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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

RECEIVED

AUG 03 2012

SC Court of Appeals

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

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

v.

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

RECORD ON APPEAL

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(843) 213-5502
*Attorney for Huggins Beach
Service, Inc. and Craig J.
Risbourg*

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COPY

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

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

PLAINTIFF,

vs.

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

DEFENDANTS.

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

**ORDER GRANTING DEFENDANT
CITY OF MYRTLE BEACH'S
MOTION FOR
SUMMARY JUDGMENT**

FILED
Horry County
2011 OCT 10 PM 12:30
MELANIE HUGGINS-WARD
CLERK OF COURT

Statement of Case

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

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

Standard of Review

RECEIVED

OCT 10 2011

BATTLE & VAUGHT, P.A.

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

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

Facts

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

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

Analysis

2 / mtc

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

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

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

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

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

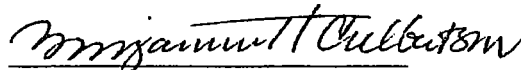
3 / mhc

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

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

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


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

Dated: Sept. 29, 2011

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

FORM 4

JUDGMENT IN A CIVIL CASE
CASE NO. 2010-CP-26-6873

Adam Corey Rabon, et al.
PLAINTIFF(S)

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

Submitted by: Benjamin H. Culbertson, Presiding Judge

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$ N/A
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

Benjamin H. Culbertson
Benjamin H. Culbertson, Circuit Court Judge

2148
Judge Code

January 30, 2012
Date

For Clerk of Court Office Use Only

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

Jeffrey E. Johnson

ATTORNEY(S) FOR THE PLAINTIFF(S)

James R. Battle

Jimmy C. Powell, Jr.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: None

AMENDED FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-26-6873

Adam Corey Rabon, et al.
PLAINTIFF(S)

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

Submitted by: Benjamin H. Culbertson, Presiding Judge

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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N/A	N/A	\$ N/A
		\$
		\$

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

Benjamin H. Culbertson
Benjamin H. Culbertson, Circuit Court Judge

2148
Judge Code

February 7, 2012
Date

For Clerk of Court Office Use Only

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

Jeffrey E. Johnson

ATTORNEY(S) FOR THE PLAINTIFF(S)

James R. Battle

Jimmy C. Powell, Jr.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: None

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

FORM 4

JUDGMENT IN A CIVIL CASE

FILED CASE NO. 2010 CP-26-6873
HORRY COUNTY

Adam Corey Rabon et al

Huggins Beach Service Inc et al

12 FEB 21 PM 4:45

PLAINTIFF(S)

RELATE MOTIONS - DEFENDANT(S)
CLERK OF COURT

Submitted by:

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Plaintiff's Motion to Amend Complaint is granted. Plaintiff's Motion to Alter and Amend is under advisement by Judge Culbertson.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

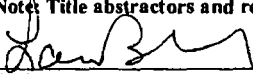
INFORMATION FOR THE PUBLIC INDEX

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

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

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

2152
Judge Code

January 30, 2012
Date

For Clerk of Court Office Use Only

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

Jefferey E Johnson

Jimmy Carlton Powell Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY | FIFTEENTH JUDICIAL CIRCUIT
2010-CP-26-~~10873~~

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

vs.

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

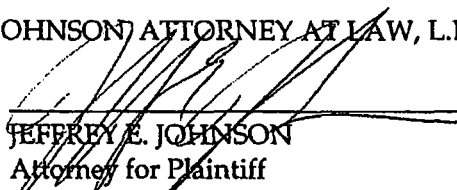
S U M M O N S

JURY TRIAL REQUESTED

TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to serve upon the subscriber
at Jeffrey E. Johnson, Attorney at Law, L.L.C., Plaintiff's Attorney, whose
address is P.O. Drawer 1829, 1409 Second Avenue, Conway, South Carolina
29528, an answer to the Complaint, which is herewith served upon you, within
thirty (30) days from the date of service, exclusive of the day of service. If you
fail to do so, judgment by default will be taken against you for the relief
demanded in the Complaint.

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


JEFFREY E. JOHNSON
Attorney for Plaintiff
1409 Second Avenue
P.O. Drawer 1829
Conway, SC 29528
Phone: (843) 488-5333
FAX: (843) 488-4290

July 27 2010
Conway, South Carolina

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STATE OF SOUTH CAROLINA]
COUNTY OF HORRY]

IN THE COURT OF COMMON PLEAS
CASE NO.: 2010 - CP - 26 - 6873

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

Plaintiff,]

vs.]

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

Defendants.]

COMPLAINT

JURY TRIAL DEMANDED

FILED
10 JUL 20 AM 9:53
CLERK OF COURT

Plaintiff above named complaining of the Defendants above named respectfully shows unto the court and alleges:

1. The Plaintiff, Adam Corey Rabon, is the duly qualified and appointed Guardian of Erik Randall Rabon, who resides in Horry County, South Carolina. Guardian was initially appointed on May 28, 2010, and was confirmed on June 28, 2010 by the Horry County Probate Court.
2. The Defendants, Huggins Beach Service, Inc., [hereinafter "Huggins Beach Service"], is, upon information and belief, a corporation, limited liability company, partnership, association or some other organization organized and existing under and by virtue of the laws of The State of South Carolina. Said Defendant Huggins Beach Service is authorized to conduct business in the State of South Carolina and licensed and doing business in the

City limits of Myrtle Beach and Horry County, South Carolina through its agents, servants and/or employees.

3. Defendant Huggins Beach Service is, upon information and belief, and at all times herein mentioned, in the business of beach service, patrol, sales and safety. Defendant Huggins Beach Service employed agents, employees and servants for the purpose of beach patrol, service, sales and safety, particularly to operate motor vehicles upon the beaches within close proximity to sunbathers and the public as a whole on the beach.

4. The City of Myrtle Beach is a municipality, governmental entity, agencies or political subdivisions of the State of South Carolina and is subject to the protection, liability and jurisdiction imposed by S.C. Code Ann. § 15-78-40 (1976) and other pertinent portions of S.C. Code Ann. § 15-78-40, et seq. currently referred to as the South Carolina Torts Claims Act; and the injury hereinafter described occurred in Horry County, South Carolina.

5. This action is brought for the benefit of the Guardian's Ward, Erik Randall Rabon, due to the injuries, medical treatment, pain and suffering, lost wages, earning capacity, disabilities and other damages he sustained as hereinafter alleged.

6. Heretofore, to wit: On or about May 14, 2010 at approximately 1:27 p.m., the Plaintiff's Ward, Erik Randall Rabon, [hereinafter "Erik Rabon"] was relaxing and lying on the sandy portion of the beach near the ocean located between 8th and 9th Avenues North in Myrtle Beach, South Carolina. At the

time Erik Rabon was lying on the beach, Defendant Craig Risbourg was operating and driving a 2004 Chevrolet truck bearing a South Carolina license plate displaying plate number DRU 806 and owned by Huggins Beach Service, Inc. As Defendant Risbourg was operating said vehicle, Defendant Risbourg drove said vehicle over and on top of Erik Rabon at a fast, rapid and dangerous rate of speed and with great force and violence. Defendant Risbourg was unaware of Erik Rabon being pinned under said vehicle and continued to drive forward and pushed and dredged Erik Rabon forward by his head and other parts of his body for a distance through the beach sand until said vehicle could no longer continue to travel forward. During the time after Defendant Risbourg's and Huggins Beach Service's vehicle came to a complete stop, Erik Rabon was conscious and screaming and begging for the vehicle's removal while he was pinned under the vehicle. While he was pinned beneath said vehicle, he was required to endure the vehicle's hot motor and other truck parts for a long period of time until a special air lift bag was obtained and brought to the emergency site to lift the vehicle off of his body for his rescue. While Eric was pinned underneath said vehicle he was unable to receive medical attention for his injuries and to prevent the causation of further injury and reduce his pain and suffering and fear of imminent death. All of the aforementioned acts committed by Defendants have caused Erik Rabon to sustain severe, permanent and disabling injuries.

7. That as a direct and proximate result of being rammed by, pushed by and pinned under said vehicle, Erik Rabon received injuries to his brain, head, neck, back, arms, legs and other parts of his body; the muscles, nerves and sinews of his body were stretched, torn, bruised and damaged; he suffered multiple crushed and broken cervical vertebrae and his spinal cord has been permanently damaged and extensively lacerated; he has suffered brain swelling and has been rendered unconscious and in a coma-like state; his health and body mobility has been greatly impaired; he is and will be dependent upon others as well as continued medical staff during all aspects and details of his remaining life; his life expectancy has been lessened and diminished; he requires the assistance of a respirator and ventilator to breathe; he has and will continue to suffer post traumatic stress disorder; has and will lose time from work; loss of earning capacity; required to expend and has expended money for hospitalization; care of doctors and other medical necessities; will continue for the remainder of his life require hospitalization, physical therapy, spinal cord therapy, doctors care and other medical necessities; and has suffered and will continue to suffer great pain and mental anguish, all to his injury and damage.

8. Erik Rabon's injuries and damages aforesaid were due directly to and proximately caused by negligence, gross negligence, careless and reckless acts of commission and/or omission on the part of Defendants as herein below stated, in the operation of the above described vehicle which was

either owned by Defendant Risbourg or operated by him with permission of the owner Huggins Beach Service in one or more of the following particulars, to wit:

(AS TO DEFENDANTS RISBOURG AND HUGGINS BEACH SERVICE)

- (a) In failing to maintain a proper lookout;
- (b) In driving too fast for the conditions then and there existing;
- (c) In driving a motor vehicle of that size on the sandy beach;
- (d) In failing to properly and adequately train and supervise lifeguards, drivers and other employees, agents and servants of Defendant Huggins Beach Service in operating a motor vehicle on the beach;
- (e) In failing to maintain proper control over his vehicle;
- (f) In failing to properly and adequately equip its vehicles with adequate mirrors and other equipment to observe or detect the public lying on the beach;
- (g) In failing to equip his vehicle with adequate and safe brakes and if so equipped, in failing to use and apply his brakes in order to avoid a collision with Plaintiff's vehicle;
- (h) In failing to stop his vehicle prior to running on top of Erik Rabon and pushing Erik Rabon's head and other parts of his body for a distance before said vehicle was unable to continue moving forward;
- (i) In failing to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances;

- (j) In failing to investigate the driving history of Defendant Huggins Beach Service employee(s) and driver(s) permitted by it to operate a motor vehicle on the beach and not prohibiting or limiting such employee(s) or driver(s) from operating a motor vehicle on the beach;
- (k) In allowing and permitting its employee(s), agent(s), servant(s), lifeguards and drivers to operate its vehicles on the beach in a careless manner;
- (l) In allowing and permitting its employee(s), agent(s), servant(s), lifeguards and drivers to operate its highway motor vehicles in areas except the dirt road between the boardwalk and the sandy beach, as said dirt road is designated to highway motor vehicle travel;
- (m) In failing to employ sufficient numbers of employees to work the beach;
- (n) In allowing and permitting highway motor vehicles on the sandy beach during times of the year and times of the day that are notoriously congested;
- (o) In failing to implement the use of smaller vehicles such as all-terrain vehicles, golf carts and other like vehicles to be used on the beach to fulfill its beach patrol, sales, service and safety mission;
- (p) In valuing profit more than safety in failing to adequately equip its motor vehicles with mirrors or cameras to view sunbathers;
- (q) In failing to comply with the standards and procedures established and set forth in Defendant Huggins Beach Service policies and manuals;
- (r) In failing to adhere to the guidelines and requirements established or suggested by the City of Myrtle Beach, including but not limited to the Water Safety Program implemented by the City on September 9, 2008 and its applicable agencies, committee(s), board(s), counsel or other bodies;
- (s) In failing to maintain the sense of security and safety a sunbather expects to be provided on the beach;

- (t) In failing to equip the vehicle with audio devices to detect obstructions in front of said vehicle or warn others of an approaching vehicle;
- (u) In failing to periodically evaluate, assess potential risks and operational safety hazards, by the Defendants' employees or owners or an independent risk assessment expert;
- (v) In failing to warn, through signage or otherwise, the public and Plaintiff of motor vehicles operating on the beach within close and dangerous proximity to sunbathers and others on the beach;
- (w) In failing to create and ensure a safe and secure beach for the public to sunbathe or otherwise use the beach and its amenities;
- (x) In creating an obstacle course of sunbathers, pedestrians and other occupants for beach service, patrol, sales and safety personnel to negotiate;
- (y) Any or all of which were the direct and proximate cause of the damages suffered by the Plaintiff's ward herein, said acts being in violation of City of Myrtle Beach and/or Horry County ordinances and regulations as well as the statutory laws of the State of South Carolina, applicable case law, codes and ordinances.

(AS TO DEFENDANT CITY OF MYRTLE BEACH)

9. Erik Rabon's injuries and damages aforesaid were due directly to and proximately caused by the negligence, gross negligence, careless and reckless acts of commission and/or omission on the part of Defendant City of Myrtle Beach as herein below stated in one or more of the following particulars, to wit:

- (aa) In failing to ensure that qualified drivers were employed by its beach service providers;

- (bb) In failing to provide adequate public safety to beach goers visiting the public beaches within the City of Myrtle Beach;
- (cc) In attempting to delegate a non-delegable duty to provide public safety services to beach goers visiting the public beaches within the City of Myrtle Beach;
- (dd) In creating and maintaining a franchise agreements with beach patrol, sales, service and safety business using a dual role scheme;
- (ee) In failing to properly supervise the training and discharge of beach patrol, sales, safety and other services by Huggins Beach Service to ensure primary emphasis on vehicle operation safety, rather than other beach activities;
- (ff) In failing to enforce all requirements set forth within the Franchise Agreement with Defendant Huggins Beach Service;
- (gg) In failing to inspect Defendant Huggins Beach Service employee driving records and driving performance and procedures to ensure vehicle operation beach safety;
- (hh) In failing to objectively inspect and evaluate the credentials and qualifications of the drivers employed by Huggins Beach Service to ensure appropriate training and experience;
- (ii) In failing to conduct a thorough and complete investigation of the incident in which Plaintiff received injuries;
- (jj) In failing to adequately implement remedial measures which were learned from previous beach injuries that would have prevented Plaintiff's injuries and disabilities;
- (kk) In omitting references of futile efforts of other beach service personnel to adequately respond to the injury scene and obtain adequate written reports and/or summaries of witnesses' statements;
- (ll) In awarding a Franchise Agreement to a business with a greater emphasis on beach rentals rather than beach safety;

- (mm) In jeopardizing its duty to provide beach safety to the general public in exchange for financial gain;
- (nn) In breaching the public trust; and
- (oo) In failing to prohibit unqualified driver(s) of Defendant Huggins Beach Service from operating motor vehicles on the beach;
- (pp) In failing to warn, through signage or otherwise, the public and Eric of motor vehicles operating on the beach within close and dangerous proximity to sunbathers and others on the beach;
- (qq) In failing to uphold its promises and assurances to the public through its posted signage and/or ordinance that motor vehicles will not be driven on the beach;
- (rr) Any or all of which were the direct and proximate cause of the damages suffered by the Plaintiff's ward herein, said acts being in violation of City of Myrtle Beach and/or Horry County ordinances and regulation as well as the statutory laws of the State of South Carolina, applicable case law, codes and ordinances.

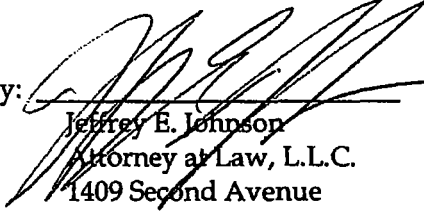
10. That by reason of the aforesaid negligent, grossly negligent, careless and reckless acts of commission and/or omission on the part of the Defendants as aforesaid, the Plaintiff has incurred actual damages and is entitled to such punitive damages as the trial jury may deem just and proper.

WHEREFORE PLAINTIFF PRAYS:

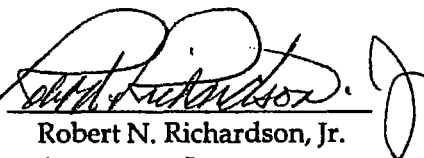
1. For judgment against Defendant Risbourg in a sum sufficient to adequately compensate Plaintiff for actual damages and punitive damages as the trial jury may deem just and proper;

2. For judgment against Defendant Huggins Beach Service in a sum sufficient to adequately compensate Plaintiff for actual damages and punitive damages as the trial jury may deem just and proper;
3. For judgment against Defendant City of Myrtle Beach in a sum sufficient to adequately compensate Plaintiff for actual damages as the trial jury may deem just and proper;
4. For the costs and disbursements of this action; and
5. For such other and further relief as this Honorable Court may deem just and proper.

RESPECTFULLY SUBMITTED,

By: 

Jeffrey E. Johnson
Attorney at Law, L.L.C.
1409 Second Avenue
P.O. Drawer 1829
Conway, S.C. 29528
Phone: (843) 488-5333
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By: 

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Phone: (843) 248-9831
FAX: (843) 248-6680

Attorneys for Plaintiff

July 21, 2010
Conway, South Carolina

COPY

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

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

PLAINTIFF,

vs.

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

DEFENDANTS.

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

ANSWER OF DEFENDANT CITY OF
MYRTLE BEACH
(Jury Trial Demanded)

FILED
CLERK OF COURT
HUGGINS-BEACH
2010-01-06 AM 11:06
HUGGINS-BEACH
COUNTY

Defendant City of Myrtle Beach ("the City"), responding to the Complaint of
Plaintiff, would respectfully show unto this Honorable Court as follows:

FOR A FIRST DEFENSE
(Failure to State a Claim)

1. The Complaint fails to state facts sufficient to constitute any cause of action against the City, and fails to raise any genuine issue of triable fact, and should, therefore, be dismissed or judgment thereon entered in favor of the City, pursuant to Rules 12(b)(6), 12(c), 41, or 56, SCRCP.

FOR A SECOND DEFENSE
(Qualified General Denial)

2. The City realleges each and every defense stated above as if it were fully repeated here.

3. The City denies each and every allegation of the Complaint which is not admitted, qualified, or explained in this Answer.

4. As to Paragraphs 1, 2, and 3, the City is without sufficient information to form a belief as to those allegations, and accordingly, denies them and demands their strict proof.

5. As to Paragraph 4, the City admits that it is a governmental entity subject to the protection, liability, and jurisdiction imposed by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, entire sequence. As to whether the injury described in the Complaint occurred in Horry County, South Carolina, the City is without sufficient information to form a belief as to those allegations, and accordingly, denies them and demands their strict proof.

6. As to Paragraphs 5, 6, and 7, the City is without sufficient information to form a belief as to those allegations, and accordingly, denies them and demands their strict proof.

7. As to Paragraph 8, the City denies that it acted with any negligence, gross negligence, carelessness, or recklessness. As to the remainder of Paragraph 8 and its subparts (a) through (y), the City is without sufficient information to form a belief as to those allegations, and accordingly, denies them and demands their strict proof.

8. The City denies Paragraph 9 and its subparts (aa) through (rr).

9. The City denies Paragraph 10.

FOR A THIRD DEFENSE
(Recreational Use Statute)

10. The City realleges each and every defense stated above as if it were fully repeated here.

11. The City asserts the Recreational Use Statute as a complete defense to Plaintiff's claims against the City.

FOR A FOURTH DEFENSE
(Tort Claims Act)

12. The City realleges each and every defense stated above as if it were fully repeated here.

13. As to any portion of the Complaint that may be interpreted as brought under the South Carolina Tort Claims Act, § 15-78-10, entire sequence, of the South Carolina Code of Laws, the City pleads said Act and all pertinent provisions contained therein as a limitation or bar on the Plaintiff's claims.

