability, "the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated." *Rest. (2d) Torts* §343A(2). Thus, the property owner still has a duty to warn of or repair harmful conditions under such circumstances.

ARGUMENT

I. Discovery is incomplete.

Defendants' motion for summary judgment should be denied for a number of reasons. First, discovery in this case is not complete, which alone justifies the denial of Defendants' motion. However, the discovery completed to date reveals that Plaintiff alleges and testified in his deposition that he was injured as a result of a defective condition of Defendants' property. Defendants have not offered any record evidence refuting Plaintiff's allegations and testimony. Although the entire record in this case will not be limited to Plaintiff's testimony, it alone is sufficient to create a genuine issue of fact. However, upon completion of discovery, the record will consist of more than just Plaintiff's deposition testimony. For instance, as noted below, Plaintiff just recently obtained records in response to a Freedom of Information Act request that arguably provide circumstantial evidence of Defendants' negligence. Additional discovery is needed to fully explore the factual issues revealed by the recently obtained records. Therefore, from a factual and procedural standpoint, summary judgment is inappropriate.

II. Defendants owed a duty of care to Plaintiff.

Summary judgment is also inappropriate from a legal standpoint. Plaintiff was unquestionably a business visitor or invitee on the Defendants' property at the time of his injury. As such, the Defendants owed Plaintiff the duty to use reasonable care to ensure his safety. Part

of this duty included preparing the premises for use, discovering risks of harm, and utilizing either safety precautions or warnings of dangers conditions. These duties are owed as a matter of law. To the extent Defendants' motion of summary judgment is premised upon an alleged absence of duty, the motion should be denied.

III. Defendants breached their duty of care.

Plaintiff was injured due to a dangerous condition of the roadway on Defendants' property that was unknown to Plaintiff. Defendants expected Plaintiff to travel the premises to dump his load at the landfill, and knew the route Plaintiff would take to accomplish his task. Plaintiff had the implied assurance that the property was safe for him to complete his business. It was unquestionably foreseeable to Defendants that Plaintiff would traverse the road in question and encounter the defective roadway condition. Thus, even if the condition is deemed to have been open and obvious, which Plaintiff denies, Defendants had the duty to warn of the dangerous condition. Either way, it was foreseeable that injury would occur if the landfill roadway was unfit for garbage trucks to traverse in the ordinary course of business.

It is apparent that Defendants breached their duty of care by either ignoring or not discovering the dangerous condition of the roadway, implementing precautions, or issuing warnings to visitors. Given the specific nature and use of the roadway in question, by garbage trucks to unload at the landfill, Defendants either knew or should have known about the defective condition of the roadway that caused Plaintiff's injuries. The Plaintiff is informed and believes that the Defendants had issues with washouts in the past and as such had notice of defective conditions and failed to warn and/or repair the hazardous conditions. This may be established by circumstantial evidence showing that, through the exercise of reasonable diligence, the defendant

should have known about the dangerous condition. *See, e.g., 5 Star v. Ford Motor Co.*, 408 S.C. 362, 759 S.E.2d 139 (2014).

There is circumstantial evidence of Defendants' negligence in this case. Less than two weeks prior to Plaintiff's injury, DHEC inspected Defendants' property and noted: "They had some heavy rain and are in the process of cleaning out ditches and repairing slopes. They have also moved some trucks across the road and are working on the fluff layer in the new cell." *See* Exhibit A, hereto. Shortly before that, DHEC noted: "The north slope facing the shop has a lot of erosion. They have repaired the slope next to it and matted. The eroded area on the north slope should be repaired and matted by early next month." *See* Exhibit B, hereto. There are additional DHEC inspection records noting other conditions that may be relevant to the claims asserted by Plaintiff. *See* Exhibit C, hereto. Plaintiff just recently received these documents and has not had sufficient opportunity to explore the landfill conditions that were noted to be present prior to Plaintiff's accident or discover if they were addressed or repaired by Defendants. However, on their face, these documents appear to constitute circumstantial evidence that Defendants breached their duty of care by failing to make the premises safe or warn Plaintiff of the potentially hazardous condition. Because Plaintiff's injuries were proximately caused by the condition of the roadway and the Defendants' failure to discover, repair, or warn of it, summary judgment is inappropriate.

IV. Plaintiff did not assume the risk of injury.

Assumption of the risk is the deliberate and voluntary choice to assume a known risk. *Singleton*, 377 S.C. at 205, 659 S.E.2d at 206. Assumption of risk has been subsumed by the doctrine of comparative negligence. "Consequently, assumption of risk no longer serves as a complete bar to a negligence claim; rather, the defense was simply another factor to consider in

comparing the parties' negligence." *Id.* Thus, "a plaintiff is not barred from recovery by the doctrine of assumption of risk unless the degree of fault arising therefrom is greater than the negligence of the defendant." *Id.* In order to grant Defendants' motion for summary judgment on this basis, the Court must find, as a matter of law, that any negligence of Plaintiff was greater than any negligence attributable to Defendants and the more determinative factor in causing his injuries. *Id.* The record does not support such a finding.

Moreover, "there are four requirements necessary to establish the assumption of risk defense in South Carolina: (1) the plaintiff must have knowledge of the fact constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself or herself to the danger." *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 78-79, 508 S.E.2d 565, 569 (1998). These elements are not satisfied in this case; therefore, summary judgment on this basis would be improper. There is no record evidence that Plaintiff had knowledge of the dangerous roadway condition that caused his injury. To the contrary, he stated he did not see the hole or washout. Thus, he could not have appreciated the nature and extent of danger created by the defect in the roadway. Accordingly, the Court should deny Defendants' motion for summary judgment on the basis that he somehow assumed the risk of injury.