FOR A FIFTH DEFENSE
(Third Party/Intervening Cause)

14. The City realleges each and every defense stated above as if it were fully repeated here.

15. The injuries allegedly sustained by the Plaintiff, which are denied, were the direct and proximate result of the negligent, grossly negligent, careless, and reckless acts of a third person whose actions and conduct were not apparent or reasonably foreseeable to the City, and the City pleads intervening and superseding cause as a complete bar or limit to Plaintiff's claims which should be dismissed, denied or limited accordingly.

FOR A SIXTH DEFENSE
(Comparative Negligence)

16. The City realleges each and every defense stated above as if it were fully repeated here.

17. If the City was negligent, grossly negligent, careless, or reckless in any particular, which is expressly denied, nevertheless any injuries or damages allegedly sustained by the Plaintiff as set forth in the Complaint, were due to and caused by the Plaintiff's own acts of negligence, gross negligence, carelessness, or recklessness by failing to take the

reasonable precautions and safety measures that a reasonable person under the same or similar circumstances would have taken and which acts or omissions on the part of the Plaintiff combined with, contributed to, and concurred with any alleged negligent or careless acts of the City, without which the injury or damages complained of would not have occurred or been sustained, and the City pleads that the Plaintiff's comparative negligence, gross negligence, carelessness, and recklessness were of such degree that such is a complete bar to the within action, and in any event, any recovery by the Plaintiff should be reduced in proportion to that degree of his negligence, gross negligence, carelessness, and recklessness.

FOR A SEVENTH DEFENSE AND CROSS-CLAIM AGAINST
HUGGINS BEACH SERVICE, INC.
(Contractual Indemnification)

18. The City realleges each and every defense stated above as if it were fully repeated here.

19. On or about September 11, 2008, the City entered into a franchise agreement with Huggins Beach Service, Inc., whereby Huggins Beach would provide a water safety service and beach concession on certain public beaches within the City. See Attached. The franchise agreement was supported by the exchange of valuable consideration between the parties.

20. Section 8, Subsection (b) of the franchise agreement states:

[Huggins Beach] does release the City from any and all claims, demands, suits, judgments, damages, actions and liabilities of every name and nature whatsoever, including attorney's fees and costs, whenever occurring, whether known or unknown, contingent or fixed, at law or in equity, that [Huggins Beach] may suffer at any time arising from or in connection with participation in the franchise, including any personal injury, commercial injury or harm or damage to any property or person.

21. Section 8, Subsection (c) of the franchise agreement states:

[Huggins Beach] further agrees to protect, defend, indemnify and hold the City free and harmless from and against any and all losses, fines, penalties, damages, settlements, costs, charges, professional fees or other expenses and liabilities of every kind and character arising out of or relating to any and all claims, liens, demands, obligations, actions, proceedings, or causes of action of every kind in connection with or arising out of this [franchise agreement] and the performance hereof, that are due to acts, errors, omissions or negligence of [Huggins Beach], its officers, agents, employers or subcontractors.

22. The City is informed and believes that if it is found liable to the Plaintiff in this matter, then it is entitled to a claim against Huggins Beach for any and all damages, including attorney's fees and all costs and other expenses incurred from defending the lawsuit.

FOR AN EIGHTH DEFENSE AND CROSS-CLAIM AGAINST
HUGGINS BEACH SERVICE, INC.
(Equitable Indemnification)

23. The City realleges each and every defense stated above as if it were fully repeated here.

24. Huggins Beach had a special relationship with the City which requires it to indemnify the City for the acts and/or omissions of Huggins Beach, its employees or agents. Such indemnification includes but is not limited to the City's costs, damages, the costs of defense including attorneys' fees and any other costs incurred as a result of Plaintiff's claims.

25. The City is informed and believes it is entitled to a judgment against Huggins Beach in an amount to be determined by the trier of fact for its costs, damages, the costs of defense including attorneys' fees and any other costs incurred as a result of Plaintiff's claims.

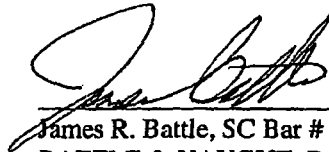
WHEREFORE, having fully answered Plaintiff's Complaint, Defendant City prays as follows:

A. That the Complaint against it be dismissed or that any recovery be limited under the defenses set forth above;

B. That it be granted a judgment of indemnification against Defendant Huggins Beach Service, Inc. for all losses resulting from the lawsuit including but not limited to costs and attorneys' fees;

C. That it be granted the costs of this action; and

D. That it be granted such further and other relief as this Court may deem just and proper.



James R. Battle, SC Bar # 73604
BATTLE & VAUGHT, P.A.
Attorney for City of Myrtle Beach
P.O. Box 530, 1200 Main Street
Conway, SC 29528
(p) (843) 248-4321
(f) (843) 248-5421

Dated: October 6, 2010
Conway, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
CITY OF MYRTLE BEACH)

SCANNED
DATE 10-24-08
BY ABM

WATER SAFETY FRANCHISE

WHEREAS, the City of Myrtle Beach requires the protection of its tourist and residential population through an efficient and effective Water Safety Program; and

WHEREAS, the successful implementation of a Water Safety Program is imperative along the City's twelve miles of oceanfront; and

WHEREAS, these goals can be optimally achieved through the cooperation of the City of Myrtle Beach and the Concessionaires of beach equipment; and

WHEREAS, the City Council by Ordinance duly adopted on September 9, 2008, has authorized the City Manager to execute franchises with the concessionaires of the beach service in accordance with the terms of this franchise:

NOW, THEREFORE, PURSUANT TO THE FRANCHISE POWER OF THE CITY OF MYRTLE BEACH (City or Franchisor) in consideration of the foregoing premises and the mutual promises of each to the other made agree as follows:

The City grants Huggins Beach Service a franchise to operate a water safety service and beach concession on the public beach of the City in Zones 28 through 38 as described in Attachment "A" for a period time beginning upon second reading of the award ordinance and ending October 1, 2015, subject to the following terms and conditions:

SECTION 1. PERIOD OF OPERATION:

Franchisee shall conduct water safety each year during the period beginning April 15 and ending September 30. Franchisee shall ensure minimum lifeguard staffing in each zone, between the hours of 8:00 a.m. and 5:00 p.m., Monday through Sunday, according to the following schedule:

April 15 through 3 rd week in May:	20% of full complement
4 th week in May through June 1:	50% of full complement
June 2 through 2 nd week of August	Full complement

3 rd week of August	75% of full complement
4 th week of August through Labor Day	50% of full complement
Labor Day through September 30	20% of full complement

Franchisee may rent beach equipment outside said period of operation, provided however, that lifeguards must be on duty at all times that beach equipment is on the beach. The Franchisee shall provide lifeguards as deemed necessary in consultation with the City.

Franchisee shall, in addition, patrol the beach between the hours of 5:00 p.m. and 7:00 p.m. The number of lifeguard personnel shall depend of the number of zones the franchisee controls. In addition to lifeguards, the Franchisee shall provide the following equipment sufficient for each area of responsibility: vehicle, jet ski or similar device, first aid kit, rescue buoy, two-way radio and two-way radio with police frequency provided by the police department.

Franchisee understands and agrees that additional stands and lifeguard personnel may be deemed necessary by the City and hereby agrees to provide such additional lifeguards after consultation with the City.

From the 1st week of June through Labor Day, and during the hours of operation, for every one (1) to six (6) stands that the Franchisee controls, a minimum of one (1) Lifeguard Only is required, and for every six (6) stands thereafter. A "Lifeguard Only" may be mobile only within a six (6)-stand range. Franchisee shall provide the Beach Patrol with the stand number of each Lifeguard Only. During the hours of operation and term of the franchise agreement, for every one (1) to ten (10) stands that the Franchisee controls, a minimum of one off-stand supervisor shall be provided. A supervisor cannot be a Lifeguard Only except during the lunch period.

SECTION 2. STANDARDS OF PERFORMANCE & LIFEGUARD CERTIFICATION

All lifeguards shall be at least seventeen (17) years of age, be of good moral character and abide by the highest standards of cleanliness and physical appearance.

All lifeguards shall:

- (A) Possess adequate vision, hearing acuity, physical ability and stamina to perform the duties of open water lifeguard;
- (B) Must possess a valid lifeguard card.
- (C) Be in good health and demonstrate an ability to swim 500 meters over a measured course in a twelve (12) minute period;
- (D) Possess a Community First Aid Certification or its equivalent;
- (E) Possess a CPR Certification or equivalent for professional rescue; and
- (F) Successfully complete a course consisting of a total of not less than 40 hours in open water life saving which meet the criteria of the United States Lifeguard Association. At the beginning of each season, the Franchisee shall prepare a training schedule for lifeguards and shall present it to the City. Franchisee shall insure that all lifeguards reasonably comply with that schedule. All lifeguards shall qualify by passing the "Minimum Training on Rescue Procedures" before beginning work on the beach.

The City shall, in consultation with Franchisee, establish pre-certification and in-service minimum training requirements and disseminate same to each Franchisee by March 30th of each year. Franchisee shall prepare a lifeguard training curriculum meeting those requirements and ensure that all lifeguard personnel qualify thereunder prior to beginning work and meet all in-service training requirements. Franchisee or designated representative and all franchise lifeguards shall attend all pre-certification and in-service training sessions. Failure to attend shall result in suspension from service until requirement is met.

Franchisee, all lifeguards and other franchise employees are prohibited from consuming alcoholic beverages while on duty or from reporting to work under the influence of alcohol or other controlled substances.

Franchisee shall not employ any individual as a lifeguard or beach concession employee who has been convicted of or plead guilty or nolo contendere to a felony or which is on parole or probation for a criminal offense.

Franchisee and any franchise employee who operates a motor vehicle in the performance of this franchise agreement shall possess a valid motor vehicle operator's

license, and successfully complete a Police Department offered training course for the type of vehicle driven on the beach.

Franchisee and the City shall determine an appropriate schedule for lunch breaks. Lunch breaks shall be staggered or alternated so that only every third lifeguard will be off-stand during designated lunch hours. The off-stand supervisor shall remain on the beach between the hours of 11:30 a.m. and 2:00 p.m. to augment the provision of water safety services during those hours.

Franchisee shall be solely responsible for any required disciplinary action of its lifeguards.

SECTION 3. LIFEGUARD UNIFORMS & EQUIPMENT

All uniforms shall be of the same color and combination. All lifeguard tee shirts shall be gold with navy blue lettering. "Life Guard" shall be printed on the front. The name of the franchise shall be printed on the back. The City of Myrtle Beach Seal shall be on the right sleeve. The company or non-commercial logo may be printed on the left sleeve.

All lifeguard swim trunks shall be navy blue. "Life Guard" shall be printed in gold letters on the right front leg. Company or non-commercial logo may be applied to left front leg. Pattern may be repeated on the rear of the garment.

Female lifeguard personnel shall wear a navy blue swimsuit. "Life Guard" shall be printed in gold letters on the front.

Outerwear shall be gold, with printing as described above.

Lifeguards shall wear shirts from 10:00 a.m. until 2:00 p.m.

All franchise stands shall be painted white and built according to City specifications. Each stand shall be maintained in good condition and be provided with the following minimum equipment:

Torpedo Buoy

Water Safety Flags (3)

First Aid Kit

Orange Lifeguard Umbrella with "Life Guard" in Navy Blue Letters

City Ordinance/Emergency Phone Number Sign

Every Other Stand Shall Have a Two-way Radio

Lifeguard stands shall be located at such distances and intervals as are determined by the City. In areas in which two franchises join, Franchisee shall not place beach equipment closer than twenty (20) feet to the point of junction. In addition, a twenty (20) foot opening shall be maintained at each street-end and a ten (10) foot opening at each public alleyway. In all cases, Franchisee, in setting up beach equipment, shall endeavor to provide the highest degree of public access possible. Franchisee agrees to remove fifty (50) percent of any un-rented chairs and umbrellas after 2:30 p.m.

Each Franchisee shall have an attended two-way radio with police frequency provided by the Police Department.

SECTION 4. BEACH SERVICE EQUIPMENT

No commercial or retail activity except as authorized herein shall be permitted on the public beach.

In return for the provision of water safety services and other considerations in Section 6, the Franchisee is hereby authorized to rent the following beach equipment:

- Chairs & footrests
- Umbrellas
- Windbreaks
- Floats
- Soft Boogie Boards

Franchisee may not rent any "hard" equipment including but not limited to:

- Surfboards
- Skim Boards
- Sailboats

Franchisee shall not display any signage other than specifically authorized herein as well as its company logo on its beach service equipment.

Franchisee is authorized to operate, in a safe and prudent manner, various types of motor vehicles in support of its water safety and beach concession operations. All such

vehicles shall be maintained in excellent mechanical condition, be neat in appearance and be properly licensed and insured as required by law, and operated by a properly licensed operator.

Except in the case of emergency, Franchisee is prohibited from bringing any chemicals, including but not limited to gasoline, oil and hydraulic fluid onto the public beach and shall be solely responsible for any release from its motor vehicles used on the public beach. In the event of spillage, Franchisee shall contain said spillage and contact Beach Patrol.

The City shall have the right to inspect and approve or disapprove the use of any motor vehicle.

SECTION 5. BEACH CLEANLINESS

Each Franchisee will be responsible for the cleanliness of its franchise zone(s) as assigned. The area of responsibility extends from the water line to the primary dune line. Each Franchisee will be held accountable to the City for the cleanliness of the beach in each respective zone. Re-occurring legitimate complaints about beach cleanliness in a specified zone shall be grounds for franchise termination.

At the beginning of each season, the City will provide trashcans as needed for each stand. The City shall be responsible for the trashcans pick-up on the beach.

SECTION 6. FINANCIAL REPORTING AND FRANCHISE FEES

Franchisee shall provide the City a review of the gross receipts prepared by a Certified Public Accountant no later than December 1 of each year during the term of this Franchise. The City may require an audited financial statement in its discretion.

Franchise fees shall be three percent (3%) of gross receipts, with a maximum of \$1,465.00 per stand, and shall be due and payable no later than December 31 of each year. Franchisee shall be afforded a ten (10) day grace period for payment of franchise fees, after which time a ten percent (10%) late fee will be assessed. Failure to pay franchise fees and any late fees within thirty (30) days of the due date shall be grounds for revocation of the franchise.

The maximum per stand charge shall be increased by ten percent (10%) on December 31st of 2010 and 2012.

SECTION 7. INSURANCE

Franchisee shall provide and pay for the following insurance coverages during the term hereof:

Public Liability – A general liability policy protecting Franchisee against liability or loss due to bodily injury, property damage or personal injury arising out of the performance of its franchise responsibilities and more specifically the provision of water safety service. Policy shall be written on an occurrence form and provide a combined single limit of liability of One Million Dollars (\$1,000,000) per occurrence. Coverage shall be included for: Premises/Operation; Products/Completed Operation; Contractual Liability; Independent Contractors and shall include a broad form property damage endorsement. In the event this policy shall exclude coverage for Lifeguard Liability as a professional service, Franchisee shall be required to provide and pay for professional service coverage protecting Franchise against liability for the acts, errors and omissions of its water safety personnel.

Automobile Liability – A Business Automobile Liability policy protecting Franchisee against liability or loss due to bodily injury and property damage arising out of the operation of a motor vehicle in the performance of this Franchise. Policy shall be written on an occurrence basis and provide coverage for "any auto" with a combined single limit of liability of One Million Dollars (\$1,000,000) per occurrence.

Worker's Compensation & Employers' Liability – A Worker's Compensation policy protecting Franchisee against liability or loss arising out of occupational injury or illness of its employees. This policy shall provide minimum limits of liability of: \$500,000 each accident; \$500,000 disease – each employee; and \$500,000 disease – policy limit.

Policy Endorsements:

Both the general liability and automobile liability policies, as well as any professional services policy shall be endorsed to name the City of Myrtle Beach as an "additional insured."

All policies shall be endorsed to provide the City of Myrtle Beach sixty (60) days prior written notice of non-renewal, reduction or exhaustion of limits or cancellation.

All policies shall include a "waiver of subrogation" endorsement in favor of the City of Myrtle Beach.

Conditions:

The clause "other insurance" in a policy in which the City of Myrtle Beach is named as an "additional insured" shall not apply to the City of Myrtle Beach.

The insuring company shall have no recourse against the City of Myrtle Beach for the payment of any premiums, deductibles or assessments.

In the event Franchisee should fail to comply with the "loss reporting" requirements of any policy, that failure shall not adversely affect the coverage afforded the City, nor shall the City be responsible for complying with the reporting requirements of any policy.

SECTION 8. INDEMNIFICATION

With respect to the parties, and their officials, agents, employees, volunteers, contractors, or those who act on the Franchisor's or Franchisee's behalf in any authorized capacity:

- a. The Franchisee is informed of risks and obligations in performance of the franchise, and for valuable consideration received in the form of the granted franchise, the Franchisee agrees to assume and fully to take on to itself all of the risks and responsibilities in any way arising from, or associated with its participation in the Franchise, and
- b. The Franchisee does release the City from any and all claims, demands, suits, judgments, damages, actions and liabilities of every name and nature whatsoever, including attorney's fees and costs, whenever occurring, whether known or unknown, contingent or fixed, at law or in equity, that the Franchisee may suffer at any time arising from or in connection with participation in the franchise, including any personal injury, commercial injury or harm or damage to any property or person.

- c. Further, as to non-parties to this agreement, Franchisee further agrees to protect, defend, indemnify and hold the City free and harmless from and against any and all losses, fines, penalties, damages, settlements, costs, charges, professional fees or other expenses and liabilities of every kind and character arising out of or relating to any and all claims, liens, demands, obligations, actions, proceedings, or causes of action of every kind in connection with or arising out of this Franchise and the performance hereof, that are due to acts, errors, omissions or negligence of Franchisee, its officers, agents, employees or subcontractors.
- d. Franchisee further agrees to investigate, handle, respond to, provide defense for and defend the same at its sole expense and agrees to bear all other costs and expenses related thereto. In specific reference to the above, the Franchisee agrees to assume the legal defense, and vigorously defend upon actual notice of claim or suit, and, in doing so, completely indemnify the Franchisor from any loss including any damage model or attorneys' fees and cost, and hold harmless the Franchisor from and against any and all liabilities.
- e. In the event a claim or suit is made against the City or those who act on its behalf, arising from the Franchisee's operation of the franchise, the same shall be transmitted by City immediately, and the Franchisee has the immediate and absolute duty to defend the claim or suit, even if it is groundless, false or fraudulent, so that the Franchisor may not incur attorney's fees and costs arising from the claim or suit of non-parties. Should the Franchisor incur attorney's fees or cost, the Franchisee shall make the Franchisor whole upon demand.
- f. This promise binds heirs, executors, administrators, legal representatives and assigns of the Franchisee and survives this agreement for the length of time necessary under the applicable statute of limitations relating to any claim, suit or cause of action. This hold harmless, indemnification, and duty to defend shall be governed for all purposes by South Carolina law, without regard to such law on choice of law.

- g. Within the time as may be provided by law for the answer or defense of any filed claim or proceeding, but no later than thirty (30) days after the City receives notice of the commencement of any action or other proceeding in respect of which indemnification or reimbursement may be sought hereunder, the City shall notify the Franchisee. If any such action or other proceeding shall be brought against the City and be transmitted to the Franchisee, the Franchisee shall, within thirty (30) days acknowledge in writing its receipt of such notice from the City, and shall acknowledge and confirm the Franchisee's obligation to hold harmless, indemnify, and assume the defense, and it shall be obligated to assume the defense of such action or proceeding with counsel chosen by the Franchisee.
- h. Notwithstanding the foregoing, the City shall have the right to employ separate counsel at the City's sole cost and expense and to control its own defense of such action or proceeding if, in the reasonable opinion of counsel to the City, (a) there are or may be legal defenses available to the City that are different from or additional to those available to the Franchisee and which could not be adequately advanced by counsel chosen by the Franchisee, or (b) a conflict or potential conflict exists between Franchisee and the City that would make such separate representation advisable.
- i. The Franchisee shall not, without the prior written consent of the City, settle or compromise or consent to the entry of any judgment in any pending or threatened claim, action or proceeding to which the City is a party unless such settlement, compromise or consent includes an unconditional release of the City from all liability arising or potentially arising from or by reason of such claim, action or proceeding.
- j. Notwithstanding any other provision contained herein, the franchise may be terminated upon Franchisee's failure to honor this, or other indemnification, hold harmless or duty to defend obligations due and owing to the Franchisor, arising from the operation of Franchisor's beach safety franchise.

SECTION 9. TRANSFER OF FRANCHISE

A Franchisee may transfer his/her franchise to another franchise holder subject to a sixty (60) day notice to and upon approval of the City Manager. City Council must approve by Resolution any franchise transfer. All such approvals shall not be unreasonably withheld.

Violation of any provision of this Franchise Agreement shall result in the suspension of the Franchise Agreement or in the permanent revocation of the Franchise by City Council.

SECTION 10. ASSIGNMENT

This Franchise may not be assigned in whole or in part except upon the written consent of the City of Myrtle Beach.

SECTION 11. TERMINATION

In the event the Franchisee is determined to be in default under the terms of this Franchise, the City shall provide Franchisee written notice of default and afford the Franchisee ten (10) days in which to cure the default. Upon failure of the Franchisee to cure or show reasonable progress towards curing the default, the City shall provide written notice of termination to Franchisee and this Franchise shall be revoked by City Council.

SECTION 12. NOTICE AND CONTACT

Any papers, request, demand, authorization, direction, notice, consent or waiver provided, required or permitted to be made upon, given by, or furnished to the either party with respect to this franchise shall be sufficient for every purpose hereunder if in writing and mailed by United States Mail, certified or registered mail, postage prepaid and addressed as follows:

To the City:

Attention: City Manager

937 Broadway

P. O. Box 2468

Myrtle Beach, SC 29577

To the Franchisee:

Attention:

Mr. Earl Huggins

Huggins Beach Service

601-37th Ave North, Myrtle Beach, SC 29577

WITNESS THE DUE EXECUTION HEREOF ON THE DATE LAST SIGNED:

City of Myrtle Beach

By: Thomas E. Leath, its City Manager

Print name: THOMAS E. LEATH

Witness signature and printed name:

Joan Grove

Joan Grove

Date: 9-11-08

Franchisee

By: Earl Huggins, its Owner

Print name: Earl Huggins

Witness signature and printed name:

Gail Moyer

GAIL MOYER

Date: 9-11-08

ATTACHMENT A

<u>ZONE</u>	<u>DESCRIPTION</u>
1	From South City Limits to center line of 29 th Avenue South
2	From center line of 29 th Avenue South to center line of 28 th Avenue South
3	From center line of 28 th Avenue South to center line of 27 th Avenue South
4	From center of 27 th Avenue South to center line of 26 th Avenue South
5	From center line of 26 th Avenue South to center line of 25 th Avenue South
6	From center line of 25 th Avenue South to center line of 24 th Avenue South
7.	From center line of 24 th Avenue South to center line of 23 rd Avenue South
8.	From center line of 23 rd Avenue South to center line of alleyway/walkway at 22 nd Avenue South
9.	From center line of alleyway/walkway at 22 nd Avenue South to center line of alleyway/walkway at 21 st Avenue South
10.	From center line of alleyway/walkway at 21 st Avenue South to center line of 19 th Avenue South
11.	From center line of 19 th Avenue South to center line of alleyway/walkway north of 18 th Avenue South
12.	From center line of alleyway/walkway north of 18 th Avenue South to center line of 16 th Avenue South
13.	From center line of 16 th Avenue South to center line of 15 th Avenue South
14.	From center line of 15 th Avenue South to center line of 13 th Avenue South
15.	From center line of 13 th Avenue South to center line of 12 th Avenue South
16.	From center line of 12 th Avenue South to center line of 11 th Avenue South
17.	From center line of 11 th Avenue South to center line of 10 th Avenue South
18.	From center line of 10 th Avenue South to center line of 9 th Avenue South
19.	From center line of 9 th Avenue South to center line of 8 th Avenue South
20.	From center line of 8 th Avenue South to center line of 7 th Avenue South
21.	From center line of 7 th Avenue South to center line of 6 th Avenue South
22.	From center line of 6 th Avenue South to center line of Withers Swash
23.	From center line of Withers Swash to center line of 3 rd Avenue South
24.	From center line of 3 rd Avenue South to center line of 2 nd Avenue South

25. From center line of 2nd Avenue South to center line of 1st Avenue South
26. From center line of 1st Avenue South to center line of 1st Avenue North
27. From center line of 1st Avenue North to South side of 2nd Avenue North Pier.
28. From North side 2nd Avenue North Pier to center line of 3rd Avenue North
29. From center line of 3rd Avenue North to center line of 4th Avenue North
30. From center line of 4th Avenue North to center line of 5th Avenue North
31. From center line of 5th Avenue North to center line of 6th Avenue North
32. From center line of 6th Avenue North to center line of 7th Avenue North
33. From center line of 7th Avenue North to center line of 8th Avenue North
34. From center line of 8th Avenue North to center line of 9th Avenue North
35. From center line of 9th Avenue North to center line of alleyway/walkway South of Mr. Joe White Avenue
36. From center line of alleyway/walkway South of Mr. Joe White Avenue to center line of alleyway/walkway north of Mr. Joe White Ave
37. From center line of alleyway/walkway north of Mr. Joe White Ave to center line of 12th Avenue North
38. From center line 12th Avenue North to South side of 14th Avenue North Pier
39. From North side of 14th Avenue North Pier to center line of the alleyway/walkway at 16th Avenue North
40. From center line of the alleyway/walkway at 16th Avenue North to center line of City Park at 19th Avenue North
41. From center line of City Park at 19th Avenue North to center line of alleyway/walkway south of 21st Avenue North
42. From center line of alleyway/walkway south of 21st Avenue North to center line of 23rd Avenue North
43. From center line of 23rd Avenue North to center line of 24th Avenue North
44. From center line of 24th Avenue North to center line of 26th Avenue North
45. From center line of 26th Avenue North to center line of alleyway/walkway at 27th Avenue North
46. From center line of alleyway/walkway at 27th Avenue North to center line of alleyway/walkway at 29th Avenue North
47. From center line of alleyway/walkway at 29th Avenue North to center line of 31st Avenue North
48. From center line of 31st Avenue North to center line of 34th Avenue North

49. From center line of 34th Avenue North to center line of 37th Avenue North
50. From center line of 37th Avenue North to center line of 38th Avenue North
51. From center line of 38th Avenue North to center line of 39th Avenue North
52. From center line of 39th Avenue North to center line of 40th Avenue North
53. From center line of 40th Avenue North to center line of 41st Avenue North
54. From center line of 41st Avenue North to center line of 42nd Avenue North
55. From center line of 42nd Avenue North to center line of 43rd Avenue North
56. From center line of 43rd Avenue North to center line of 44th Avenue North
57. From center line of 44th Avenue North to center line of 45th Avenue North
58. From center line of 45th Avenue North to center line of 46th Avenue North
59. From center line of 46th Avenue North to center line of 47th Avenue North
60. From center line of 47th Avenue North to center line of 48th Avenue North
61. From center line of 48th Avenue North to center line of 49th Avenue North
62. From center line of 49th Avenue North to center line of 50th Avenue North
63. From center line of 50th Avenue North to center line of 51st Avenue North
64. From center line of 51st Avenue North to center line of 52nd Avenue North
65. From center line of 52nd Avenue North to center line of 53rd Avenue North
66. From center line of 53rd Avenue North to center line of City Park at South Side of Cabana Section
67. From center line of City Park, South Side of Cabana Section to center line Beach Place
68. From center line of Beach Place to center line of Seaside Place
69. From center line of Seaside Place to center line of alleyway/walkway South side Haskell Circle
70. From center line of alleyway/walkway South side Haskell Circle to center line alleyway/walkway North of 63rd Avenue North
71. From center line of alleyway/walkway North of 63rd Avenue North to center line of 64th Avenue
72. From center line of 64th Avenue North to center line of 65th Avenue North
73. From center line of 65th Avenue North to center line of 66th Avenue North
74. From center line of 66th Avenue North to center line of 67th Avenue North
75. From center line of 67th Avenue North to center line of 69th Avenue North

76. From center line of 69th Avenue North to center line of 70th Avenue North
77. From center line of 70th Avenue North to center line of 71st Avenue North
78. From center line of 71st Avenue North to center line of 72nd Avenue North
79. From center line of 72nd Avenue North to center line of 73rd Avenue North
80. From center line of 73rd Avenue North to center line of 74th Avenue North
81. From center line of 74th Avenue North to center line of 75th Avenue North
82. From center line of 75th Avenue North to center line of 76th Avenue North
83. From center line of 76th Avenue North to center line of 77th Avenue North
84. From center line of 77th Avenue North to center line of 78th Avenue North
85. From center line of 78th Avenue North to center line of 79th Avenue North
86. From center line of 79th Avenue North to center line of 80th Avenue North
87. From center line of 80th Avenue North to center line of 81st Avenue North
88. From center line of 81st Avenue North to center line of 82nd Avenue North
89. From centerline of 82nd Avenue North to Northern City Limits.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Adam Corey Rabon, as Personal
Representative for the Estate of
Erik Randall Rabon,
Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2010-CP-26-6873

AMENDED

S U M M O N S

JURY TRIAL REQUESTED

CLERK OF COURT
JESSIE HUGGINS-WARD

2012 FEB -1 PM 3:02

CLERK OF COURT

TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to serve upon the subscriber at
Jeffrey E. Johnson, Attorney at Law, L.L.C., Plaintiff's Attorney, whose address is
P.O. Drawer 1829, 1409 Second Avenue, Conway, South Carolina 29528, an answer
to the Amended Complaint, which is herewith served upon you, within fifteen (15)
days from the date of service, exclusive of the day of service. If you fail to do so,
judgment by default will be taken against you for the relief demanded in the
Complaint.

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


JEFFREY E. JOHNSON
Attorney for Plaintiff
1409 Second Avenue
P.O. Drawer 1829
Conway, SC 29528
Phone: (843) 488-5333
FAX: (843) 488-4290

Attorney for Plaintiff

February 1, 2012
Conway, South Carolina

000045

STATE OF SOUTH CAROLINA]

COUNTY OF HORRY]

Adam Corey Rabon as Personal,
Representative for the Estate of
Erik Randall Rabon,

Plaintiff,

vs.

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

Defendants.]

IN THE COURT OF COMMON PLEAS
CASE NO.: 2010 - CP- 26 - 6873

**AMENDED
COMPLAINT**

JURY TRIAL DEMANDED

FILED
CLARE HUGGINS-WARD
CLERK OF COURT
HORRY COUNTY
2012 FEB - 1 PM 3:02

Plaintiff above named complaining of the Defendants above named
respectfully shows unto this Honorable Court and alleges:

1. The Plaintiff, Adam Corey Rabon, was initially appointed Guardian
for Erik Randall Rabon on May 28, 2010, and was confirmed on June 28, 2010
by the Horry County Probate Court. The Guardian's Ward, Erik Randall
Rabon, was receiving medical treatment in Aiken County, South Carolina
when he expired from his injuries and resulting medical conditions on July 30,
2011. On September 30, 2011, Plaintiff, Adam Corey Rabon was qualified and
formally appointed by the Horry County Probate Court as Personal
Representative for the Estate of Erik Randall Rabon, deceased, who last
resided in Horry County, South Carolina.

000046

2. The Defendants, Huggins Beach Service, Inc., [hereinafter "Huggins Beach Service"], is, upon information and belief, a corporation, limited liability company, partnership, association or some other organization organized and existing under and by virtue of the laws of The State of South Carolina. Defendant Huggins Beach Service is authorized to conduct business in the State of South Carolina and licensed and doing business within the city limits of Myrtle Beach and Horry County, South Carolina through its agents, servants and/or employees.

3. Defendant Huggins Beach Service is, upon information and belief, and at all times herein mentioned, in the business of beach service, patrol, beach equipment sales and rentals and safety. Defendant Huggins Beach Service employed agents, employees and servants for the purpose of beach patrol, service, beach equipment sales and rentals and safety, particularly to operate motor vehicles upon the beaches within close proximity to sunbathers and the public as a whole on the beach.

4. The City of Myrtle Beach is a municipality, governmental entity, agencies or political subdivisions of the State of South Carolina and is subject to the protection, liability and jurisdiction imposed by S.C. Code Ann. § 15-78-40 (1976) and other pertinent portions of S.C. Code Ann. § 15-78-40, et seq. currently referred to as the South Carolina Torts Claims Act; and the injury hereinafter described occurred in Horry County, South Carolina.

5. This action is brought by Plaintiff Adam Corey Rabon as Personal Representative for the Estate of Erik Randall Rabon, Deceased, whose estate is being administered through the Office of the Probate Court for Horry County, South Carolina, under file number 2011-ES-26-1370.

6. This action is further brought for the benefit of the deceased's biological daughter, namely Summer Rabon, as statutory beneficiary of the Estate of Erik Randall Rabon, deceased under South Carolina Code Ann. § 15-78-170 et. seq. (1976) for the decedent's wrongful death and conscious pain and suffering.

7. Plaintiff's decedent eventually expired from his injuries, leaving his biological child, namely Summer Rabon, whose benefit this action is brought. Erik Randall Rabon's injuries and death caused by the Defendants' actions, inaction and omissions as alleged herein deprived her of his love, care and consortium, and caused her to suffer pecuniary loss, funeral expenses, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprived her of the use and comfort of the Plaintiff's decedent's society, the loss of his experience, knowledge and judgment in managing the affairs of himself and his beneficiary, in addition the loss of his ability to earn money for the support, maintenance, care and protection of his child, all to her injury and actual damage as the trial jury may deem just and proper.

8. The decedent was not negligent in the cause of his injuries or death nor did any alleged negligence on his part cause or contribute to his injury and death.

9. Heretofore, to wit: On or about May 14, 2010 at approximately 1:27 p.m., the Plaintiff's Decedent, Erik Randall Rabon, [hereinafter "Erik Rabon"] was relaxing and lying on the sandy portion of the beach near the ocean located between 8th and 9th Avenues North in Myrtle Beach, South Carolina. At the time Erik Rabon was lying on the beach, Defendant Craig Risbourg was operating and driving a 2004 Chevrolet truck bearing a South Carolina license plate displaying plate number DRU 806 and owned by Huggins Beach Service, Inc. As Defendant Risbourg was operating said vehicle, Defendant Risbourg drove said vehicle over and on top of Erik Rabon at a fast, rapid and dangerous rate of speed and with great force and violence. Defendant Risbourg was unaware of Erik Rabon being pinned under said vehicle and continued to drive forward and pushed and dredged Erik Rabon forward by his head and other parts of his body for a distance through the beach sand until said vehicle could no longer continue to travel forward. During the time after Defendant Risbourg's and Huggins Beach Service's vehicle came to a complete stop, Erik Rabon was conscious and screaming and begging for the vehicle's removal while he was pinned under the vehicle. While he was pinned beneath said vehicle, he was required to endure the vehicle's hot motor and other truck parts for a long period of time until a

special air lift bag was obtained and brought to the emergency site to lift the vehicle off of his body for his rescue. While Eric was pinned underneath said vehicle he was unable to receive medical attention for his injuries and to prevent the causation of further injury and reduce his pain and suffering and fear of imminent death. All of the aforementioned acts committed by Defendants have caused Erik Rabon to sustain severe, permanent and disabling injuries.

10. That as a direct and proximate result of being rammed by, pushed by and pinned under said vehicle, Erik Rabon received injuries to his brain, head, neck, back, arms, legs and other parts of his body; the muscles, nerves and sinews of his body were stretched, torn, bruised and damaged; he suffered multiple crushed and broken cervical vertebrae and his spinal cord had been permanently damaged and extensively lacerated; he had suffered brain swelling and had been rendered unconscious and in a coma-like state; his health and body mobility had been greatly impaired; for the remainder of his life he was dependent upon others as well as continued medical staff during all aspects and details of his existence; he required the assistance of a respirator and ventilator to breathe; he suffered post traumatic stress disorder; had lost time from work; a loss of earning capacity; required to expend and had expended money for hospitalization; care of doctors and other medical necessities; and suffered great pain and mental anguish until his death, all to his injury and damage.

11. Erik Rabon's injuries, death and damages aforesaid were due directly to and proximately caused by negligence, gross negligence, careless and reckless acts of commission and/or omission on the part of Defendants as herein below stated, in the operation of the above described vehicle which was either owned by Defendant Risbourg or operated by him with permission of the owner Huggins Beach Service in one or more of the following particulars, to wit:

(AS TO DEFENDANTS RISBOURG AND HUGGINS BEACH SERVICE)

- (a) In failing to maintain a proper lookout;
- (b) In driving too fast for the conditions then and there existing;
- (c) In driving a motor vehicle of that size on the sandy beach;
- (d) In failing to properly and adequately train and supervise lifeguards, drivers and other employees, agents and servants of Defendant Huggins Beach Service in operating a motor vehicle on the beach;
- (e) In failing to maintain proper control over his vehicle;
- (f) In failing to properly and adequately equip its vehicles with adequate mirrors and other equipment to observe or detect the public lying on the beach;
- (g) In failing to equip his vehicle with adequate and safe brakes and if so equipped, in failing to use and apply his brakes in order to avoid a collision with Plaintiff's vehicle;
- (h) In failing to stop his vehicle prior to running on top of Erik Rabon and pushing Erik Rabon's head and other parts of his body for a

distance before said vehicle was unable to continue moving forward;

- (i) In failing to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances;
- (j) In failing to investigate the driving history of Defendant Huggins Beach Service employee(s) and driver(s) permitted by it to operate a motor vehicle on the beach and not prohibiting or limiting such employee(s) or driver(s) from operating a motor vehicle on the beach;
- (k) In allowing and permitting its employee(s), agent(s), servant(s), lifeguards and drivers to operate its vehicles on the beach in a careless manner;
- (l) In allowing and permitting its employee(s), agent(s), servant(s), lifeguards and drivers to operate its highway motor vehicles in areas except the dirt road between the boardwalk and the sandy beach, as said dirt road is designated to highway motor vehicle travel;
- (m) In failing to employ sufficient numbers of employees to work the beach;
- (n) In allowing and permitting highway motor vehicles on the sandy beach during times of the year and times of the day that are notoriously congested;
- (o) In failing to implement the use of smaller vehicles such as all-terrain vehicles, golf carts and other like vehicles to be used on the beach to fulfill its beach patrol, sales, service and safety mission;
- (p) In valuing profit more than safety in failing to adequately equip its motor vehicles with mirrors or cameras to view sunbathers;
- (q) In failing to comply with the standards and procedures established and set forth in Defendant Huggins Beach Service policies and manuals;
- (r) In failing to adhere to the guidelines and requirements established or suggested by the City of Myrtle Beach, including but not limited

to the Water Safety Program implemented by the City on September 9, 2008 and its applicable agencies, committee(s), board(s), counsel or other bodies;

- (s) In failing to maintain the sense of security and safety a sunbather expects to be provided on the beach;
- (t) In failing to equip the vehicle with audio devices to detect obstructions in front of said vehicle or warn others of an approaching vehicle;
- (u) In failing to periodically evaluate, assess potential risks and operational safety hazards, by the Defendants' employees or owners or an independent risk assessment expert;
- (v) In failing to warn, through signage or otherwise, the public and Plaintiff of motor vehicles operating on the beach within close and dangerous proximity to sunbathers and others on the beach;
- (w) In failing to create and ensure a safe and secure beach for the public to sunbathe or otherwise use the beach and its amenities;
- (x) In creating an obstacle course of sunbathers, pedestrians and other occupants for beach service, patrol, sales and safety personnel to negotiate;
- (y) Any or all of which were the direct and proximate cause of the damages suffered by the Plaintiff's decedent herein, said acts being in violation of City of Myrtle Beach and/or Horry County ordinances and regulations as well as the statutory laws of the State of South Carolina, applicable case law, codes and ordinances.