CONCLUSION

For the reasons set forth herein, the Court should deny Defendants' motion for summary judgment.

August 29, 2016

LANIER & BURROUGHS, LLC

By: _____

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AND

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WILLIAM B. COX, JR.
VINCENT A. SHEHEEN *
STEPHEN R. SMOAK
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December 14, 2016

VIA EMAIL ONLY

The Honorable Deandre Benjimin
Chief Administrative Judge

RE: Earl Kinley vs. Loveless and Loveless, Inc.; Waste Management of South Carolina, Inc.; and Chambers Richland County Landfill, Inc.

Dear Judge Benjamin,

I understand that a motion for summary judgment in this case has been rescheduled for this Friday at 9:30am. Unfortunately, I am out of town starting Thursday on a long planned trip. I would therefore respectfully request a continuance until the January term.

I also understand that there is a chance that this case may be up for trial in January and so there is concern about the motion being timely heard. As normal course, I will be requesting legislative protection from any lengthy trial during the early months of the session due to the time requirements. Also, as normal course I am more than happy to appear at scheduled motions hearings to move things along during session. Please have your office advise me if you need me to send anything else regarding there requests.

I very much appreciate your consideration in these matters.

Very truly,

Vincent A. Sheheen

cc: The Honorable Jean H. Toal
William Sweeney IV
Shane Burroughs
Duke Highfiled
David Mashall
Sally Brennan
Jeffrey Wiseman
Ann Henley

EXHIBIT
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D

2010-04-21-01 (Amended by Order 2013-06-21-01)

The Supreme Court of South Carolina

Re: Lawyer-Legislator Protection During the Legislative Session

ADMINISTRATIVE ORDER

This order supersedes the April 5, 2004 order issued by the Chief Justice concerning lawyers who serve as members of the General Assembly and who at times are unable to appear in any court, deposition and administrative hearing during the legislative session.

I find that lawyers who serve as members of the General Assembly provide a great service to the citizens of this State and, at times, are unable to appear in the courts of this State for trials, hearings, or depositions and in administrative tribunals for hearings during the legislative session. Lawyer-legislators may have a need to be protected on all days during the legislative session because of the need to attend to matters such as preparing briefs, meeting with clients, and the continuing requirements to attend to the constituents they represent. I further find that such protection of the lawyer-legislators will benefit their clients. Now, therefore,

IT IS ORDERED that lawyers who are members of the General Assembly are granted absolute protection from being called to a trial, deposition or hearing in any court of competent jurisdiction of this State or any administrative tribunal of this State from the first Tuesday in January until the third Thursday in June or until two weeks after the General Assembly stops meeting in regular session, whichever is later. Further, lawyer-legislators are similarly protected during any special or called session after the regular session. Hearings, trials or depositions may be scheduled during these time periods only if the lawyer-legislator consents to the hearing, deposition or trial being set and is given proper notice.

This order takes effect immediately and remains in effect unless amended or rescinded by the Chief Justice.

s/Jean Hoefer Toal
Jean H. Toal
Chief Justice of South Carolina

April 21, 2010
Columbia, South Carolina

YCRLAW

Jeffrey J. Wiseman

Direct Dial: (843) 720-5488
Direct Fax: (843) 579-1393
E-mail: jwiseman@ycrlaw.com

December 14, 2016

Via Email Only
The Honorable DeAndrea G. Benjamin
Chief Administrative Judge
P.O. Box 192
Columbia, SC 29202

Re: Earl Kinley v. Loveless and Loveless, Inc., et al.
Case No.: 2016-CP-04-0067
YCR File: 5251-20150606

Dear Judge Benjamin:

We were copied on a request for a continuance from Vincent Sheheen regarding a Motion for Summary Judgment that is scheduled for hearing this Friday, December 16, 2016, at 9:30 a.m. Please accept this letter as our objection to this requested continuance.

First, we object on the grounds that this motion has been pending since June of 2016. The hearing on this motion has been scheduled and continued three prior times. The first time was for an August 25, 2016 hearing that was continued at the request of the Plaintiff. The second time was for an October 12, 2016 hearing that was continued at the request of the Plaintiff. The third time was for a December 15, 2016, hearing and, again, the Plaintiff requested that the hearing be rescheduled due to a Christmas party. The hearing is now scheduled for December 16, 2016 and this new request by Mr. Sheheen will make the fourth time he has requested a continuance of the hearing on this motion.

Further, we would like to point out that Mr. Sheheen's law firm is one of two law firms representing the Plaintiff in this matter. Also, we have had no involvement with Mr. Sheheen's office in the normal course of litigating this case. For instance, the Plaintiff was deposed with counsel from the other law firm, Lanier & Burroughs, LLC, in attendance and defending that deposition. As such, we respectfully fail to see why Mr. Sheheen's attendance at the hearing is dispositive as to whether this hearing can go forward given that counsel from Lanier & Burroughs, LLC has not voiced an inability to attend this hearing and has further attended and otherwise litigated this matter up to this point.

Given all of the reasons set forth above, we respectfully object to the request for continuance and request that this motion hearing move forward on Friday as scheduled.

Thank you for your attention to this matter. With kindest regards, I am

Respectfully,

YOUNG CLEMENT RIVERS, LLP

Jeffrey J. Wiseman

JJW/tlb
cc (via email only): Chief Justice Jean Hoefer Toal
Shane M. Burroughs, Esquire
Vincent A. Sheheen, Esquire

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December 14, 2016

VIA ELECTRONIC MAIL ONLY

The Honorable Deandre Benjamin
Chief Administrative Judge
P.O. Box 192
Columbia, SC 29202

Re: *Earl Kinley v. Waste Management of South Carolina, Inc., et al*
Civil Action No.: 2016-CP-40-0067

Dear Judge Benjamin:

Along with Vincent Sheheen, Shane Burroughs and I represent the Plaintiff in this matter. I write to offer some background to the current situation and the Plaintiff's request for continuance of motion hearing.

The Defendant's motion for summary judgment was scheduled for hearing yesterday, December 13, 2016 at 3:30 pm. The day before, the court asked to move the hearing to 2:00 pm to accommodate the schedule of Chief Justice Toal, and the parties agreed. As counsel for Plaintiff was in route to the 2:00 pm hearing, the court emailed the parties notifying that the hearing would have to be rescheduled to another date. The proposed time was Thursday at 3:30 pm. Counsel for Plaintiff notified the court that they had conflicts for such time and requested that the motion be placed on the next motions roster the week of January 4, 2017.

This morning, the court suggested January 5 or 6 for this motion to be rescheduled, and counsel for Defendant indicated that January 6 "works for them" but that they are still amenable to having the motion heard this week. Later this morning, the parties received email notice of a motion hearing for this Friday at 9:30 am. Thereafter, my co-counsel Vincent Sheheen notified you as the chief administrative judge, according to the terms of the notice issued by the court, and requested a continuance since he will be out of town for a long-planned trip and intended to attend this motion hearing. In response, the Defendant notified the court of its objection to Plaintiff's request for continuance, despite already advising the court that January 6 would work for a motion hearing and not identifying any prejudice that would be caused by the continuance.

In the objection, Defendant's description of the history of the motion and prior continuances does not provide adequate context. For instance, Vincent Sheheen and I were both present at the original motion hearing August 25, 2016 ready to argue the

motion, but preferred a continuance since discovery was not complete. The Defendant did not object, and the motion was continued.

The motion was next scheduled for October 12, 2016, and the parties submitted a consent request for continuance due to the aftermath of Hurricane Matthew (defense counsel's office is located in Charleston and my office was without power at the time). The court granted the continuance.

I believe this context is important in considering the current request for continence of a motion hearing that was set less than 48 hours prior to the time the hearing is set to occur.

Additionally, I should note that the Plaintiff's position remains that having the motion continued would benefit judicial economy, as additional discovery remains outstanding. On October 5, 2016, I requested dates to obtain additional discovery from the Defendant. No dates were provided. The discovery requested included an inspection of the landfill and corporate deposition of the Defendant. Another request for such discovery was made by Plaintiff on December 6, 2016. In response, Defendant has indicated the landfill inspection can likely be completed prior to December 30, or perhaps on January 3. We are checking availability and intend to respond to Defendant so we can work out a date for the inspection to occur. We are also preparing a Rule 30(b)(6) deposition notice of the Defendant and intend to serve it upon defense counsel tomorrow. Thus, given this outstanding discovery, it remains our position that it would be most efficient for the motion for summary judgment to be continued until after the completion of this discovery.

I apologize for the length of this letter, but wanted to provide as much context as possible for the instant issue before the court. Thank you for your consideration and assistance.

With kind regards, I am

Very truly yours,

LANIER & BURROUGHS, LLC

David C. Marshall

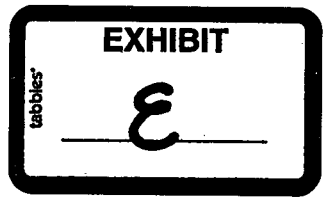
DCM/

cc: Chief Justice Jean Hoefer Toal
Jeffrey J. Wiseman
Vincent A. Sheheen
(All via email only)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2016-CP-40-0067
EARL KINLEY ,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION FOR SUMMARY JUDGMENT
	)	
WASTE MANAGEMENT OF SOUTH CAROLINA, INC.; AND CHAMBERS RICHLAND COUNTY LANDFILL, INC.,	)	
	)	
	)	
DEFENDANTS.	)	
	)	

NOW COMES the Defendants Waste Management of South Carolina, Inc. and Chambers Richland Count Landfill, Inc.(referenced herein as "Defendants"), by and through their undersigned attorneys, and hereby moves this Honorable Court pursuant to *Rule 59* of the *South Carolina Rules of Civil Procedure* and other relevant law for a motion reconsidering the Order Denying Defendants' Motion for Summary Judgment (referenced herein as the "Order"), a copy of which was provided to the Defendants via electronic mail on January 30, 2017 and a copy of which is attached hereto as **Exhibit A**.

This motion is taken in accordance with the *Rules* and is based upon the grounds that the pleadings and depositions previously taken, along with all written discovery and any affidavits that may be served upon counsel prior to the hearing, were insufficient to create a genuine issue of material fact as to the absence of any breach of duty by Defendants and the lack of evidence establishing the proximate cause of any actionable conduct on the part of Defendants with respect to Plaintiff's alleged damages. Defendants further respectfully assert that the language of the Order improperly expands its findings and rulings into issues that are (1) without proper



foundation; (2) more proper for the jury; (3) would likely require expert evidence and (4) were never made a part of the summary judgment motion and therefore were never placed before this Court. The Order as it is currently written makes findings of fact and law and involves the merits of the case and is likely immediately appealable.