12. Any one or more of the foregoing acts of negligence, gross negligence, careless and reckless acts of commission and/or omission on the part of the Defendants, furnished the proximate cause of the collision, injuries, conscious pain and suffering and the death of Erik Randall Rabon.

13. The Plaintiff is entitled to judgment against the Defendants, in an amount of such damages for the wrongful death and conscious pain and

suffering of Erik Randall Rabon as may be found by this Honorable Court and the Jury at the trial of this matter.

(AS TO DEFENDANT CITY OF MYRTLE BEACH)

14. Erik Rabon's injuries, death and damages aforesaid were due directly to and proximately caused by the negligence, gross negligence, careless and reckless acts of commission and/or omission on the part of Defendant City of Myrtle Beach as herein below stated in one or more of the following particulars, to wit:

- (aa) In failing to ensure that qualified drivers were employed by its beach service providers;
- (bb) In failing to provide adequate public safety to beach goers visiting the public beaches within the City of Myrtle Beach;
- (cc) In attempting to delegate a non-delegable duty to provide public safety services to beach goers visiting the public beaches within the City of Myrtle Beach;
- (dd) In creating and maintaining a franchise agreements with beach patrol, sales, service and safety business using a dual role scheme;
- (ee) In failing to properly supervise the training and discharge of beach patrol, sales, safety and other services by Huggins Beach Service to ensure primary emphasis on vehicle operation safety, rather than other beach activities;
- (ff) In failing to enforce all requirements set forth within the Franchise Agreement with Defendant Huggins Beach Service;
- (gg) In failing to inspect Defendant Huggins Beach Service employee driving records and driving performance and procedures to ensure vehicle operation beach safety;

- (hh) In failing to objectively inspect and evaluate the credentials and qualifications of the drivers employed by Huggins Beach Service to ensure appropriate training and experience;
- (ii) In failing to conduct a thorough and complete investigation of the incident in which Plaintiff received injuries;
- (jj) In failing to adequately implement remedial measures which were learned from previous beach injuries that would have prevented Plaintiff's injuries and disabilities;
- (kk) In omitting references of futile efforts of other beach service personnel to adequately respond to the injury scene and obtain adequate written reports and/or summaries of witnesses' statements;
- (ll) In awarding a Franchise Agreement to a business with a greater emphasis on beach rentals rather than beach safety;
- (mm) In jeopardizing its duty to provide beach safety to the general public in exchange for financial gain;
- (nn) In breaching the public trust; and
- (oo) In failing to prohibit unqualified driver(s) of Defendant Huggins Beach Service from operating motor vehicles on the beach;
- (pp) In failing to warn, through signage or otherwise, the public and Eric of motor vehicles operating on the beach within close and dangerous proximity to sunbathers and others on the beach;
- (qq) In failing to uphold its promises and assurances to the public through its posted signage and/or ordinance that motor vehicles will not be driven on the beach;
- (rr) Any or all of which were the direct and proximate cause of the damages suffered by the Plaintiff's decedent herein, said acts being in violation of City of Myrtle Beach and/or Horry County ordinances and regulation as well as the statutory laws of the State of South Carolina, applicable case law, codes and ordinances.

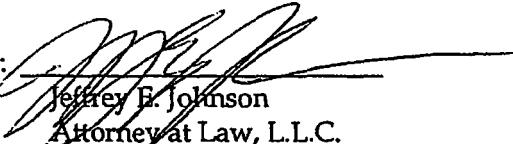
15. That by reason of the aforesaid negligent, grossly negligent, careless and reckless acts of commission and/or omission on the part of the Defendants as aforesaid, Erik Rabon incurred injuries, pain and suffering and death and incurred actual damages and is entitled to such punitive damages as the trial jury may deem just and proper.

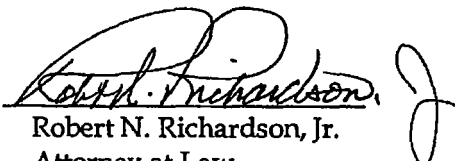
WHEREFORE PLAINTIFF PRAYS:

1. For judgment against Defendant Risbourg in a sum sufficient to adequately compensate the beneficiary for the wrongful death of Erik Randall Rabon, deceased and to adequately compensate Plaintiff for further actual and punitive damages as the trial jury may deem just and proper;
2. For judgment against Defendant Huggins Beach Service in a sum sufficient to adequately compensate the beneficiary for the wrongful death of Erik Randall Rabon, deceased and to adequately compensate Plaintiff for further actual and punitive damages as the trial jury may deem just and proper;
3. For judgment against Defendant City of Myrtle Beach in a sum sufficient to adequately compensate the beneficiary for the wrongful death of Erik Randall Rabon, deceased and to adequately compensate Plaintiff for further actual damages as the trial jury may deem just and proper;

4. For the costs and disbursements of this action; and
5. For such other and further relief as this Honorable Court may deem just and proper.

RESPECTFULLY SUBMITTED,

By: 
Jeffrey E. Johnson
Attorney at Law, L.L.C.
1409 Second Avenue
P.O. Drawer 1829
Conway, S.C. 29528
Phone: (843) 488-5333
FAX: (843) 488-4290

By: 
Robert N. Richardson, Jr.
Attorney at Law
1305 Third Avenue
Conway, SC 29526
Phone: (843) 248-9831
FAX: (843) 248-6680

February 1, 2012
~~November~~, 2011
Conway, South Carolina

Attorneys for Plaintiff

COPY

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

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

PLAINTIFF,

vs.

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

DEFENDANTS.

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

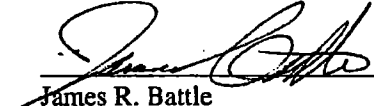
**CITY'S MOTION FOR
SUMMARY JUDGMENT**

FILED
HORRY COUNTY
2011 APR 28 PM 12:32
KELANNE HUGGINS-WARD
CLERK OF COURT

PLEASE TAKE NOTICE that the City, by and through its undersigned counsel, moves and will move, at such time and place as may be scheduled by the Court of Common Pleas for Horry County, at least ten (10) days hence, for an Order granting summary judgment on behalf of the City, pursuant to Rule 56, SCRPC, on the grounds that there are no material issues of fact, and the City is immune from liability under the South Carolina Recreational Use Statute, S.C. Code Ann. § 27-3-10, et. seq.

The accident occurred as the result of the actions of a third party independent contractor and not as the result of the actions of anyone employed by the City of Myrtle Beach. S.C. Code Ann. § 5-7-145. The Plaintiff was resting on the public seashore when the accident occurred. Under South Carolina law, a city owes no duty of care to keep the public seashore safe for entry or use by persons such as the Plaintiff who use it for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such property to such persons entering for such purposes.

This motion will be supported by the City's Memorandum, affidavits (to be submitted), Water Safety Agreement between the City and Huggins Beach (attached), and Plaintiff's Complaint and discovery responses (attached).


James R. Battle
BATTLE & VAUGHT, P.A.
Attorney for Defendant City of Myrtle Beach
P.O. Box 530, 1200 Main Street
Conway, SC 29528
(843) 248-4321 (phone)
(843) 248-5421 (fax)
jbattle@battlevaught.com

April 28, 2011
Conway, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

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

PLAINTIFF,

vs.

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

DEFENDANTS.

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

**CITY'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

PLAINTIFF, City of Myrtle Beach would respectfully show the Court:

Nature of the Case

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

Standard of Review

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

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

Facts

On May 14, 2010 at approximately 1:27 PM, Erik Rabon was relaxing and lying on the sandy portion of the beach between 8th and 9th Avenues North in the City. See Complaint, ¶ 6. This area is patrolled by Huggins Beach, a City franchisee contracted to provide lifeguard and water safety services to the beach going public. See Franchise Agreement. At or about the same time and location, Craig Risbourg, a manager for Huggins Beach, patrolled the beach in a Huggins Beach truck. See Risbourg Statement. When Risbourg made a right-hand U-turn, he struck Rabon causing him bodily injury. See Risbourg Statement & Complaint, ¶ 7.

Analysis

Plaintiff's Complaint alleges the City committed 17 negligent acts or omissions, which can be grouped into 7 general allegations: (1) the City failed to ensure Huggins Beach hired qualified drivers; (2) the City failed to provide adequate beach safety services; (3) the City failed to enforce its Franchise Agreement with Huggins Beach; (4) the City failed to adequately investigate Plaintiff's accident; (5) the City failed to learn from prior beach accidents; (6) the City failed to post warning signs; and (7) the City failed to enforce its own signs and ordinances prohibiting the public from driving on the beach. See Complaint, ¶ 9.

“An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence.” *Oblachinski v. Reynolds*, 391 S.C. 557, 559, 706 S.E.2d 844, 845 (2011).

Under the South Carolina Recreational Use Statute, S.C. Code Ann. § 27-3-10, et seq.,

the City does not owe the Plaintiff a duty of care.

The City, as the landowner where Plaintiff's injuries occurred, does not owe a duty of care to Plaintiff. Under the Recreational Use Statute (“RUS”) a landowner owes no duty of care to keep the premises safe for those who have his permission to use his land free of charge for recreational purposes. S.C. Code Ann. § 27-3-30. The landowner has no duty to warn such persons of dangerous conditions on the land; extends no assurance that the premises are safe; and does not confer the legal status of an invitee or licensee on the people permitted to use the land. *Id.*; S.C. Code Ann § 27-3-40.

Applying the RUS to the instant case, it is undisputed that the City owns the beach where Plaintiff's accident occurred and that the City does not charge admission for entry to the beach. Moreover, Plaintiff qualifies as a recreational user of the City's beach because just prior to the accident Plaintiff was “relaxing and lying in the sandy portion of the beach near the ocean.” See Complaint, ¶ 6. Therefore, pursuant to the RUS, the City owed Plaintiff no duty of care to protect him from, or warn him of, any hazards connected with lying on the beach.

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

The RUS does not limit a landowner's liability for a grossly negligent, willful, or malicious failure to guard or warn against a dangerous condition. S.C. Code Ann. § 27-

3-60(a). Therefore, to overcome the RUS's limitation on liability, Plaintiff must present evidence that the City's acts were grossly negligent, willful, or malicious. Plaintiff's Complaint alleges gross negligence on the part of the City but does not allege willfulness or malice. See Complaint, ¶ 9.

Gross negligence is defined as the "intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do...[G]ross negligence connotes the failure to exercise even *slight care*." *Clyburn v. Sumter County School Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994) (emphasis added). Gross negligence ordinarily is a mixed question of law and fact. See *Rogers v. Atlantic Coast Line R.R. Co.*, 222 S.C. 66, 71 S.E.2d 585 (1952). When the evidence supports but one reasonable inference, however, the question becomes a matter of law for the court. See *Foster v. South Carolina Dep't of Highways and Public Transportation*, 306 S.C. 519, 413 S.E.2d 31 (1992).

Plaintiff's Complaint largely alleges that the City breached a duty to Plaintiff by hiring Huggins Beach to provide water safety on its beaches. See Complaint, ¶ 9.

First, the duty of slight care does not require the City to provide beach safety to the general public. See *Cole v. SCE&G, Inc.*, 362 S.C. 445, 455, 608 S.E.2d 859, 864 (2005) (Under the RUS a landowner has a duty to exercise only slight care, and safety features such as lifeguards and lifesaving equipment exceed this "slight care" standard).

Second, S.C. Code Ann. § 5-7-145 provides that the City *may*, but is not required, to provide lifeguard and other safety related services on and along the public beaches within its corporate limits. *If* it decides to provide lifeguard services along the public beaches within its corporate limits, it may do so by an agreement with a private beach

safety company. Id. Therefore, agreements like the City's Franchise Agreement with Huggins Beach are permitted under South Carolina's statutory law.

If the City elects to provide lifeguard services through a private beach safety company, then the City may grant an exclusive right to that beach safety company to rent certain beach equipment to the public. Id. Therefore, "dual role schemes" where the beach safety company rents beach equipment and provides beach safety is also permitted under South Carolina's statutory law.

Because South Carolina law grants the City explicit authority to hire private companies such as Huggins Beach and to allow those companies to operate under a "dual role scheme," the beach safety services provided on the City's property do not breach its duty of slight care.

The legislative intent behind the RUS was to protect landowners from lawsuits such as Plaintiff's.

The S.C. legislature passed the Recreational Use Statute ("RUS") "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." S.C. Code Ann. § 27-3-10. The City "is known for its strong tourist population" and depends on the beach to attract those tourists. *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 166, 547 S.E.2d 862, 867 (2001). The protections provided by the RUS are critical to the City's ability to keep the beach open to the public for recreational use, and therefore, granting the City's motion is in keeping with the RUS's purpose.

Under the public duty rule the City does not owe the Plaintiff a duty.

To the extent Plaintiff's Complaint alleges the City owes the Plaintiff a statutorily created duty, the public duty rule holds that "a statute creating duties of office imposes on the public officer no duty of care towards individual members of the public." *Rayfield v. S.C. Dept. of Corrections*, 297 S.C. 95, 105, 374 S.E.2d 910, 915 (S.C.App. 1988). The basis for the public duty rule is that "a statute which creates or defines the duties of a public office has the essential purpose of...securing the general welfare and safety of the public. These statutes are not intended primarily to protect discrete individuals from particular types of harm. In such cases, any actual benefit or injury to a particular individual from the performance or nonperformance of the duties of the office is incidental to the purpose of the statute." *Id.* Therefore, the City does not owe a statutorily created duty to the individual Plaintiff.

In addition, the public duty rule is not an affirmative defense. *Id.* "It denies an element of the [P]laintiff's cause of action – the existence of a duty of care. The burden is on the [P]laintiff to establish a duty of care owed to him." *Id.*

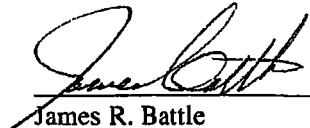
South Carolina common law recognizes an exception to the public duty rule, where the statute creates a "special duty" to "identifiable individuals from a particular kind of harm." *Id.* at 106, 916. "A special duty exists if: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not to cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his

duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office." *Id.*

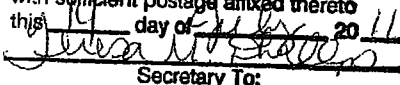
Neither the statutes implicated nor the facts alleged in Plaintiff's Complaint sets forth a "special duty" to "identifiable individuals from a particular kind of harm." Therefore, the public duty rule's exception does not apply.

Relief Sought

For the foregoing reasons, the City requests the Court approve the City's motion for summary judgment and dismiss Plaintiff's Complaint as to the City.


James R. Battle
BATTLE & VAUGHT, P.A.
Attorney for Defendant City of Myrtle Beach
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Conway, SC 29528
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(843) 248-5421 (fax)
jbattle@battlevaught.com

July 14, 2011
Conway, South Carolina

CERTIFICATE OF SERVICE
The undersigned hereby certifies that
a true copy of the foregoing pleading
has been served upon opposing counsel
by mailing a copy properly addressed
with sufficient postage affixed thereto
this 14 day of July, 2011

Secretary To:
Battle & Vaught, P.A.
P.O. Box 530
Conway, SC 29528
Attorney's for City of Myrtle Beach

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

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

PLAINTIFF,

vs.

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

DEFENDANTS.

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

AFFIDAVIT OF LAURA BONHOMME

Personally appeared before me Laura Bonhomme, who being duly sworn, states:

1. I have personal knowledge of the matters stated herein.
2. I am a Claims Specialist with Progressive Insurance. Some of my duties as a Claims Specialist include gathering and processing information needed to complete insurance claims, investigating pending claims, and resolving discrepancies.
3. Pursuant to my duties as a Claims Specialist, I created the attached Craig Risbourg statement at or near the time that I spoke with him.
4. Risbourg's statement was kept in the course of Progressive's regularly conducted business activity.
5. It is the regular practice of Progressive's business activities to make documents such as Risbourg's statement.

Signature Follows

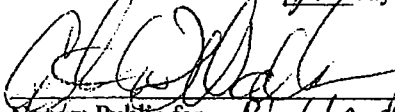
A handwritten signature in cursive script, appearing to read 'Laura Bonhomme', written over a horizontal line.

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Laura Bonhomme

Sworn to before me this 12th day of July, 2011


Notary Public for Richland
State of South Carolina
My Commission Expires 02/21/2017

RECORDED STATEMENT
CRAIG RISBOURG

BLANK

Q: So how long had you been on the beach that day?

A: I come on duty at 8:00 AM, and this happened about 1:30, so that would be probably five, 5 ½ hours.

Q: What time were you planning to get off that day?

A: 5:00 PM.

Q: All right, so Craig, just tell me what happened, best that you can recall.

A: At the time, when the lifeguard goes to lunch, I supervise his area of operations, so at that time the lifeguard in that area was off for lunch and I just finished patrolling the beach and I stopped right there at 8th Avenue and facing.....and I just sat there for a minute and I was observing the water, watching the water and making sure there wasn't anything going on, and like I said, I just patrolled that entire area from 2nd Ave to 8th Ave and when I left, when I took off in the area after about a minute and a half, I made a right turn and just within a few - after I took off, I heard a noise, so I got out of the truck and then I had rolled over the guy. Obviously you know, he was in my blind spot in my truck when I took the right turn and I just didn't see him.

Q: Was he to your right then to the best you can detect?

A: To my right, yes. It was absolutely to my right.

Q: Would you call it like to the middle? I know you can't tell because you never saw him, but would you say probably he was like beside your right tire or up a front to the right?

A: I would imagine he was maybe like five or ten feet to my right, you know?

Q: Toward the or the back?

A: Towards the front right, yeah.

Q: Okay.

A: So in other words, I made a right hand turn from where I was at, you know, maybe I may have went a few feet forward and turned right, you know? I can't really exactly how far before the turn, but it happened quick.

Q: Right.

A: And I wasn't expecting this to happen, so

Q: Yeah, I know.

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A: So I just kind of took off and made a right turn and then boom, boom, boom, and I stopped right away, you know, got out and looked and the guy was under the truck.

Q: Okay, did he have a lot of beach equipment there?

A: No, it was just him and his t-shirt, that's it. He didn't even have a beach towel.

Q: Okay.

A: I saw a t-shirt, a can of Skoal and maybe a pair of sunglasses on the beach, that's it.

Q: No alcohol or anything?

A: I didn't see any.

Q: Did he have anybody with him?

A: No, he was alone.

Q: Okay. happen?

A: Well as soon as I stopped and I got out and looked under the truck and saw him, I called the police immediately, within seconds after this. I have them on speed dial on my phone, so I called them right away.

Q: Right.