This Motion is based on the following:

1. The motion for summary judgment, as set forth in Defendants' memorandum of law on the issue, argued only that a motion for summary judgment was appropriate because the Plaintiffs failed to provide any evidence of a potential defect and therefore could not prove that any potential defect proximately caused the Plaintiff's injury. Other findings of fact and law in the Order were not argued nor, as we understood it, ruled by this Honorable Court at the hearing;
2. The Plaintiff provided a memorandum of law with attached documents from alleged DHEC inspections.[1] These DHEC documents were argued and ruled at the hearing that they could be viewed as a "scintilla of evidence" of a defect that the defendants either created or of which had some notice. Defendants respectfully assert that the Order goes beyond these issues in that the Order finds that "as a matter of law and fact that the Defendant owed a duty of care to the Plaintiffs while he was on their premises." We respectfully assert that this issue was not argued before the Court.
3. Further, the Order contains language that states "The Court finds that there is sufficient evidence in the record supporting Plaintiff's claim that he was injured on the Defendants' property/landfill." The Order then contains language which deems

[1] The Plaintiffs' memorandum of law and the referenced DHEC documents were never provided to the Defendants either before or even during the hearing. Defendants only obtained these documents after the hearing after specifically requesting the same.

the Plaintiff a "business invitee" and makes a legal ruling as to the duty owed to this Plaintiff. We respectfully assert that this language goes beyond what was argued as a part of the summary judgment motion and further delves into factual issues that are within the purview of the jury. Specifically, the Defendants' memorandum of law and arguments at the hearing pointed out that the Plaintiff could not provide any detail as to the alleged defect that caused him to become injured as alleged while operating his truck. Specifically, the arguments focused on the admitted testimony from the Plaintiff that he never saw any hole and could not provide any details of said hole – only that he "bounced around" in his truck at some point while driving down the embankment on the Defendants' property. Whether the Plaintiff was injured while on the Defendants' property is a factual issue for the jury upon which the Plaintiff will bear the burden of proof at trial. As such, the Order is improper to the extent it makes this factual finding.

4. Further, the following language also improperly makes factual findings and is also outside the issues before the court:

> *The Court finds that there is sufficient evidence in the record supporting Plaintiff's claim that the Defendants' breached their duty of care to Plaintiff, and that such breach proximately caused Plaintiff's injuries. The Court finds that the Defendants had the knowledge and expectation that garbage truck drivers like Plaintiff would travel the premises to dump loads at the landfill, and knew the routes that would be taken to accomplish this task.*

This Honorable Court ruled from the bench that the DHEC documents "could be" evidence of a "breach" and that this satisfied the "scintilla of evidence" standard in order to defeat a summary judgment motion. The Order goes beyond this ruling and makes a factual ruling of "sufficient evidence ... to support Plaintiff's claim" of breach. This also

inserts language regarding Defendants' alleged "knowledge and expectation" that was never argued nor was it ever placed before the Court in any way. The Plaintiffs have not deposed any defendants or any DHEC personnel nor have they presented any evidence in any way that connects anything in the newly produced DHEC documents to these injuries or this alleged defect. Such evidence would likely require expert testimony to connect anything in these DHEC documents to any alleged defect and Plaintiffs have not provided any such expert testimony. Defendants further assert that any such connection or finding would also be within the purview of the jury and is improper as a factual finding in this Order.

5. Defendants also assert that the following language in the Order is improper for a summary judgment denial order:

> *The Court finds that Plaintiff's claim that Defendants breached their duty of care is supported by evidence of defects, washouts, and/or erosion in the roads, slopes, and other areas of the landfill as documented by the DHEC inspection reports submitted by Plaintiff. It is evident to the Court that there was a pattern known to the Defendants prior to Plaintiff's injury that such erosion or washouts routinely followed periods of heavy rain. It was therefore foreseeable to Defendants that such conditions were likely to develop following rain events.*

Defendants respectfully assert that this language goes beyond what was before the Court and further improperly makes rulings that are within the realm of the jury. This language is not consistent with the court's finding of a "scintilla" of evidence and seeks to elevate that ruling into a factual finding that a "breach[] ... is supported by evidence of defects ...." This Order even blends what would likely need to be expert opinion testimony into a factual finding of this court.

6. The Order makes improper assumptions and factual connections between the newly produced DHEC documents and the alleged injuries without any foundation or evidence. As such, the DHEC documents should not have been considered as sufficient evidence to defeat the summary judgment motion in this matter. Specifically, Plaintiff made no showing that anything referenced in the DHEC documents could have caused any of the defects that the Plaintiff alleges to have existed.

7. The Motion for Summary Judgment should have been granted as the Plaintiff failed to provide a scintilla of evidence that he was proximately injured by a defective condition on the Defendants' property that the Defendants either created or of which had legal notice.

The Defendants will supplement this motion with a supporting memorandum of law and relevant exhibits.

WHEREFORE, the Defendants respectfully PRAY that this Honorable Court:

a. Reconsider the Order as set forth in this motion and alter the rulings accordingly and as justice and the law requires;

b. Grant summary judgment in the favor of the Defendants and dismiss the claims of the Plaintiff; and

c. Grant such other relief as this Honorable Court shall see fit and just;

<SIGNATURES NEXT PAGE>

YOUNG CLEMENT RIVERS, LLP

By: _____

Duke R. Highfield
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bsweeny@ycrlaw.com
Attorneys for the Defendants
Waste Management of South Carolina, Inc.
and Richland County Landfill, Inc.