A: And they had Dan Lance come down and I guess I was right there and just watched them pick him up. They put these inflatable bags they put up under the side of the truck, lifted the truck and then they took him out.

Q: How did you make the decision to not move the vehicle until they got there? Was that just to.....?

A: Training. You don't move it, no.....You know what I mean? Any time there's a possibility of a spinal injury, you don't move.

Q: Okay, so the TAPE SLIDING.....so the best course is to leave everything as is. Were you able to administer him any emergency aid?

A: No.

Q: What kind of injuries did you observe?

A: What I could see was scratches on his face and chest and it appeared he was bleeding some from around his nose, his face, maybe he got scraped. Maybe he was laying on his back, you know, and whatever was on the bottom of the truck scraped him, you know? And of course, he was

Q: run over his body?

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A: I don't think so, no. I think I straddled him.

Q: Okay. So you didn't leave the truck rolled up on him. You just left the truck where it was?

A: No, no, he was between the tires. He was parallel with the truck, he was parallel with the ocean. So when I turned right and I was going parallel, he went between the tires.

Q: Okay. Between the front tires? His body was facing the same position like your truck?

A: His seat would have been facing south and his head would have been facing north. The truck would have been facing south.

Q: Okay. All right. Okay, and was he conscious?

A: Yes.

Q: Okay. What did he say? Did he say anything?

A: He was just moaning, I can't breathe.....oil pan was right on his chest at the time, you know?

Q: Okay.

A: He was complaining he was having trouble breathing.

Q: All right. Have you ever had an accident before.....injury?

A: Yes. With an injury? No, none that I know of, no.

Q: All right. Driving record?

A: It's okay.

Q: All right.....TAPE SLIDING....had you had anything to drink that day, alcohol?

A: No, we left the scene of the accident, Me and Earl, and we went down to the Clinic here and I took a breathalyzer and a urine test and was perfectly clean.

Q: Excellent. Good. Okay.

A: Did that immediately after the accident.

Q: What at?

A: It's a walk-in clinic on 21st Avenue. I'm sure Earl knows the name of it. I don't know the name off hand, I just know that it's a walk in clinic?

Q: Like an Urgent Care kind of place?

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A: Like that. Yeah. It's one of these places you can walk in and just see a doctor, you know? You don't have to have an appointment or anything like that.

Q: And who did you say went with you?

A: Me and Earl. Earl drove me there.

Q: Is that Earl Huggins?

A: Earl Huggins drove me there, yeah.

Q: Okay, did he come to the scene after the accident?

A: Yes he did. He was there within – as soon as I called the police, I called him. And he was there. He was on the scene – I don't know if he got there before they actually got him out from under the truck, but he was there, you know, he was there quick. He was there within a few minutes.

Q: All right. Have you heard any updates on the condition of the guy from the

A: Earl went there to go check on him last night. He's in the hospital. He's had some surgery. And they won't release any information. I tried to get the police to tell me what was going on with him several times and they tell me they can't give me any information. But Earl went down there last night and he would know better than I would on that.

Q: He what?

A: Yeah, Earl Huggins went to the hospital last night to see the guy.

Q: Did he see him? Was he able to ...?

A: Yes he did see him.

Q: Okay.

A: So it would be best to talk to him about the guy's condition. He'd be able to tell you better. I didn't actually see him.

Q: All right. Anything else you can think of Craig, that would was there any witnesses that saw this happen?

A: I don't think anybody saw it actually happen, but some people saw it right after the fact, you know?

Q: Okay,.....TAPE SLIDING.....

A: No I didn't.

Q: Do you know what police officer investigated, led the investigation?

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A: No Mam I don't.

Q: Was it a Myrtle Beach PD?

A: Yeah, as a matter of fact, he gave me a careless operation ticket. Let met see if I can find my wallet. I'll give you his name. He wrote it on the ticket. Just a second. Let's see.....anything else you want to ask me about the

Q: I think I've about got everything I need. What's that?

A: Let me find these cars, and I'll walk to the car and get my wallet.

Q: Did they give you like a green form?

A: A green form? They gave Earl a form to send into you. If that's what you're talking about.

Q: Yeah, that's what I'm talking about.

A: Can I call you right back with that?

Q: I'm going to go ahead and end this statement. Have you understood all my questions?

A: Yes.

Q: And all your answers been true and correct?

A: Yes Mam.

Q: And do me a favor Craig and confirm your social security number on here for identification purposes?

A: 434-78-1069.

Q: Okay great. I'm going to turn this off now, okay?

A: Thank you.

CERTIFIED TRUE AND CORRECT COPY

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
CITY OF MYRTLE BEACH

Mudia Zangini
City Clerk, City of Myrtle Beach
Deputy City Clerk
DATE 7/14/11

SCANNED
DATE 10-
BY LGM

WATER SAFETY FRANCHISE

WHEREAS, the City of Myrtle Beach requires the protection of its tourist and residential population through an efficient and effective Water Safety Program; and

WHEREAS, the successful implementation of a Water Safety Program is imperative along the City's twelve miles of oceanfront; and

WHEREAS, these goals can be optimally achieved through the cooperation of the City of Myrtle Beach and the Concessionaires of beach equipment; and

WHEREAS, the City Council by Ordinance duly adopted on September 9, 2008, has authorized the City Manager to execute franchises with the concessionaires of the beach service in accordance with the terms of this franchise:

NOW, THEREFORE, PURSUANT TO THE FRANCHISE POWER OF THE CITY OF MYRTLE BEACH (City or Franchisor) in consideration of the foregoing premises and the mutual promises of each to the other made agree as follows:

The City grants Huggins Beach Service a franchise to operate a water safety service and beach concession on the public beach of the City in Zones 28 through 38 as described in Attachment "A" for a period time beginning upon second reading of the award ordinance and ending October 1, 2015, subject to the following terms and conditions:

SECTION 1. PERIOD OF OPERATION:

Franchisee shall conduct water safety each year during the period beginning April 15 and ending September 30. Franchisee shall ensure minimum lifeguard staffing in each zone, between the hours of 8:00 a.m. and 5:00 p.m., Monday through Sunday, according to the following schedule:

April 15 through 3 rd week in May:	20% of full complement
4 th week in May through June 1:	50% of full complement
June 2 through 2 nd week of August	Full complement

3 rd week of August	75% of full complement
4 th week of August through Labor Day	50% of full complement
Labor Day through September 30	20% of full complement

Franchisee may rent beach equipment outside said period of operation, provided however, that lifeguards must be on duty at all times that beach equipment is on the beach. The Franchisee shall provide lifeguards as deemed necessary in consultation with the City.

Franchisee shall, in addition, patrol the beach between the hours of 5:00 p.m. and 7:00 p.m. The number of lifeguard personnel shall depend of the number of zones the franchisee controls. In addition to lifeguards, the Franchisee shall provide the following equipment sufficient for each area of responsibility: vehicle, jet ski or similar device, first aid kit, rescue buoy, two-way radio and two-way radio with police frequency provided by the police department.

Franchisee understands and agrees that additional stands and lifeguard personnel may be deemed necessary by the City and hereby agrees to provide such additional lifeguards after consultation with the City.

From the 1st week of June through Labor Day, and during the hours of operation, for every one (1) to six (6) stands that the Franchisee controls, a minimum of one (1) Lifeguard Only is required, and for every six (6) stands thereafter. A "Lifeguard Only" may be mobile only within a six (6)-stand range. Franchisee shall provide the Beach Patrol with the stand number of each Lifeguard Only. During the hours of operation and term of the franchise agreement, for every one (1) to ten (10) stands that the Franchisee controls, a minimum of one off-stand supervisor shall be provided. A supervisor cannot be a Lifeguard Only except during the lunch period.

SECTION 2. STANDARDS OF PERFORMANCE & LIFEGUARD CERTIFICATION

All lifeguards shall be at least seventeen (17) years of age, be of good moral character and abide by the highest standards of cleanliness and physical appearance.

All lifeguards shall:

- (A) Possess adequate vision, hearing acuity, physical ability and stamina to perform the duties of open water lifeguard;
- (B) Must possess a valid lifeguard card.
- (C) Be in good health and demonstrate an ability to swim 500 meters over a measured course in a twelve (12) minute period;
- (D) Possess a Community First Aid Certification or its equivalent;
- (E) Possess a CPR Certification or equivalent for professional rescue; and
- (F) Successfully complete a course consisting of a total of not less than 40 hours in open water life saving which meet the criteria of the United States Lifeguard Association. At the beginning of each season, the Franchisee shall prepare a training schedule for lifeguards and shall present it to the City. Franchisee shall insure that all lifeguards reasonably comply with that schedule. All lifeguards shall qualify by passing the "Minimum Training on Rescue Procedures" before beginning work on the beach.

The City shall, in consultation with Franchisee, establish pre-certification and in-service minimum training requirements and disseminate same to each Franchisee by March 30th of each year. Franchisee shall prepare a lifeguard training curriculum meeting those requirements and ensure that all lifeguard personnel qualify thereunder prior to beginning work and meet all in-service training requirements. Franchisee or designated representative and all franchise lifeguards shall attend all pre-certification and in-service training sessions. Failure to attend shall result in suspension from service until requirement is met.

Franchisee, all lifeguards and other franchise employees are prohibited from consuming alcoholic beverages while on duty or from reporting to work under the influence of alcohol or other controlled substances.

Franchisee shall not employ any individual as a lifeguard or beach concession employee who has been convicted of or plead guilty or nolo contendere to a felony or which is on parole or probation for a criminal offense.

Franchisee and any franchise employee who operates a motor vehicle in the performance of this franchise agreement shall possess a valid motor vehicle operator's

license, and successfully complete a Police Department offered training course for the type of vehicle driven on the beach.

Franchisee and the City shall determine an appropriate schedule for lunch breaks. Lunch breaks shall be staggered or alternated so that only every third lifeguard will be off-stand during designated lunch hours. The off-stand supervisor shall remain on the beach between the hours of 11:30 a.m. and 2:00 p.m. to augment the provision of water safety services during those hours.

Franchisee shall be solely responsible for any required disciplinary action of its lifeguards.

SECTION 3. LIFEGUARD UNIFORMS & EQUIPMENT

All uniforms shall be of the same color and combination. All lifeguard tee shirts shall be gold with navy blue lettering. "Life Guard" shall be printed on the front. The name of the franchise shall be printed on the back. The City of Myrtle Beach Seal shall be on the right sleeve. The company or non-commercial logo may be printed on the left sleeve.

All lifeguard swim trunks shall be navy blue. "Life Guard" shall be printed in gold letters on the right front leg. Company or non-commercial logo may be applied to left front leg. Pattern may be repeated on the rear of the garment.

Female lifeguard personnel shall wear a navy blue swimsuit. "Life Guard" shall be printed in gold letters on the front.

Outerwear shall be gold, with printing as described above.

Lifeguards shall wear shirts from 10:00 a.m. until 2:00 p.m.

All franchise stands shall be painted white and built according to City specifications. Each stand shall be maintained in good condition and be provided with the following minimum equipment:

Torpedo Buoy

Water Safety Flags (3)

First Aid Kit

Orange Lifeguard Umbrella with "Life Guard" in Navy Blue Letters

City Ordinance/Emergency Phone Number Sign

Every Other Stand Shall Have a Two-way Radio

Lifeguard stands shall be located at such distances and intervals as are determined by the City. In areas in which two franchises join, Franchisee shall not place beach equipment closer than twenty (20) feet to the point of junction. In addition, a twenty (20) foot opening shall be maintained at each street-end and a ten (10) foot opening at each public alleyway. In all cases, Franchisee, in setting up beach equipment, shall endeavor to provide the highest degree of public access possible. Franchisee agrees to remove fifty (50) percent of any un-rented chairs and umbrellas after 2:30 p.m.

Each Franchisee shall have an attended two-way radio with police frequency provided by the Police Department.

SECTION 4. BEACH SERVICE EQUIPMENT

No commercial or retail activity except as authorized herein shall be permitted on the public beach.

In return for the provision of water safety services and other considerations in Section 6, the Franchisee is hereby authorized to rent the following beach equipment:

- Chairs & footrests
- Umbrellas
- Windbreaks
- Floats
- Soft Boogie Boards

Franchisee may not rent any "hard" equipment including but not limited to:

- Surfboards
- Skim Boards
- Sailboats

Franchisee shall not display any signage other than specifically authorized herein as well as its company logo on its beach service equipment.

Franchisee is authorized to operate, in a safe and prudent manner, various types of motor vehicles in support of its water safety and beach concession operations. All such

vehicles shall be maintained in excellent mechanical condition, be neat in appearance and be properly licensed and insured as required by law, and operated by a properly licensed operator.

Except in the case of emergency, Franchisee is prohibited from bringing any chemicals, including but not limited to gasoline, oil and hydraulic fluid onto the public beach and shall be solely responsible for any release from its motor vehicles used on the public beach. In the event of spillage, Franchisee shall contain said spillage and contact Beach Patrol.

The City shall have the right to inspect and approve or disapprove the use of any motor vehicle.

SECTION 5. BEACH CLEANLINESS

Each Franchisee will be responsible for the cleanliness of its franchise zone(s) as assigned. The area of responsibility extends from the water line to the primary dune line. Each Franchisee will be held accountable to the City for the cleanliness of the beach in each respective zone. Re-occurring legitimate complaints about beach cleanliness in a specified zone shall be grounds for franchise termination.

At the beginning of each season, the City will provide trashcans as needed for each stand. The City shall be responsible for the trashcans pick-up on the beach.

SECTION 6. FINANCIAL REPORTING AND FRANCHISE FEES

Franchisee shall provide the City a review of the gross receipts prepared by a Certified Public Accountant no later than December 1 of each year during the term of this Franchise. The City may require an audited financial statement in its discretion.

Franchise fees shall be three percent (3%) of gross receipts, with a maximum of \$1,465.00 per stand, and shall be due and payable no later than December 31 of each year. Franchisee shall be afforded a ten (10) day grace period for payment of franchise fees, after which time a ten percent (10%) late fee will be assessed. Failure to pay franchise fees and any late fees within thirty (30) days of the due date shall be grounds for revocation of the franchise.

The maximum per stand charge shall be increased by ten percent (10%) on December 31st of 2010 and 2012.

SECTION 7. INSURANCE

Franchisee shall provide and pay for the following insurance coverages during the term hereof:

Public Liability – A general liability policy protecting Franchisee against liability or loss due to bodily injury, property damage or personal injury arising out of the performance of its franchise responsibilities and more specifically the provision of water safety service. Policy shall be written on an occurrence form and provide a combined single limit of liability of One Million Dollars (\$1,000,000) per occurrence. Coverage shall be included for: Premises/Operation; Products/Completed Operation; Contractual Liability; Independent Contractors and shall include a broad form property damage endorsement. In the event this policy shall exclude coverage for Lifeguard Liability as a professional service, Franchisee shall be required to provide and pay for professional service coverage protecting Franchisee against liability for the acts, errors and omissions of its water safety personnel.

Automobile Liability – A Business Automobile Liability policy protecting Franchisee against liability or loss due to bodily injury and property damage arising out of the operation of a motor vehicle in the performance of this Franchise. Policy shall be written on an occurrence basis and provide coverage for “any auto” with a combined single limit of liability of One Million Dollars (\$1,000,000) per occurrence.

Worker’s Compensation & Employers’ Liability – A Worker’s Compensation policy protecting Franchisee against liability or loss arising out of occupational injury or illness of its employees. This policy shall provide minimum limits of liability of: \$500,000 each accident; \$500,000 disease – each employee; and \$500,000 disease – policy limit.

Policy Endorsements:

Both the general liability and automobile liability policies, as well as any professional services policy shall be endorsed to name the City of Myrtle Beach as an “additional insured.”

All policies shall be endorsed to provide the City of Myrtle Beach sixty (60) days prior written notice of non-renewal, reduction or exhaustion of limits or cancellation.

All policies shall include a "waiver of subrogation" endorsement in favor of the City of Myrtle Beach.

Conditions:

The clause "other insurance" in a policy in which the City of Myrtle Beach is named as an "additional insured" shall not apply to the City of Myrtle Beach.

The insuring company shall have no recourse against the City of Myrtle Beach for the payment of any premiums, deductibles or assessments.

In the event Franchisee should fail to comply with the "loss reporting" requirements of any policy, that failure shall not adversely affect the coverage afforded the City, nor shall the City be responsible for complying with the reporting requirements of any policy.

SECTION 8. INDEMNIFICATION

With respect to the parties, and their officials, agents, employees, volunteers, contractors, or those who act on the Franchisor's or Franchisee's behalf in any authorized capacity:

- a. The Franchisee is informed of risks and obligations in performance of the franchise, and for valuable consideration received in the form of the granted franchise, the Franchisee agrees to assume and fully to take on to itself all of the risks and responsibilities in any way arising from, or associated with its participation in the Franchise, and
- b. The Franchisee does release the City from any and all claims, demands, suits, judgments, damages, actions and liabilities of every name and nature whatsoever, including attorney's fees and costs, whenever occurring, whether known or unknown, contingent or fixed, at law or in equity, that the Franchisee may suffer at any time arising from or in connection with participation in the franchise, including any personal injury, commercial injury or harm or damage to any property or person.

- c. Further, as to non-parties to this agreement, Franchisee further agrees to protect, defend, indemnify and hold the City free and harmless from and against any and all losses, fines, penalties, damages, settlements, costs, charges, professional fees or other expenses and liabilities of every kind and character arising out of or relating to any and all claims, liens, demands, obligations, actions, proceedings, or causes of action of every kind in connection with or arising out of this Franchise and the performance hereof, that are due to acts, errors, omissions or negligence of Franchisee, its officers, agents, employees or subcontractors.
- d. Franchisee further agrees to investigate, handle, respond to, provide defense for and defend the same at its sole expense and agrees to bear all other costs and expenses related thereto. In specific reference to the above, the Franchisee agrees to assume the legal defense, and vigorously defend upon actual notice of claim or suit, and, in doing so, completely indemnify the Franchisor from any loss including any damage model or attorneys' fees and cost, and hold harmless the Franchisor from and against any and all liabilities.
- e. In the event a claim or suit is made against the City or those who act on its behalf, arising from the Franchisee's operation of the franchise, the same shall be transmitted by City immediately, and the Franchisee has the immediate and absolute duty to defend the claim or suit, even if it is groundless, false or fraudulent, so that the Franchisor may not incur attorney's fees and costs arising from the claim or suit of non-parties. Should the Franchisor incur attorney's fees or cost, the Franchisee shall make the Franchisor whole upon demand.
- f. This promise binds heirs, executors, administrators, legal representatives and assigns of the Franchisee and survives this agreement for the length of time necessary under the applicable statute of limitations relating to any claim, suit or cause of action. This hold harmless, indemnification, and duty to defend shall be governed for all purposes by South Carolina law, without regard to such law on choice of law.