Charleston, South Carolina

2/6, 2017

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was electronically mailed and sent via U.S. Mail to all counsel of record in this proceeding this 6th day of February, 2017.

_____

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4000067

Earl Kinley
PLAINTIFF(S)

Waste Management of South Carolina Inc
Loveless and Loveless Inc
DEFENDANT(S)

Submitted by: Esco

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

RICHLAND COUNTY FILED JAN 23 2017 PM 12:58

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: Defendant Waste Management of South Carolina's Motion for Summary Judgment is denied. See attached order

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
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.

Circuit Court Judge _____ Judge Code 2758 Date 1-12-17

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 24 day of Jan, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Shane Morris Burroughs
Vincent Austin Sheheen
Duke Raleigh Highfield
R. Scott Wallinger Jr.
Christopher Michael Huber
William O. Sweeny III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

DEFENDANT'S EXHIBIT A

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Case No.: 2016-CP-40-0067
Earl Kinley,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
	)	
Waste Management of South Carolina, Inc. and Chambers Richland County Landfill, Inc.,	)	
	)	
Defendants.	)	

This matter came before the Court upon the Defendants' motion for summary judgment. The Court heard oral argument from counsel on December 16, 2016 and has reviewed the submissions from all parties. For the reasons set forth herein, the Court denies Defendants' motion for summary judgment.

#1 JBT

FACTUAL BACKGROUND

Plaintiff alleges he was injured on May 29, 2012 as he was operating a garbage truck at a landfill owned and operated by Defendants. Plaintiff alleges he was driving down the landfill sloped road toward the exit when his truck suddenly hit a hole or washout, causing him to be thrown about the cab of the truck and hit his head on the roof. Plaintiff filed this civil action against the Defendants alleging premises liability and other claims of negligence.

Defendants have denied liability and moved for summary judgment on the grounds that (1) Defendants owed no duty of care to Plaintiff, (2) there was no breach of duty, (3) proximate causation is lacking, and (4) Plaintiff assumed the risk of injury by entering Defendants' premises. Plaintiff opposes Defendants' motion for summary judgment. For the reasons set

forth herein, the Court denies Defendants' motion for summary judgment on all arguments set forth by Defendants.

LEGAL STANDARD

I. Summary Judgement

Summary judgment may be granted "if 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. In determining whether any triable issues of fact exist, the trial 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." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). In typical negligence cases, "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 Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

II. Premises Liability

To establish negligence in a premises liability action, the plaintiff must prove the following three elements: (1) a duty of care owed by the defendant to the plaintiff; (2) the defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *Hurst v. East Coast Hockey League, Inc.*, 271 S.C. 33, 37, 637 S.E.2d 560, 562 (2006). The nature and scope of duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury. *Sims v. Giles*, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001).

DISCUSSION

Based upon the record before the Court, and in accordance with the terms of Rule 56, SCRCP, the Court makes the following findings of law and/or fact:

1. The Court finds as a matter of law and fact that the Defendants owed a duty of care to Plaintiff while he was on their premises. The Court finds that Plaintiff was a business invitee on the Defendants' property/landfill. A business invitee is a person "whose purpose for entering the property is either directly or indirectly connected with the purpose for which the property owner uses the land." *Singleton v. Sherer*, 377 S.C. 185, 199, 659 S.E.2d 196, 203 (Ct. App. 2008). Property owners owe the highest duty of care to business invitees or visitors on their property. Specifically, the Defendants owed Plaintiff in this case "the duty of exercising reasonable or ordinary care for his safety and [are] liable for injuries resulting from the breach of such duty." *Larimore v. Carolina Power & Light*, 340 S.C. 438, 444, 531 S.E.2d 535, 538 (Ct. App. 2000). Plaintiff, like any business invitee, entered the premises "with the implied assurance of preparation and reasonable care for his protection and safety while he is there." *Landry v. Hilton Head Plantation Prop. Owners Ass'n*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994). The Defendants owed Plaintiff "the duty of due care to discover risks and take safety precautions to warn of or eliminate foreseeable unreasonable risks." *Id.* In this case, this duty exists as a matter of law and fact.

2. The Court finds that there is sufficient evidence in the record supporting Plaintiff's claim that he was injured on the Defendants' property/landfill. Plaintiff alleges in his Amended Complaint, and testified in his deposition, that he was injured as a result of a defective condition of the Defendants' property. *See* Amended Complaint at ¶ 4; Deposition at 68, 76-79.

No evidence was submitted by the Defendants refuting Plaintiff's allegations and testimony. Thus, there is sufficient factual evidence in the record supporting Plaintiff's claim of injury.

3. The Court finds that there is sufficient evidence in the record supporting Plaintiff's claim that the Defendants' breached their duty of care to Plaintiff, and that such breach proximately caused Plaintiff's injuries. The Court finds that the Defendants had the knowledge and expectation that garbage truck drivers like Plaintiff would travel the premises to dump loads at the landfill, and knew the routes that would be taken to accomplish this task. Thus, it was foreseeable to Defendants that Plaintiff herein would travel the road in which he alleges he was injured. As a business invitee, Plaintiff had the implied assurance that the property was safe for him to complete his business. The Court finds it was reasonably foreseeable to Defendants that if the roadway traveled by Plaintiff was defective or unfit for garbage trucks to traverse in the ordinary course of business, that such condition could result in injury to garbage truck drivers or other persons on the property, such as Plaintiff.

#4

4. The Court finds that Plaintiff's claim that Defendants breached their duty of care is supported by evidence of defects, washouts, and/or erosion in the roads, slopes, and other areas of the landfill as documented by the DHEC inspection reports submitted by Plaintiff. It is evident to the Court that there was a pattern known to the Defendants prior to Plaintiff's injury that such erosion or washouts routinely followed periods of heavy rain. It was therefore foreseeable to Defendants that such conditions were likely to develop following rain events. In making this finding, the Court relies on the inspection reports that pre-date Plaintiff's injury. Based on this evidence, the Defendants knew or should have known that erosion and washouts were likely to occur after rain events, and that such conditions could cause injury to persons on the property. With this knowledge, the Defendants had a duty to act reasonably, and there is

sufficient evidence in the record supporting Plaintiff's claim that Defendants breached their duty by either ignoring or not discovering the dangerous condition of the roadway, implementing precautions, or issuing warnings to visitors. This may be established by circumstantial evidence.

5. The Court finds that triable issues of fact exist as to the issues of breach of duty and proximate causation, and that Plaintiff has met his burden of presenting "a scintilla of evidence" in order to withstand Defendants' motion for summary judgment.

6. The Court finds that Defendants' argument concerning assumption of risk is subsumed by the general framework of negligence and comparative negligence. *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008). To the extent Defendants seek summary judgment on this basis, the Court finds that the elements of assumption of risk are lacking, and that Plaintiff did not assume any risk of injury by simply operating his garbage truck on the premises.

#9

CONCLUSION

For the reasons set forth herein, the Court denies the Defendants' motion for summary judgment.

IT IS SO ORDERED.

January 12, 2017
Columbia, SC

The Honorable Jean Hoefer Toal
Presiding Judge, Fifth Judicial Circuit

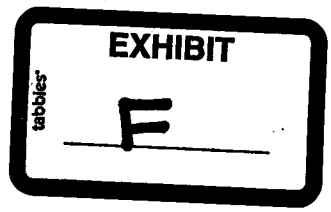
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2016-CP-40-0067
EARL KINLEY,	)	
PLAINTIFF,	)	
vs.	)	**DEFENDANTS WASTE MANAGEMENT OF SOUTH CAROLINA, INC. AND RICHLAND COUNTY LANDFILL, INC.'S ANSWER TO SECOND AMENDED COMPLAINT** (JURY TRIAL REQUESTED)
WASTE MANAGEMENT OF SOUTH CAROLINA, INC.; AND CHAMBERS RICHLAND COUNTY LANDFILL, INC.,	)	
DEFENDANTS.	)	

The Defendants Waste Management of South Carolina, Inc. and Richland County Landfill, Inc. (incorrectly identified as "Chambers Richland County Landfill, Inc.") hereby answer the Plaintiff's Second Amended Complaint as follows:

1. Each and every allegation of the Plaintiff's Second Amended Complaint not hereinafter expressly admitted, qualified and/or explained is denied.

2. The Defendants admit, on information and belief, the allegations contained in Paragraph 1 of the Plaintiff's Second Amended Complaint.

3. In response to Paragraph 2 of the Plaintiff's Second Amended Complaint, the Defendants admit only that Waste Management of South Carolina, Inc. is a South Carolina corporation that does business in South Carolina. By way of further response, to the extent that Paragraph 2 of the Plaintiff's Second Amended Complaint attempts to allege or does allege any cause of action, claim, act, error or omission as to the Defendants, those allegations are denied, and strict proof thereof is demanded.



4. In response to Paragraph 3 of the Plaintiff's Second Amended Complaint, the Defendants admit only that Richland County Landfill, Inc. owns and operates a landfill in Richland County. By way of further response, to the extent that Paragraph 3 of the Plaintiff's Second Amended Complaint attempts to allege or does allege any cause of action, claim, act, error or omission as to the Defendants, those allegations are denied, and strict proof thereof is demanded.

5. The Defendants deny the allegations contained in Paragraphs 4 and 5 of the Plaintiff's Second Amended Complaint, and strict proof thereof is demanded.

6. In response to Paragraph 6 of the Plaintiff's Second Amended Complaint, the Defendants reiterate each and every prior paragraph of this Answer as fully and completely as if set forth herein verbatim.

7. The Defendants deny the allegations contained in Paragraphs 7 and 8 of the Plaintiff's Second Amended Complaint, and strict proof thereof is demanded.

8. The Defendants also deny the allegations contained in the "Wherefore" Paragraph of the Plaintiff's Second Amended Complaint, which is the remainder of the Plaintiff's Second Amended Complaint, and strict proof thereof is demanded.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE:
(Comparative Negligence)

9. The Defendants, on information and belief, would allege and show that any injuries and damages sustained by the Plaintiff as alleged in the Second Amended Complaint, which are denied, were due to and were caused and occasioned by the Plaintiff's own acts of comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness, which acts on the part of the Plaintiff combined and contributed and concurred with any

negligence, carelessness, recklessness, heedlessness, willfulness and wantonness on the part of the Defendants, which is denied, without which the alleged incident and resulting alleged damages would not have occurred or have been sustained, and the Defendants do plead such comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness on the part of the Plaintiff as the direct and proximate cause of the injuries and damages sustained by the Plaintiff as alleged in the Second Amended Complaint. Accordingly, the Defendants are entitled to a determination as to the percentage with which the Plaintiff's own comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness contributed to this incident and the Plaintiff's alleged injuries and damages and to the reduction of any sum awarded to the Plaintiff by an amount equal to the percentage of the Plaintiff's own comparative negligent, careless, reckless, heedless, willful and wanton conduct.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Unconstitutionality of Punitive Damages)