- g. Within the time as may be provided by law for the answer or defense of any filed claim or proceeding, but no later than thirty (30) days after the City receives notice of the commencement of any action or other proceeding in respect of which indemnification or reimbursement may be sought hereunder, the City shall notify the Franchisee. If any such action or other proceeding shall be brought against the City and be transmitted to the Franchisee, the Franchisee shall, within thirty (30) days acknowledge in writing its receipt of such notice from the City, and shall acknowledge and confirm the Franchisee's obligation to hold harmless, indemnify, and assume the defense, and it shall be obligated to assume the defense of such action or proceeding with counsel chosen by the Franchisee.
- h. Notwithstanding the foregoing, the City shall have the right to employ separate counsel at the City's sole cost and expense and to control its own defense of such action or proceeding if, in the reasonable opinion of counsel to the City, (a) there are or may be legal defenses available to the City that are different from or additional to those available to the Franchisee and which could not be adequately advanced by counsel chosen by the Franchisee, or (b) a conflict or potential conflict exists between Franchisee and the City that would make such separate representation advisable.
- i. The Franchisee shall not, without the prior written consent of the City, settle or compromise or consent to the entry of any judgment in any pending or threatened claim, action or proceeding to which the City is a party unless such settlement, compromise or consent includes an unconditional release of the City from all liability arising or potentially arising from or by reason of such claim, action or proceeding.
- j. Notwithstanding any other provision contained herein, the franchise may be terminated upon Franchisee's failure to honor this, or other indemnification, hold harmless or duty to defend obligations due and owing to the Franchisor, arising from the operation of Franchisor's beach safety franchise.

SECTION 9. TRANSFER OF FRANCHISE

A Franchisee may transfer his/her franchise to another franchise holder subject to a sixty (60) day notice to and upon approval of the City Manager. City Council must approve by Resolution any franchise transfer. All such approvals shall not be unreasonably withheld.

Violation of any provision of this Franchise Agreement shall result in the suspension of the Franchise Agreement or in the permanent revocation of the Franchise by City Council.

SECTION 10. ASSIGNMENT

This Franchise may not be assigned in whole or in part except upon the written consent of the City of Myrtle Beach.

SECTION 11. TERMINATION

In the event the Franchisee is determined to be in default under the terms of this Franchise, the City shall provide Franchisee written notice of default and afford the Franchisee ten (10) days in which to cure the default. Upon failure of the Franchisee to cure or show reasonable progress towards curing the default, the City shall provide written notice of termination to Franchisee and this Franchise shall be revoked by City Council.

SECTION 12. NOTICE AND CONTACT

Any papers, request, demand, authorization, direction, notice, consent or waiver provided, required or permitted to be made upon, given by, or furnished to the either party with respect to this franchise shall be sufficient for every purpose hereunder if in writing and mailed by United States Mail, certified or registered mail, postage prepaid and addressed as follows:

To the City:

Attention: City Manager

937 Broadway

P. O. Box 2468

Myrtle Beach, SC 29577

To the Franchisee:

Attention:

Mr. Earl Huggins

Huggins Beach Service

601-37th Ave North, Myrtle Beach, SC 29577

WITNESS THE DUE EXECUTION HEREOF ON THE DATE LAST SIGNED:

City of Myrtle Beach

By: Thomas E. Leath, its City Manager

Print name: THOMAS E. LEATH

Witness signature and printed name:

Joan Grove

JOAN GROVE

Date: 9-11-08

Franchisee

By: Earl Huggins, its Owner

Print name: EARL HUGGINS

Witness signature and printed name:

Gail Moyer

GAIL MOYER

Date: 9-11-08

ATTACHMENT A

<u>ZONE</u>	<u>DESCRIPTION</u>
1	From South City Limits to center line of 29 th Avenue South
2	From center line of 29 th Avenue South to center line of 28 th Avenue South
3	From center line of 28 th Avenue South to center line of 27 th Avenue South
4	From center of 27 th Avenue South to center line of 26 th Avenue South
5	From center line of 26 th Avenue South to center line of 25 th Avenue South
6	From center line of 25 th Avenue South to center line of 24 th Avenue South
7.	From center line of 24 th Avenue South to center line of 23 rd Avenue South
8.	From center line of 23 rd Avenue South to center line of alleyway/walkway at 22 nd Avenue South
9.	From center line of alleyway/walkway at 22 nd Avenue South to center line of alleyway/walkway at 21 st Avenue South
10.	From center line of alleyway/walkway at 21 st Avenue South to center line of 19 th Avenue South
11.	From center line of 19 th Avenue South to center line of alleyway/walkway north of 18 th Avenue South
12.	From center line of alleyway/walkway north of 18 th Avenue South to center line of 16 th Avenue South
13.	From center line of 16 th Avenue South to center line of 15 th Avenue South
14.	From center line of 15 th Avenue South to center line of 13 th Avenue South
15.	From center line of 13 th Avenue South to center line of 12 th Avenue South
16.	From center line of 12 th Avenue South to center line of 11 th Avenue South
17.	From center line of 11 th Avenue South to center line of 10 th Avenue South
18.	From center line of 10 th Avenue South to center line of 9 th Avenue South
19.	From center line of 9 th Avenue South to center line of 8 th Avenue South
20.	From center line of 8 th Avenue South to center line of 7 th Avenue South
21.	From center line of 7 th Avenue South to center line of 6 th Avenue South
22.	From center line of 6 th Avenue South to center line of Withers Swash
23.	From center line of Withers Swash to center line of 3 rd Avenue South
24.	From center line of 3 rd Avenue South to center line of 2 nd Avenue South

25. From center line of 2nd Avenue South to center line of 1st Avenue South
26. From center line of 1st Avenue South to center line of 1st Avenue North
27. From center line of 1st Avenue North to South side of 2nd Avenue North Pier.
28. From North side 2nd Avenue North Pier to center line of 3rd Avenue North
29. From center line of 3rd Avenue North to center line of 4th Avenue North
30. From center line of 4th Avenue North to center line of 5th Avenue North
31. From center line of 5th Avenue North to center line of 6th Avenue North
32. From center line of 6th Avenue North to center line of 7th Avenue North
33. From center line of 7th Avenue North to center line of 8th Avenue North
34. From center line of 8th Avenue North to center line of 9th Avenue North
35. From center line of 9th Avenue North to center line of alleyway/walkway South of Mr. Joe White Avenue
36. From center line of alleyway/walkway South of Mr. Joe White Avenue to center line of alleyway/walkway north of Mr. Joe White Ave
37. From center line of alleyway/walkway north of Mr. Joe White Ave to center line of 12th Avenue North
38. From center line 12th Avenue North to South side of 14th Avenue North Pier
39. From North side of 14th Avenue North Pier to center line of the alleyway/walkway at 16th Avenue North
40. From center line of the alleyway/walkway at 16th Avenue North to center line of City Park at 19th Avenue North
41. From center line of City Park at 19th Avenue North to center line of alleyway/walkway south of 21st Avenue North
42. From center line of alleyway/walkway south of 21st Avenue North to center line of 23rd Avenue North
43. From center line of 23rd Avenue North to center line of 24th Avenue North
44. From center line of 24th Avenue North to center line of 26th Avenue North
45. From center line of 26th Avenue North to center line of alleyway/walkway at 27th Avenue North
46. From center line of alleyway/walkway at 27th Avenue North to center line of alleyway/walkway at 29th Avenue North
47. From center line of alleyway/walkway at 29th Avenue North to center line of 31st Avenue North
48. From center line of 31st Avenue North to center line of 34th Avenue North

49. From center line of 34th Avenue North to center line of 37th Avenue North
50. From center line of 37th Avenue North to center line of 38th Avenue North
51. From center line of 38th Avenue North to center line of 39th Avenue North
52. From center line of 39th Avenue North to center line of 40th Avenue North
53. From center line of 40th Avenue North to center line of 41st Avenue North
54. From center line of 41st Avenue North to center line of 42nd Avenue North
55. From center line of 42nd Avenue North to center line of 43rd Avenue North
56. From center line of 43rd Avenue North to center line of 44th Avenue North
57. From center line of 44th Avenue North to center line of 45th Avenue North
58. From center line of 45th Avenue North to center line of 46th Avenue North
59. From center line of 46th Avenue North to center line of 47th Avenue North
60. From center line of 47th Avenue North to center line of 48th Avenue North
61. From center line of 48th Avenue North to center line of 49th Avenue North
62. From center line of 49th Avenue North to center line of 50th Avenue North
63. From center line of 50th Avenue North to center line of 51st Avenue North
64. From center line of 51st Avenue North to center line of 52nd Avenue North
65. From center line of 52nd Avenue North to center line of 53rd Avenue North
66. From center line of 53rd Avenue North to center line of City Park at South Side of Cabana Section
67. From center line of City Park, South Side of Cabana Section to center line Beach Place
68. From center line of Beach Place to center line of Seaside Place
69. From center line of Seaside Place to center line of alleyway/walkway South side Haskell Circle
70. From center line of alleyway/walkway South side Haskell Circle to center line alleyway/walkway North of 63rd Avenue North
71. From center line of alleyway/walkway North of 63rd Avenue North to center line of 64th Avenue
72. From center line of 64th Avenue North to center line of 65th Avenue North
73. From center line of 65th Avenue North to center line of 66th Avenue North
74. From center line of 66th Avenue North to center line of 67th Avenue North
75. From center line of 67th Avenue North to center line of 69th Avenue North

76. From center line of 69th Avenue North to center line of 70th Avenue North
77. From center line of 70th Avenue North to center line of 71st Avenue North
78. From center line of 71st Avenue North to center line of 72nd Avenue North
79. From center line of 72nd Avenue North to center line of 73rd Avenue North
80. From center line of 73rd Avenue North to center line of 74th Avenue North
81. From center line of 74th Avenue North to center line of 75th Avenue North
82. From center line of 75th Avenue North to center line of 76th Avenue North
83. From center line of 76th Avenue North to center line of 77th Avenue North
84. From center line of 77th Avenue North to center line of 78th Avenue North
85. From center line of 78th Avenue North to center line of 79th Avenue North
86. From center line of 79th Avenue North to center line of 80th Avenue North
87. From center line of 80th Avenue North to center line of 81st Avenue North
88. From center line of 81st Avenue North to center line of 82nd Avenue North
89. From centerline of 82nd Avenue North to Northern City Limits.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	FIFTEENTH JUDICIAL CIRCUIT
Adam Corey Rabon, as Guardian)	Civil Action No. 10-CP-26-6873
Erik Randall Rabon,)	
Plaintiff,)	
~vs~)	
Huggins Beach Service, Inc., the)	PLAINTIFF'S MEMORANDUM IN
City of Myrtle Beach and)	OPPOSITION TO DEFENDANT CITY
Craig J. Risbourg,)	OF MYRTLE BEACH MOTION FOR
Defendants,)	SUMMARY JUDGMENT
_____)	

Plaintiff, above named, submits this Memorandum in Opposition to Defendant City of Myrtle Beach ("City") Motion for Summary Judgment and respectfully shows unto this Honorable Court:

STATEMENT OF FACTS

On May 14, 2010, at approximately 1:27 p.m., the Plaintiff's Ward, Erik Randall Rabon ("Erik Rabon") was relaxing and lying on the sandy portion of the beach near the ocean located between 8th and 9th Avenues North in Myrtle Beach, South Carolina. At the time Erik Rabon was lying on the beach, Defendant Craig Risbourg ("Risbourg") was operating and driving a 2004 Chevrolet truck owned by Huggins Beach Service, Inc. ("Huggins"). As Defendant Risbourg was operating the truck, Defendant Risbourg drove the truck over and on top of Erik Rabon causing him severe and permanent injuries. Defendant Risbourg was unaware of Erik Rabon being pinned under the beach service truck and continued to drive forward and pushed and dredged Erik Rabon forward by his body for a distance through the beach sand until the truck could no longer continue to

travel forward. Defendant Risbourg got out of the truck and, at that time, saw Erik Rabon's legs sticking out from under the front portion of the truck. Apparently, Risbourg and witnesses saw that Erik Rabon was conscious and screaming and begging for the vehicle's removal while he was pinned under the vehicle. While he was pinned beneath the truck, Erik Rabon endured the vehicle's hot motor until he was removed by emergency personnel.

After this accident, Adam Rabon applied to the Horry County Probate Court for appointment as Erik Rabon's guardian and conservator. Adam Rabon was appointed as his brother's guardian and conservator and subsequently filed this action.

STANDARD OF REVIEW

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC ; Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997) . In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. Baughman v. American Tel.and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment

should be denied. Baril v. Aiken Regional Medical Centers, 2002 WL 31410739, S.C. App., 2002, decided Oct. 28, 2002, citing, Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002).

Generally, "[q]uestions of agency ordinarily should not be resolved by summary judgment where there are any facts giving rise to an inference of an agency relationship." (Emphasis added). Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d at 425 (S.C. 1982), citing Reid v. Kelly & Play Air, Inc., 274 S.C. 171, 174, 262 S.E.2d 24 (1980); Jamison v. Howard, 271 S.C. 385, 247 S.E.2d 450 (1978).

ARGUMENT

RUS and Duty.

Plaintiff believes that the City does have a duty and its argument under the Recreational Use Statute ("RUS") is inapplicable. S.C. Code Ann. § 27-3-60 and titled "Certain liability not limited" provides that [n]othing in this chapter limits in any way any liability which otherwise exists:

- (a) For grossly negligent, willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.
- (b) For injury suffered in any case where the owner of land charges persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the State or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

The binding agreement between the Defendants titled "Water Safety Franchise" ("Agreement") provides in section four (4) titled "Beach Service Equipment" that "[i]n return for the provision of water safety services and other consideration in Section 6, the

Franchisee is hereby authorized to rent the following beach equipment: Chairs & footrests; Umbrellas; Windbreaks; Floats; Soft Boogie Boards.” Agreement, § 4, ¶ 2, emphasis and semicolons added.

The Agreement further provides in section six (6) and titled “Financial Reporting and Franchise Fees” that “[f]ranchisee shall provide the City a review of the gross receipts prepared by a Certified Public Accountant no later than December 1 of each year during the term of this Franchise. The City may require an audited financial statement in its discretion.” See Agreement, § 6, ¶ 1. The Agreement further provides that “[f]ailure to pay franchise fees and any late fees within thirty (30) days of the due date shall be grounds for revocation of the franchise.” Id., ¶ 2.

Further, the beach intended to exclusively control the reaping of financial benefits from the public’s use of the beach through the use of Huggins Beach Service and its employees. The Agreement provides that “[n]o commercial or retail activity except as authorized herein shall be permitted on the public beach.” See Agreement, § 4, ¶ 1.

The RUS covers situations different from the relationship between these parties. The RUS is intended to protect, for example, landowners who offer their land without a financial incentive to other persons to use for recreational use. In the matter at hand, the Defendants contracted to engage in a beneficial financial bargain to make money from those who visited the beach.

The City further argues that it owes no duty of care to protect Mr. Rabon from, or warn him of, any hazards connected with lying on the beach. City’s Memorandum, p. 3, ¶ 3. Unfortunately, Defendant Risbourg’s deposition was previously noticed, but he had moved to Thailand. Plaintiff’s attorneys have been advised that he will, in the near future,

return to Horry County for his deposition. However, Risbourg was traveling the beach in Huggins truck to view the safety of and patrol the area as well as the rental activities on the beach. The Defendants had reached a mutual agreement for Huggins to perform the City's duties for beach safety by requiring Huggins to patrol the beach. Agreement, p. 2, ¶ 2.

Importantly, the City had contracted with Huggins that all lifeguards shall successfully complete "a Police Department offered training course for the type of vehicle driven on the beach." Agreement, p. 4, ¶ 1. The importance of this contractual driving course requirement was that off road driving around persons laying on the beach and special hazards created by sunbathers requires special driver training. Obviously, the City knew of this special hazard and its duty to only allow properly trained persons to operate a dangerous instrument on the beach. See generally, Howle v. McDaniel, 232 S.C. 125, 101 S.E.2d 255, 261 (S.C. 1957). Unfortunately, the City did not require Huggins employees to engage in this contractually necessary off road driver's training course until this tragic accident occurred. Depo. of Earl H. Huggins, Jr., p. 48, ll. 3-5; 23-25.

Liability for Independent Contractor and Agency.

In the case of Durkin, the tenant slipped on a soapy substance left on the kitchen floor by the carpet cleaners. The court held that a non-delegable duty of reasonable care arose when the landlord undertook to clean the carpet. Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (S.C.App. 1993). In its analysis, the court stated the general rule that a landlord is not liable for the negligence of an independent contractor. The court then noted an exception to the general rule and found that a "person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the

independent contractor just as if the independent contractor were an employee." Durkin v. Hansen, 313 S.C. at 347, 437 S.E.2d at 553. In Durkin, the landlord's absolute duty arose when the landlord undertook the gratuitous carpet cleaning. Durkin, 313 S.C. at 348, 437 S.E.2d at 553.

The City unilaterally admits that it was not required to provide lifeguards and contracted with Huggins for beach safety. See City's Memorandum dated July 14, 2011, p. 4. Obviously, the City elected to provide beach safety services and its alleged independent contractor committed the negligent act of running over Mr. Rabon. The first paragraph of page one of the Agreement reads that "the City of Myrtle Beach requires the protection of its tourists and residential population through an efficient and effective Water Safety Program" The City clearly and definitely owed a duty to protect Mr. Rabon while he laid on the beach.

This duty and special relationship becomes even more obvious through the City's intent to hold out Huggins and its employees as agents of the City. Section three (3) of the Agreement titled "Lifeguard Uniforms & Equipment" provides "[t]he City of Myrtle Beach Seal shall be on the right sleeve" of the lifeguard's uniform. Agreement, p. 4, § 3, ¶ 1, emphasis added.

Our Supreme Court previously dealt with the issue of agency in a franchise agreement relationship and wrote that generally agency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d at 426 (S.C. 1982), citing Fochtman v. Clanton's Auto Auction Sales, 233 S.C. 581, 106 S.E.2d 272 (1958).

The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. *Id.* See generally, West's General Digest, Principal & Agent, Key # 9.

The Florida Court of Appeals held that the existence of special relationships or public policy considerations may give rise to non-delegable duties. Hinkley v. Palm Beach County Board of County Commissioners, et al. 801 So.2d 193 (Fla.App. 4 Dist. 2001), citing See *Sammons v. Broward Bank*, 599 So. 2d 1018, 1020 (Fla. 4th DCA 1992). In Sammons, the Florida court determined that a bank had a non-delegable duty to repossess a vehicle only by peaceful means. *Id.* at 1020. Therefore, the bank could not avoid liability for a violation of that duty by hiring an independent contractor. See *Id.* A common carrier cannot relieve itself from its primary duty to maintain safe accommodations for its passengers and their baggage by contracting with an independent contractor to perform its functions. See Johnson v. Fla. E. Coast Ry. Co., 63 So. 713, 715 (Fla. 1913).

The functions that Huggins performed for the City were non-delegable and the City unilaterally admits it was not required to provide beach safety for beach visitors, however, it required lifeguards to appear to the public as City of Myrtle Beach employees and possessed City authority, especially when contracted to have patrolling authority. When the City took on the responsibility of providing beach safety, it was bound to the non-delegable duty to protect its beach visitors and ensure its franchisee was properly trained for off road driving around beach visitors, such as the Plaintiff.

CONCLUSION

The City of Myrtle Beach is not entitled to Summary Judgment because a genuine issue of fact exists and these facts give rise to an inference that the City is responsible for the negligent acts of Huggins through the theories of agency, non-delegable duty and other theories argued above.

Furthermore, Plaintiff asserts that discovery is not complete and has noticed the depositions of Defendant Risbourg and intends to depose City employees. Plaintiff believes the facts and inferences drawn from the facts argued above should be submitted to and determined by a jury.

RESPECTFULLY SUBMITTED,

By: s/Jeffrey E. Johnson
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Attorneys for Plaintiff

July 21, 2011
Conway, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-26-6873

Adam Corey Rabon, as Guardian for
Erik Randall Rabon,

Plaintiff,

vs.

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

Defendants.