10. The Plaintiff's claim for punitive damages violates the Fifth, Sixth, Seventh, and Fourteenth Amendments of the Constitution of the United States in the following particulars:

a. The Plaintiff's claim for punitive damages violates the Fifth Amendment for the following reasons:

i) The double-jeopardy clause is violated because multiple awards of punitive damages can be imposed upon the Defendants for the same act or omission, and because an award of punitive damages can be imposed upon the Defendants, even though the Defendants were convicted or acquitted of a factually related defense in an underlying criminal proceeding; and

ii) The self-incrimination clause is violated because Defendants can be compelled to give testimony against themselves;

b. The Plaintiff's claim for punitive damages violates the Sixth and Fourteenth Amendments because such damages may be imposed according to the lesser standard of proof applicable in civil cases, whereas

punitive damages are a fine or penalty and are quasi-criminal in nature and, as such require the "beyond the reasonable doubt" standard of proof;

c. The Plaintiff's claim for punitive damages violates the Defendants' right to access to the courts guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of unlimited punitive damages chills the Defendants' exercise of that right;

d. The Plaintiff's claim for punitive damages violates the due process and equal protection clauses of the Fourteenth Amendment for the following reasons:

i) The standard or test for determining the requisite mental state of Defendants for imposition of punitive damages is void for vagueness;

ii) Insofar as punitive damages are not measured against actual injury to the Plaintiffs and are left up to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damages that may be awarded is indeterminate at the time of Defendants' alleged egregious conduct;

iii) In cases involving more than one defendant, the evidence of the net worth of each is admissible, and the jury is permitted to award punitive damages in differing amounts based upon the affluence of a given defendant;

iv) The tests or standards for the imposition of punitive damages differ from state to state, such that a specific act or omission of a given defendant may or may not result in the imposition of punitive damages, or may result in differing amounts of punitive damages, depending upon the state in which the suit is filed, such that the defendant is denied equal protection of law; and

v) Punitive damages may be imposed without a requisite showing of hatred, spite, ill will or wrongful motive.

FURTHER ANSWERING AND FOR A FURTHER AND AFFIRMATIVE DEFENSE
(Improper Claim for Punitive Damages)

11. Punitive damages are inappropriate in this case since the Defendants did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages would be based.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(S.C. Code Ann. 15-32-510 et. seq.)

12. The Defendants do plead the limitations on damage awards found in S.C. Code Ann. 15-32-510 et. seq., and request bifurcation in accordance with these code sections.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(No Duty to Warn of the Unknowable)

13. The Defendants had no duty to warn about possible dangers or hazards, if any, which were not known or which were not capable of being known.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Open and Obvious)

14. The Defendants would allege and show that the Plaintiff was, at all times, fully aware of the alleged dangers as set forth in the Second Amended Complaint, and that the Plaintiff was negligent and careless in failing to take necessary precautions and that the Plaintiff assumed any alleged risk incident to the allegations set forth in the Second Amended Complaint, and that this negligent, careless, reckless, heedless, willful and wanton assumption of the risk was the proximate cause of the Plaintiff's alleged injuries and damages as set forth in the Second Amended Complaint; therefore, the Plaintiff is herein barred from recovery.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Failure to State a Claim)

15. The Plaintiff's Second Amended Complaint fails to state any claims upon which relief can be granted as to the Defendants, and the Plaintiff's Amended Complaint should, therefore, be dismissed pursuant to Rule 12(b)(6), *SCRCP*.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Intervening and Superseding Negligence)

16. The Defendants would allege and show that any injuries and damages sustained by the Plaintiff as alleged in the Second Amended Complaint, which are denied, were due to and were caused and occasioned by the intervening and superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness of some other party or parties over whom the Defendants had no supervision or control, and the Defendants do plead such intervening and superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness as the direct and proximate cause of the injuries and damages sustained by the Plaintiff as alleged in the Second Amended Complaint.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Statute of Limitations)

17. The Second Amended Complaint is, or may be, barred, as to these Defendants, by the applicable statute of limitations.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Laches, Waiver and/or Estoppel)

18. The Second Amended Complaint is barred by the doctrines of laches, waiver and/or estoppel.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Reliance on Other Defenses)

19. The Defendants hereby give notice that they intend to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserve the right to amend their Answer to assert any such defenses.

WHEREFORE, having fully answered the Plaintiff's Second Amended Complaint, the Defendants pray that the same be dismissed, together with the costs and disbursements of this action, and for such other and further relief as this Court deems proper. The Defendants also request a trial by jury.

[SIGNATURE BLOCK ON NEXT PAGE]

YOUNG CLEMENT RIVERS, LLP

By: _____

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bsweeny@ycrlaw.com
Attorneys for the Defendants
Waste Management of South Carolina, Inc.
and Richland County Landfill, Inc.

Charleston, South Carolina

5/3, 2016

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 3 day of May, 2016.

Laura S. Ruddy

David Marshall

From: Wiseman, Jeffrey <JWiseman@ycrlaw.com>
Sent: Friday, June 23, 2017 2:27 PM
To: David Marshall; Bates, Tiffany; Kelley Cline; Elizabeth Boles; Shane Burroughs; afurniss@thesavagefirm.com; vsheheen@thesavagefirm.com
Cc: Brennan, Sally; Highfield, Duke; Hines, Russell; Sweeny IV, William (Billy)
Subject: RE: Earl Kinley v. Waste Management of South Carolina, Inc., et al.