NOTICE OF MOTION &
MOTION TO ALTER OR AMEND
ORDER GRANTING DEFENDANT
CITY OF MYRTLE BEACH'S
MOTION FOR SUMMARY JUDGMENT

TO THE ABOVE-NAMED DEFENDANTS, AND THEIR ATTORNEYS
RECORD:

FILED
HORRY COUNTY
2011 OCT 18 PM 4:46
CLERK OF COURT
CLARE HUGGINS WARD

YOU WILL PLEASE TAKE NOTICE that ten (10) days from date or at such other time as counsel may be heard, the Plaintiff, pursuant to Rule 59(e), South Carolina Rules of Civil Procedure, and by and through his undersigned attorneys, will move the Court for an order altering or amending this Court's Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment, dated September 29, 2011 and filed in the Horry County Clerk's office on October 10, 2011. Plaintiff, by and through his undersigned attorneys, received written notice of entry of the order on October 12, 2011, in the following particulars:

1. To find that the facts were considered in the light most favorable to the Plaintiff.

2. To find that additional discovery was needed before the Court could render a finding of fact and conclusions of law, pursuant to SCRCF, Rule 56(f).

3. To find that Plaintiff submitted the deposition testimony of Earl H. Huggins, Jr..

4. To find that Plaintiff asserted in its Plaintiff's Memorandum in Opposition to Defendant City of Myrtle Beach Motion for Summary Judgment that discovery was incomplete and had previously noticed the deposition of Defendant Risbourg and intended to depose City of Myrtle Beach ("City") employees.

5. To rule upon the issues of agency and non-delegable duty.

6. To find that a genuine issue of material fact exists as to whether Huggins had apparent authority or was an apparent agent of the City in the performance of Huggins franchise duties by the City requiring Huggins employees and lifeguards (collectively referred to as "employee(s)") to display the City of Myrtle Beach Seal on Huggins employees right sleeves in plain view of the public.

7. To find that a genuine issue of material fact exists as to whether the City of Myrtle Beach failed to provide an off road driver's training course to Defendants Huggins Beach Service, Inc. ("Huggins"), its employees and Craig J. Risbourg prior to this accident as required in the "Water Safety Franchise" (Agreement).

8. To find that a genuine issue of material fact exists as to whether the City of Myrtle Beach reserved in the franchise agreement the obligation and responsibility to adequately train and instruct drivers in a manner to ensure Huggins employee drivers were properly trained and instructed to prevent injuries to Plaintiff.

9. To find that a genuine issue of material fact exists as to whether the City of Myrtle Beach breached its duty in the franchise agreement its obligation and responsibility to protect its tourists and residential population by failing to adequately train and instruct drivers in a manner to ensure Huggins employee drivers were properly trained and instructed to prevent injuries to Plaintiff.

10. To find that a genuine issue of material fact exists as to whether the City of Myrtle Beach was grossly negligent or willfully breached its duty in the franchise agreement to protect its tourists and residential population by failing to adequately train and instruct drivers in a manner to ensure Huggins employee drivers were properly trained and instructed to prevent injuries to Plaintiff.

11. To find that a genuine issue of material fact exists as to whether the City was to ensure that qualified drivers were employed by its beach service providers.

12. To find that a genuine issue of material fact exists as to whether the City failed to properly supervise the training of Huggins employee drivers to ensure vehicle operation safety.

13. To find that a genuine issue of material fact exists as to whether the City was grossly negligent in failing to properly supervise the training of Huggins vehicle drivers to ensure vehicle operation safety.

14. To find that a genuine issue of material fact exists as to whether the City negligently, willfully, was grossly negligent or otherwise failed to enforce all requirements set forth within the Franchise Agreement with Defendant Huggins Beach Service.

15. To find that a genuine issue of material fact exists as to whether the City willfully, was grossly negligent or otherwise failed to inspect and evaluate the credentials and qualifications of the drivers employed by Huggins Beach Service to ensure appropriate training and experience before allowing Huggins employee drivers to operate a motor vehicle on the beach.

16. To find that a genuine issue of material fact exists as to whether the City willfully, was grossly negligent or otherwise failed to inspect and evaluate the credentials and qualifications of Craig J. Risbourg employed by Huggins to ensure appropriate training and experience before allowing Huggins employee drivers to operate a motor vehicle on the beach.

17. To find that a genuine issue of material fact exists as to whether the City required Huggins employees to display the "City of Myrtle Beach Seal" on their right sleeves.

18. To find that a genuine issue of material fact exists as to whether the City required Huggins employee driver Craig J. Risbourg to display the "City of Myrtle Beach Seal" on the right sleeve of his shirt at the time Plaintiff received his injuries as alleged in the Complaint.

19. To find that a genuine issue of material fact exists as to whether the City and Huggins entered into an agreement to protect third party beneficiaries of their agreement.

20. To find that a genuine issue of material fact exists as to whether the City received a financial benefit from Huggins by contracting with Huggins to perform beach safety services, including beach equipment rentals.

21. To find that a genuine issue of material fact exists as to whether the City received a financial benefit from those who visited the beach.

22. To find that a genuine issue of material fact exists as to whether the City received a financial bargain from Huggins and beach visitors by entering into a contractual relationship with Huggins to rent beach equipment and receive franchise fees from the rental of beach equipment.

23. To find that a genuine issue of material fact exists as to whether the City leased the land of the beach area to Huggins.

24. To find that a genuine issue of material fact exists as to whether the City was grossly negligent or willfully failed to guard or warn Plaintiff against a dangerous condition, use or activity on the beach.

25. To find that a genuine issue of material fact exists as to whether the City was grossly negligent or willfully failed to guard or warn Plaintiff against the dangerous condition, use or activity on the beach, such as the City failing to require Huggins employees to successfully complete "a Police Department offered training course for the type of vehicle driven on the beach."

26. To find that a genuine issue of material fact exists as to whether the City was willful, negligent or grossly negligent in placing emphasis on the collection of monies for the City from franchise fees rather than ensuring Huggins employee drivers were properly trained to drive on the beach.

27. To find that a genuine issue of material fact exists as to whether the City was willful, negligent or grossly negligent in placing emphasis on the collection of monies for the City from franchise fees rather than ensuring Huggins employee drivers

were properly trained to drive on the beach which were specifically reserved in the franchise agreement which specifically provided that “the City of Myrtle Beach requires the protection of its tourists and residential population [third parties] through an Efficient and Effective Water Safety Program”, emphasis added.

28. To find that a genuine issue of material fact exists as to whether the City, even though the City was not required to provide lifeguards for beach safety, assumed the duty of providing such service and protections by entering into a Franchise Agreement with Huggins to ensure protection of its beach residents and visitors as beneficiaries of the franchise agreement through a water safety program and collection of monies through franchise fees from beach equipment rentals.

29. To find that a genuine issue of material fact exists as to whether the City was willful, negligent or was grossly negligent by failing to require Huggins employee drivers were trained by the City’s police department in off road driving and off road driving situations in close proximity to sunbathers and other beach visitors and residents.

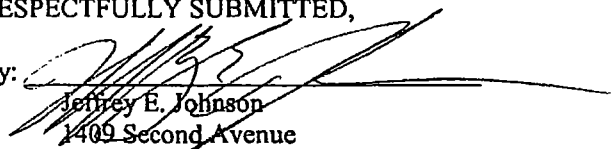
Plaintiff’s Motion to Alter or Amend Judgment is based upon good cause.

Plaintiff’s Motion will further be based upon any and all other arguments presented at the hearing of this matter.

Based upon the above, Plaintiff requests this Honorable Court to alter or amend its Order dated September 29, 2011 to render findings of fact and rulings as to the issues provided herein and that City of Myrtle Beach is not entitled to summary judgment under the South Carolina Recreational Use Statute.

RESPECTFULLY SUBMITTED,

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Attorneys for Plaintiff

October 18, 2011
Conway, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO.: 2010-CP-26-6873
	)	
Adam Corey Rabon, as Guardian for	)	
Erik Randall Rabon,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Huggins Beach Service, Inc., The	)	
City of Myrtle Beach and Craig J.	)	
Risbourg,	)	
	)	
Defendants.	)	
	)	

AFFIRMATION PURSUANT TO
RULE 11(a), SCRCP

2011 OCT 18 PM 4:46
CLERK OF COURT
HUGGINS BEACH SERVICE, INC.
COUNTY

In accordance with the provisions of Rule 11(a), SCRCP the undersigned counsel in the above-captioned case hereby affirms as follows:

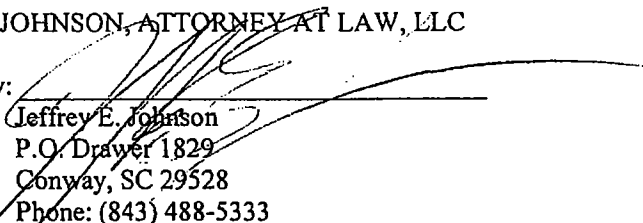
_____ (a) That prior to the filing of the attached Motion, the undersigned counsel has communicated orally or in writing with opposing counsel and attempted in good faith to resolve the matters contained within the attached Motion.

_____ (b) That the undersigned counsel hereby certifies that consultation with opposing counsel as to the matters contained in the attached Motion would serve no useful purpose or could not be timely held.

~~_____~~ (c) That the undersigned counsel is under no duty to consult with opposing counsel concerning the matters contained in the attached Motion as the litigants to this matter have appeared pro se or the attached Motion is exempted from the requirements of Rule 11(a).

(Signature Page to Follow)

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Attorneys for Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 10-CP-26-6873
Adam Corey Rabon, as Guardian	)	
Erik Randall Rabon,	)	
	)	
Plaintiff,	)	
	)	
~vs~	)	
	)	PLAINTIFF'S BRIEF IN SUPPORT
Huggins Beach Service, Inc., the	)	OF HIS MOTION TO ALTER OR AMEND
City of Myrtle Beach and	)	JUDGMENT
Craig J. Risbourg,	)	
	)	
Defendants,	)	
	)	

Plaintiff submits this brief in support of his previously filed Motion to Alter or Amend Judgment, pursuant to SCRCP, Rule 59(e) with some exceptions combined or singularly for the purpose of addressing each exception and further respectfully shows unto this Honorable Court:

1. To find that the facts were considered in the light most favorable to the Plaintiff.
2. To find that additional discovery was needed before the Court could render a finding of fact and conclusions of law, pursuant to SCRCP, Rule 56(f).

Although the Order does provide "... the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party" in the Standard of Review section of the Order, and the Analysis

section of the Order does not specifically state that the Court viewed the particular facts or evidence in the light most favorable to the Plaintiff nor does the Order provide an analysis of the Court viewing the issue and evidence of gross negligence in the light most favorable to the Plaintiff. The Order does not specifically analyze the facts presented in Mr. Huggins' deposition and language of the Franchise Agreement as to gross negligence being viewed in the light most favorable to the Plaintiff.

Further, when one considers the Plaintiff's plea at the hearing and in its Memorandum that "... discovery is not complete and has noticed the depositions of Defendant Risbourg and intends to depose City employees," the matter is unripe for the Court to consider summary judgment.

1. To find that the facts were considered in the light most favorable to the Plaintiff.
3. To find that Plaintiff submitted the deposition testimony of Earl H. Huggins, Jr.
7. To find that a genuine issue of material fact exists as to whether the City of Myrtle Beach failed to provide an off road driver's training course to Defendants Huggins Beach Service, Inc. ("Huggins"), its employees and Craig J. Risbourg prior to this accident as required in the "Water Safety Franchise" (Agreement).
8. To find that a genuine issue of material fact exists as to whether the City of Myrtle Beach reserved in the franchise agreement the obligation and responsibility to adequately train and instruct drivers in a manner to ensure Huggins employee drivers were properly trained and instructed to prevent injuries to Plaintiff.

24. To find that a genuine issue of material fact exists as to whether the City was grossly negligent or willfully failed to guard or warn Plaintiff against a dangerous condition, use or activity on the beach.

25. To find that a genuine issue of material fact exists as to whether the City was grossly negligent or willfully failed to guard or warn Plaintiff against the dangerous condition, use or activity on the beach, such as the City failing to require Huggins employees to successfully complete "a Police Department offered training course for the type of vehicle driven on the beach."

29. To find that a genuine issue of material fact exists as to whether the City was willful, negligent or was grossly negligent by failing to require Huggins employee drivers were trained by the City's police department in off road driving and off road driving situations in close proximity to sunbathers and other beach visitors and residents.

South Carolina Code of Laws Ann., § 27-3-60 provides that nothing in this chapter limits in any way any liability which otherwise exists for grossly negligent, willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity. See Plaintiff's Memo, p. 3. At the hearing and in Memorandum, Plaintiff argued the City contracted with Huggins that all lifeguards "shall . . . successfully complete a Police Department offered training course for the type of vehicle driven on the beach." Agreement, p. 3-4. The Court's Order does not mention the Deposition of Earl Henry Huggins, Jr. of which a copy was handed up to the Court to include in the record. Mr. Huggins, as owner of Huggins Beach Service, Inc., testified the City began offering the driver's course to his company in 2009, which was after this accident.

Huggins Depo., p. 41. Obviously, when considering the evidence in the light most favorable to the Plaintiff, evidence of gross negligence was produced and raised a genuine issue of material fact to the Court. The Court's Order is completely devoid of reference to this issue, and Plaintiff is entitled to the benefits and protections of SCRCF, Rule 56(f), to conduct discovery of City employees and driver Risbourg.

Even by Mr. Huggins testifying that such a course was contracted for but not even offered, engaged, conducted or completed until this tragic event occurred, raises a genuine issue of material of fact as to whether, pursuant to statutory language as well as an inference to which a jury is entitled, the City was grossly negligent by failing to guard beach visitors against a dangerous condition that was present on the beach when the City allowed untrained drivers to drive in close proximity to persons lying on the beach; by failing to guard beach visitors against the danger of untrained drivers using motor vehicles on the beach; and/or the activity of untrained drivers on the beach was grossly negligent. The Order does not specify how these facts were viewed in the light most favorable to the Plaintiff. Surely the facts of a contractual agreement (Franchise Agreement) using mandatory language of "shall" to ensure the City requires the beach service to complete a driver's training course for employees driving on the beach raises a genuine issue of material fact that the Court's definition of gross negligence has been met when the order provides "intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Brooks v. Northwood Little League, Inc., 489 S.E.2d 647 (S.C.App. 1997) Undisputed is the fact that this tragic accident occurred on May 14, 2010, and the Franchise Agreement was entered into by the City and Huggins in September of 2008 and undisputed is the fact

that more than a year and half passed by without this mandated driving course having been initiated at all by the City. See, Huggins Depo., p. 41. A genuine issue of material fact and an inference to which a jury is entitled is created as to whether the daily activity of Huggins employees driving on the beach was negligence that was repetitious and rose to the level of gross negligence.

The Court's Order does not specifically mention the Franchise Agreement which was made part of the Court's record at the hearing and referenced in Plaintiff's Memorandum and during oral argument. The Court's Order summarily analyzes the fact that Erik Rabon was not charged admission for entry onto the beach and, as such, the City is entitled to the protections of S.C. Code Ann. § 27-3-30; § 27-3-40.

With the deposition testimony of Mr. Huggins and the mandatory language of the Agreement, a genuine issue of material fact exists that gross negligence or willfulness in not doing what the parties were required to do to protect Erik Rabon. Sufficient facts exist for a jury to draw inferences of gross negligence.

20. To find that a genuine issue of material fact exists as to whether the City received a financial benefit from Huggins by contracting with Huggins to perform beach safety services, including beach equipment rentals.

21. To find that a genuine issue of material fact exists as to whether the City received a financial benefit from those who visited the beach.

22. To find that a genuine issue of material fact exists as to whether the City received a financial bargain from Huggins and beach visitors by entering into a

contractual relationship with Huggins to rent beach equipment and receive franchise fees from the rental of beach equipment.

The Franchise Agreement provides that the City shall be entitled to three (3%) percent of gross receipts with a maximum fee per stand. See Agreement, p. 6, § 6. Beach rentals are for the rental of certain beach equipment identified in the Agreement. Agreement, p. 5, § 4. The City authorized motor vehicles on the beach to support beach concession operations. *Id.* With the City entering into an Agreement to make money from beach equipment sales with aided use of motor vehicles on the beach, the City was required to adhere to its agreement and ensure Huggins employees completed the driving course when operating motor vehicles on the beach to make money and generate revenue. See Plaintiff's Memorandum Opposing Summary Judgment, p. 4. The Court's Order does not give any finding of fact or conclusion of law as to whether this money-making endeavor on behalf of the City goes outside the Recreational Use Statute (RUS) and create inferences to which a jury is entitled to consider or genuine issue of material fact exists as to whether this money-making activity took precedence over the safety activity of the contractually mandated driving course. Certainly inferences of gross negligence or willfulness in placing financial gain before safety can be drawn from the fact that, as Mr. Huggins testified, no driving course was initiated until after this accident; that the Agreement mandated the safety driving course; and the Agreement provides for a financial gain from beach equipment rentals and lifeguard stand revenues.

2. To find that additional discovery was needed before the Court could render a finding of fact and conclusions of law, pursuant to SCRPC, Rule 56(f).

5. To rule upon the issues of agency and non-delegable duty.

6. To find that a genuine issue of material fact exists as to whether Huggins had apparent authority or was an apparent agent of the City in the performance of Huggins franchise duties by the City requiring Huggins employees and lifeguards (collectively referred to as "employee(s)") to display the City of Myrtle Beach Seal on Huggins employees' right sleeves in plain view of the public.

14. To find that a genuine issue of material fact exists as to whether the City was negligently, willfully, grossly negligent or otherwise failed to enforce all requirements set forth within the Franchise Agreement with Defendant Huggins Beach Service.

Our Supreme Court in Rock Hill Telephone Company, Inc. v. Globe Communications, Inc., 611 S.E.2d 235, 238 (S.C. 2005), again identified several situations in which the nondelegable duty doctrine applies:

An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control.

A landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly.

A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured, and remains vicariously liable for injuries caused by an unsecured load.

A bail bondsman has a nondelegable duty to supervise the work of his employees, and remains vicariously liable for injuries caused by those employees.

A municipality has a nondelegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs.

Rock Hill v. Globe, citing, *Osborne v. Adams*, 346 S.C. 4, 12, 550 S.E.2d 319, 323-24 (2001); see also *Simmons*, 341 S.C. at 50, 533 S.E.2d at 323 (holding that a hospital owes a nondelegable duty to render competent service to its emergency room patients).

When viewing the facts in the light most favorable to the Plaintiff, the Franchise Agreement shows the City was allowing Huggins to perform its necessary governmental functions as stated in the Agreement: "... the City of Myrtle Beach requires the protection of its tourists and residential population through an efficient and effective Water Safety Program; and ... is imperative along the City's twelve miles of oceanfront." Agreement, p. 1.

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

341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000). It actually is the liability, not the duty, that is not delegable. Id. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor. Id.

The case at hand clearly shows a Franchise Agreement that involves Huggins contracting to perform a specialized service that a general business cannot perform without authority from the City which is to provide beach safety services and beach equipment rentals to the public. The City's and Huggins' relationship is a special relationship as read from the Franchise Agreement as a whole and is akin to the example recited by our Supreme Court, supra, that a municipality has a nondelegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs. When the City gave Huggins the Franchise Agreement to perform services and functions that only the City could perform but for this Agreement, the City remains vicariously liable for the negligent acts of Huggins employees as though they were the City's employees.

Therefore, a genuine issue of material fact exists as to whether a nondelegable duty existed between the City and Huggins and whether the City is unable to escape liability from Huggins' negligent acts.

19. To find that a genuine issue of material fact exists as to whether the City and Huggins entered into an agreement to protect third party beneficiaries of their agreement.