David:

Yes, we are appealing the order as written as it goes beyond summary judgment issues and involves the merits.

Best,

Jeff

From: David Marshall [mailto:David@landblawfirm.com]
Sent: Friday, June 23, 2017 2:25 PM
To: Bates, Tiffany; Kelley Cline; Elizabeth Boles; Shane Burroughs; afurniss@thesavagefirm.com; vsheheen@thesavagefirm.com
Cc: Brennan, Sally; Highfield, Duke; Wiseman, Jeffrey; Hines, Russell; Sweeny IV, William (Billy)
Subject: RE: Earl Kinley v. Waste Management of South Carolina, Inc., et al.

Jeff,

Am I correct that you all are appealing the order denying your motion for summary judgment? It is an interlocutory order and not appealable under S.C. Code § 14-3-330. I just want to make sure I understand this correctly before we move to dismiss the appeal and seek costs and fees for having to do so.

David C. Marshall
Attorney & Certified Mediator
Lanier & Burroughs, LLC
250 Gibson Street
Orangeburg, SC 29115
Phone: (803) 268-9800
Fax: (803) 531-3465
david@landblawfirm.com
www.landblawfirm.com

From: Bates, Tiffany [mailto:tbates@ycrlaw.com]
Sent: Friday, June 23, 2017 1:34 PM
To: David Marshall <David@landblawfirm.com>; Kelley Cline <kelley@landblawfirm.com>; Elizabeth Boles <Elizabeth@landblawfirm.com>; Shane Burroughs <shane@landblawfirm.com>; afurniss@thesavagefirm.com; vsheheen@thesavagefirm.com
Cc: Brennan, Sally <sbrennan@ycrlaw.com>; Highfield, Duke <dhighfield@ycrlaw.com>; Wiseman, Jeffre

EXHIBIT
tabbies
G

<JWiseman@ycrlaw.com>; Hines, Russell <RHines@ycrlaw.com>; Sweeny IV, William (Billy) <bsweeny@ycrlaw.com>; Bates, Tiffany <tbates@ycrlaw.com>
Subject: Earl Kinley v. Waste Management of South Carolina, Inc., et al.

Please see attached letter to the Court of Appeals, Notice of Appeal, and Proof of Service. A copy of these documents is also being sent to you by regular mail. Thanks.

Tiffany L. Bates
Legal Secretary
Young Clement Rivers, LLP
25 Calhoun Street, Suite 400
Charleston, SC 29401
Direct Dial: 843-720-5488
Fax: 843-579-2929
Email: tbates@ycrlaw.com

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Building on a Strong Foundation

communication in error, please notify us immediately by telephone or by email to email@ycrlaw.com or by replying to this message and destroy all copies of this message and all attachments.

Young Clement Rivers, LLP
http://www.ycrlaw.com
Charleston: (843) 577-4000

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"ATTORNEY-CLIENT PRIVILEGED; DO NOT FORWARD WITHOUT PERMISSION." The information contained in this transmission is privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone or by email to email@ycrlaw.com or by replying to this message and destroy all copies of this message and all attachments.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean Hoefer Toal, Circuit Court Judge

Case No: 2016-CP-40-00067

Earl Kinley, ... Respondent,

v.

Waste Management of South Carolina, Inc., and
Chambers Richland County Landfill, Inc., ... Appellants.

PROOF OF SERVICE

The undersigned counsel for Respondent certifies that a copy of Respondent's Motion to Dismiss Appeal and for Expedited Review has been served on counsel for Appellants via United States mail, postage prepaid and addressed as follows:

Stephen L. Brown
Duke R. Highfield
Jeffrey J. Wiseman
Russell G. Hines
William O. Sweeney, IV
YOUNT CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, SC 29401

June 27, 2017

By: _____

David C. Marshall
Shane M. Burroughs
Lanier & Burroughs, LLC
P.O. Drawer 2789
Orangeburg, SC 29116

-and-

Vincent A. Sheheen, Esquire
Savage, Royall & Sheheen, LLP
P.O. Drawer 10
Camden, SC 29021

ATTORNEYS FOR RESPONDENT EARL KINLEY

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LEWIS C. LANIER
SHANE M. BURROUGHS
CHARLES J. MCCUTCHEN
JUSTIN T. BAMBERG
DAVID C. MARSHALL

TELEPHONE:
(803) 268-9800

FAX: (803) 531-3465

June 27, 2017

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

Re: *Earl Kinley v. Waste Management of South Carolina, Inc. at al.*
Civil Action No. 2016-Cp-40-00067

Dear Ms. Kitchings:

On behalf of Respondent Earl Kinley, enclosed please find the original and 7 copies of Respondent's Motion to Dismiss Appeal and for Expedited Review and associated Proof of Service. Also enclosed is my firm check in the amount of $25.00 for the motion filing fee. Please file the enclosed copies and return one file-stamped copy of the motion and proof of service to me in the enclosed return envelope.

By copy of this correspondence to opposing counsel, I am hereby serving them with a copy of the enclosed motion and proof of service.

Thank you for your assistance with this matter, and please feel free to contact me if you have any questions.

With kind regards, I am

Very truly yours,

LANIER & BURROUGHS, LLC

David C. Marshall

DCM/
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