26. To find that a genuine issue of material fact exists as to whether the City was willful, negligent or grossly negligent in placing emphasis on the collection of monies for the City from franchise fees rather than ensuring Huggins employee drivers were properly trained to drive on the beach.

27. To find that a genuine issue of material fact exists as to whether the City was willful, negligent or grossly negligent in placing emphasis on the collection of monies for the City from franchise fees rather than ensuring Huggins employee drivers were properly trained to drive on the beach which were specifically reserved in the franchise agreement which specifically provided that "the City of Myrtle Beach requires the protection of its tourists and residential population [third parties] through an Efficient and Effective Water Safety Program", emphasis added.

28. To find that a genuine issue of material fact exists as to whether the City, even though the City was not required to provide lifeguards for beach safety, assumed the duty of providing such service and protections by entering into a Franchise Agreement with Huggins to ensure protection of its beach residents and visitors as beneficiaries of the franchise agreement through a water safety program and collection of monies through franchise fees from beach equipment rentals.

The Court in Touchberry recognized that individuals may be third party beneficiaries of public contracts. Touchberry v. City of Florence, 367 S.E.2d 149, 150 (S.C. 1988), citing Compare Ancrum v. Camden Water, Light and Ice Co., 82 S.C. 284, 64 S.E. 151 (1909) with Cothran v. Rock Hill, 211 S.C. 17, 43 S.E.2d 615 (1947). The presumption that the contract is not enforceable by an individual may be overcome by

showing he was intended to be the direct beneficiary of the contract. Ancrum, supra; see also Peeples v. South Carolina Power Co., 166 S.C. 150, 164 S.E. 605 (1932).

Undoubtedly, the City passed the Franchise Agreement by ordinance to protect its tourists and residential population. Agreement, p. 1. The aim of the Agreement between the City and Huggins was to protect the public lying on the beach by requiring Huggins employees be properly trained and qualified to drive on the beach. A genuine issue of material fact exists as to whether all aspects of the Agreement, as well as this driving course was to train drivers to exercise care and protect people like Erik Rabon lying on the beach.

Again a genuine issue of material facts exists and an inference is created that Erik Huggins was a third-party beneficiary of the Franchise Agreement.

9. To find that a genuine issue of material fact exists as to whether the City of Myrtle Beach breached its duty in the franchise agreement its obligation and responsibility to protect its tourists and residential population by failing to adequately train and instruct drivers in a manner to ensure Huggins employee drivers were properly trained and instructed to prevent injuries to Plaintiff.

10. To find that a genuine issue of material fact exists as to whether the City of Myrtle Beach was grossly negligent or willfully breached its duty in the franchise agreement to protect its tourists and residential population by failing to adequately train and instruct drivers in a manner to ensure Huggins employee drivers were properly trained and instructed to prevent injuries to Plaintiff.

11. To find that a genuine issue of material fact exists as to whether the City was to ensure that qualified drivers were employed by its beach service providers.

Again, Mr. Huggins testified the City did not offer a driving course until this tragic accident occurred. By the City failing to adhere to the "shall" language of the Agreement between it and Huggins and ensuring Huggins drivers met the driving course qualifications, a genuine issue of material fact exists and raises an inference to which a jury is entitled which is that the City was grossly negligent or willfully failed to protect the public and Erik Rabon. Without Defendant Risbourg's deposition and then the City employees' depositions, the Plaintiff could not discover the driver's qualifications and gross negligence or willfulness of the parties.

12. To find that a genuine issue of material fact exists as to whether the City failed to properly supervise the training of Huggins employee drivers to ensure vehicle operation safety.

13. To find that a genuine issue of material fact exists as to whether the City was grossly negligent in failing to properly supervise the training of Huggins vehicle drivers to ensure vehicle operation safety.

15. To find that a genuine issue of material fact exists as to whether the City willfully, was grossly negligent or otherwise failed to inspect and evaluate the credentials and qualifications of the drivers employed by Huggins Beach Service to ensure appropriate training and experience before allowing Huggins employee drivers to operate a motor vehicle on the beach.

Mr. Huggins, as owner of Huggins Beach Service, Inc., testified the City began offering the driver's course to his company in 2009, which was after this accident. Huggins Depo., p. 41. Obviously, Plaintiff will not know Mr. Risbourg's qualifications in off-road driving until his deposition is completed. City employee depositions need to be held after Mr. Risbourg's to discover the reason for the City not requiring the driving course to evaluate the Huggins drivers' qualifications and safety operation of motor vehicles on the beach.

4. To find that Plaintiff asserted in its Plaintiff's Memorandum in Opposition to Defendant City of Myrtle Beach Motion for Summary Judgment that discovery was incomplete and had previously noticed the deposition of Defendant Risbourg and intended to depose City of Myrtle Beach ("City") employees.

16. To find that a genuine issue of material fact exists as to whether the City willfully, was grossly negligent or otherwise failed to inspect and evaluate the credentials and qualifications of Craig J. Risbourg employed by Huggins to ensure appropriate training and experience before allowing Huggins employee drivers to operate a motor vehicle on the beach.

On May 23, 2011, Plaintiff served all parties of record with Notice of Deposition of Craig J. Risbourg and Mr. Huggins for June 10, 2011. Mr. Huggins deposition was held, but Defendant Risbourg did not appear as he notified his attorneys that he had moved to Thailand. Pl. Memo., p. 4. To comply with the intent of SCRCP, Rule 56(f),

the Court should not have granted summary judgment in detriment to Plaintiff when discovery was incomplete, especially when it was previously noticed.

17. To find that a genuine issue of material fact exists as to whether the City required Huggins employees to display the "City of Myrtle Beach Seal" on their right sleeves.

18. To find that a genuine issue of material fact exists as to whether the City required Huggins employee driver Craig J. Risbourg to display the "City of Myrtle Beach Seal" on the right sleeve of his shirt at the time Plaintiff received his injuries as alleged in the Complaint.

The Court's Order is completely devoid of any analysis of the contractual requirement of the City and Huggins in requiring Huggins employees to display the City of Myrtle Beach Seal on their sleeves. Plaintiff believes the Court can only render findings of fact and conclusions of law concerning this issue after Plaintiff has completed discovery and completed the depositions of Risbourg and City employees. The Court's Order in no way discusses the issue of whether the intent of the contractual language was to give the public the perception that Huggins employees were given the City's governmental authority in carrying out their duties. An inference is created from these facts for a jury and a genuine issue of material fact exists as to whether Huggins employees were part of the City.

When viewing the Franchise Agreement as a whole, the Agreement forms a relationship between the City and Huggins that Huggins was to perform functions the

City created. Page 7 of the Agreement provides that the general, automobile and professional services policies “shall be endorsed to name the City of Myrtle Beach as an ‘additional insured.’” The City created the right to audit the financial receipts of Huggins related to Huggins’ collected revenue, and the City received a portion of the monies obtained. Agreement, p. 6. The City retained the right to inspect, approve or disapprove the use of any motor vehicle. Id. The City contracted to provide trashcans to the stands and for pick-up on the beach. Id. Huggins was to provide 60 days prior written notice of non-renewal, reduction or exhaustion of limits or cancellation. Id. at p. 8. From the Agreement as a whole, an inference is created that the Franchise Agreement was a special relationship and the City knew it could not be free of liability by allowing Huggins to perform a service it was required to do.

23. To find that a genuine issue of material fact exists as to whether the City leased the land of the beach area to Huggins.

The Franchise Agreement was made part of the record at the hearing of this motion and deals with the financial relationship between the Defendants. Since the Court relied heavily on the RUS statutory language, the Court should have analyzed and supplied findings of fact and conclusions of law that there was no inferences to which a jury would be entitled or genuine issue of material fact that the City only leased the land to Huggins without any other financial dealings between these two Defendants.

CONCLUSION

The Plaintiff asserts that there is a genuine issue of material fact, and the Court should alter or amend its previous Order Granting Defendant City of Myrtle Beach's Motion for Summary Judgment to reflect the above argued facts and legal grounds and render an order denying Defendant City of Myrtle Beach's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED,

By:

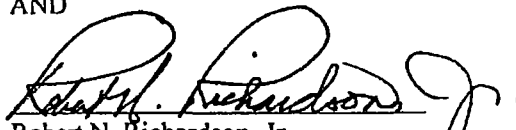


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Attorneys for Plaintiff

November 7, 2011
Conway, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
10-CP-26-06873

Adam Corey Rabon as guardian)
for Eric Randall Rabon,)

PLAINTIFF,

vs.

TRANSCRIPT OF RECORD

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

DEFENDANT.

July 25, 2011
Conway, South Carolina

BEFORE:

The Honorable Benjamin H. Culbertson

APPEARANCES:

BY: Jeffrey E. Johnson, Esq.
Robert N. Richardson, Jr., Esq.
Attorneys for Adam Corey Rabon
as guardian for Eric Randall Rabon

BY: James R. Battle, Esq.
Michael W. Battle, Esq.
Attorneys The City of Myrtle Beach

David C. Slough, Esq.
Attorney for Huggins Beach Service and
Craig Risbourg

BRENDA R. BABB
Circuit Court Reporter

000123

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1 The Court: All right, 2010-CP-26-6873 case of,
2 let me get the full caption, this is the case of Adam Corey
3 Rabon as guardian for Eric Randall Rabon v. Huggins Beach
4 Service Inc. and City of Myrtle Beach and Craig J. --- how
5 do you pronounce it?

6 Mr. Battle: Risbourg.

7 The Court: Risbourg, all right. According to
8 my roster this is a motion for summary judgment by
9 defendant City of Myrtle Beach; is that correct?

10 Mr. Battle: Yes, Your Honor.

11 The Court: All right, if you don't mind please
12 give the court reporter your names again and who you
13 represent?

14 Mr. Battle: My name is James Battle, I'm here
15 on behalf of the City of Myrtle Beach.

16 Mr. Slough: Your Honor, David Slough here for
17 Huggins Beach Service and Craig Risbourg.

18 Mr. Johnson: Jeff Johnson and Bobby Richardson
19 on behalf of the plaintiff Adam Rabon and Eric Rabon.

20 The Court: All right, this is your motion?

21 Mr. Battle: Yes, sir.

22 The Court: Mr. Battle, you also here as co-
23 chair?

24 Mr. Battle: Yes, sir.

25 The Court: Okay, thank you.

1 Mr. Battle: On behalf of the City of Myrtle
2 Beach, Mike Battle.

3 The Court: All right, thank you. All right,
4 Mr. Battle, let me hear from you.

5 Mr. Battle: Sure, Your Honor, this case is
6 basically a automobile accident. It occurred on the sandy
7 portion of the beach in front of 8th Avenue North in the
8 City of Myrtle Beach.

9 On May 14th of 2010 Mr. Johnson's client, Mr.
10 Rabon, went out on the beach to lay out, enjoy the breeze
11 and the sunshine. While he was laying down he was struck
12 by a Huggins Beach Service truck that was driven by a
13 Huggins Beach Service employee. He suffered severe injury
14 and now brings this lawsuit claiming negligence on the part
15 of the City and Huggins Beach.

16 Your Honor, the City's motion for summary
17 judgment it's primarily based that it doesn't owe a duty to
18 Mr. Johnson's client Mr. Rabon, that it is immune from
19 liability due to the recreational use statute and without
20 owing a duty to Mr. Rabon a case of negligence cannot lie
21 against the City.

22 Just a little background about the recreational
23 use statute, it was a statute passed to which allows
24 landowners who keep their land open to the public for
25 recreational use. It provides them protection from

1 immunity so that people who come onto their land to enjoy
2 the recreational use don't owe those people a duty. They
3 don't owe them a duty to warn them of dangerous conditions
4 or dangerous activities on that land.

5 Essentially there are three elements that have to
6 be met in over for someone to claim the protections of the
7 recreational use statute. First they have to be the owner.
8 They have to admit people onto the land for free and the
9 person who's injured has to have been using the land for
10 recreational purposes.

11 Your Honor, the City meets all three of those
12 elements in this case. They own the land or the sandy
13 portion of the beach. Mr. Rabon was not charged for his
14 admittance to the beach and there's no question that he was
15 enjoying the recreational utility of the beach while he was
16 there so, therefore, the City doesn't owe a duty to Mr.
17 Rabon and can't be held liable for any negligence to him.

18 The reason that the, that the legislature passed
19 the recreational use statute was to encourage landowners
20 who owned a lake or a river, or in this case a sandy beach,
21 to keep that property open to the public for their use and
22 enjoyment and to a large extent the City relies on this
23 statute to keep their beaches open for the millions of
24 tourists who come here every year. But the legislature
25 also passed an exception to the recreational use

1 protections and they said that if the landowner was grossly
2 negligent then there is a duty triggered in the statute
3 and, Your Honor, the plaintiff in this case has made
4 numerous allegations of gross negligence on the part of the
5 City, primarily those have to do with the failure to train
6 and the failure to supervise Huggins Beach, that the City
7 wasn't overseeing the training of the drivers of Huggins
8 Beach or its employees.

9 Your Honor, we would argue that those, none of
10 those allegations rise to the level of gross negligence.
11 Gross negligence in this state has been defined as a
12 failure to use slight care. It's also been called a
13 conscious failure to do what ought to be done and also in
14 this court it's a mixed issue of law and fact but when you
15 have, you know, all the evidence can only provide one
16 conclusion then it does become an issue of law but the
17 plaintiff's allegations don't rise to that level of gross
18 negligence primarily based on the broad language of the
19 statute, the recreational use statute and the large volume
20 of case law that supports landowners when faced with
21 similar lawsuits.

22 I would also direct the court's attention to a
23 recent opinion by Judge Wooten in the Federal District
24 Court -

25 The Court: This isn't an appellate decision, is

1 it?

2 Mr. Battle: No, it's ---

3 The Court: Just a regular, okay.

4 Mr. Battle: --- trial court level, and he
5 dismissed the City of Myrtle Beach. This was a drowning
6 case where the plaintiff had sued the beach service company
7 and the City. The plaintiff had allegations against the
8 City of failing to supervise or failing to train and Judge
9 Wooten dismissed the City on a Rule 12 based on the
10 recreational use statute.

11 The Court: Was that appealed or is there any
12 appellate decision on that?

13 Mr. Battle: No, Your Honor, I think they
14 ultimately settled out of court with Lacks.

15 The Court: All right.

16 Mr. Battle: And I have a number of other cases
17 where state courts have also ruled that ---

18 The Court: Well I'm looking primarily for
19 appellate decisions; is there any appellate decision out
20 there that deals with that?

21 Mr. Battle: I have a Fourth Circuit, well let's
22 see, I have, well state appellate court decisions and
23 Fourth Circuit Federal Court decision.

24 The Court: And they, what did those say?

25 Mr. Battle: Same thing.

1 The Court: Okay.

2 Mr. Battle: One kept the City out on summary
3 judgment and, let me see, I can hand these opinions up as
4 well.

5 The Court: Let me see that one, thank you.

6 Mr. Battle: That's Corbett v. City of Myrtle
7 Beach.

8 The Court: Well now this says that the judge
9 wrongfully granted summary judgment.

10 Mr. Battle: That's the Corbett?

11 The Court: Yeah.

12 Mr. Battle: It says in the footnote that the
13 City, they kept John's Beach in; they said they wanted the
14 owner but they kicked the City out in summary judgment.

15 The Court: Oh, that's in a footnote?

16 Mr. Battle: It should be on the second page.

17 The Court: Oh, I see right here under
18 recreational use statute landowner owes no duty of care to
19 keep the premises safe for recreational users, okay. All
20 right, anything else?

21 Mr. Battle: I have two other cases.

22 The Court: Thank you.

23 Mr. Battle: And it should be, yeah --

24 The Court: All right, anything else?

25 Mr. Battle: That's it in a nutshell, Your

1 Honor.

2 The Court: All right, Mr. Johnson, who wants,
3 you going to argue, okay? I didn't know which one was
4 going to be arguing the motion.

5 Mr. Johnson: Yes, Your Honor, thank you. Your
6 Honor, may it please the Court?

7 The Court: Yes, sir.

8 Mr. Johnson: As you know Mr. Richardson and I
9 we represent the Rabon's in connection with the injuries
10 that Eric has sustained whenever he was laying out on the
11 beach. Of course they're severe injures and he's down in
12 North Augusta. He's in a nursing home now unable to
13 communicate.

14 Those cases I've seen, Your Honor, haven't read
15 them in detail, read one of them, two of them that I did
16 know about, some of the other I did not. They all look to
17 me that they were about the same thing, that went to
18 drowning, and this is a totally different situation except
19 for that ---

20 The Court: There was one that had with them
21 falling off of a boardwalk or a walkway or something of
22 that nature, okay.

23 Mr. Johnson: All those were drowning except for
24 that one which is different from bring run over. The next
25 thing is that one case which was just handed to me now ---

1 The Court: Right.

2 Mr. Johnson: --- that one I haven't read in
3 detail, however, it's totally different from our situation
4 we have today. If you look at my brief, of course I've
5 argued against the recreational use, also said they do have
6 a duty and the reason I think there is a duty is if you
7 look at the tort claims act statute it says tort claims act
8 applies and that the government can be liable for acts of
9 the State's employees and agents. It's our position that
10 Huggins was the agent of the beach.

11 Now recreational use statute I'm going to go a
12 little bit more in that in a minute, the recreational use
13 statute deals mostly whenever lands are held out for people
14 to use free of charge, okay. In this situation if you look
15 at this franchise agreement it says in here in section six
16 that the City is to receive monies, okay, from the rentals,
17 okay, franchise agreement, part of the lease, and at the
18 rates. Also the City can audit Huggins Beach Service,
19 okay, so they're getting money, the City is getting money
20 by people coming onto the beach renting these chairs,
21 renting these umbrellas.

22 The Court: So the driver of the vehicle that
23 hit the plaintiff was engaged in renting the chairs and the
24 umbrellas and out of that rental the City gets a
25 percentage?

1 Mr. Johnson: Exactly, Your Honor.

2 The Court: Okay.

3 Mr. Johnson: Now I have tried, I have set up
4 the deposition of Craig Wrisberg but he's in Thailand. My
5 understanding from Jimmy Powell that he is going to be
6 returning here soon to the United States; we're going to
7 take his deposition then. Discovery is incomplete. This
8 franchise agreement provides they are making money.

9 Now the last one, walking on the boardwalk,
10 clearly no money received by the City for that, okay, here
11 they are. My understanding what Craig Wrisberg was doing
12 was he was driving on the beach, he was checking things
13 out, the rentals, safety, all those things, okay, and what
14 he had done was he was coming down the beach and he had
15 stopped, kind of looked things over, and he sat there maybe
16 ten minutes, I think the deposition says, and when he
17 started off he made a u-turn, ran right over Mr. Rabon,
18 okay. The City and Huggins they're in this together, and
19 if I may the franchise agreement if I understand attached
20 to the memorandum, a part of the record says, the City of
21 Myrtle Beach requires the protection of its tourists and
22 residential population through an efficient and effective
23 water safety program. It also says its water safety
24 program is imperative along the twelve miles of oceanfront
25 and through the cooperation of the City of Myrtle Beach and

1 the concessionaires of beach equipment, which is this
2 franchisee here Huggins Beach Service.

3 The ordinance was passed with this franchise be
4 entered into and, of course, there are many requirements
5 that the City puts on this franchisee. Even says that the
6 franchisee shall provide lifeguards as deemed necessary in
7 consultation with the City, says that the franchisee shall
8 patrol the beach between certain hours, 5 p.m. and 7 p.m.
9 I haven't taken the deposition of some of the City
10 personnel to figure out whether or not that was a typo, was
11 it 5 a.m. to 7 p.m.

12 The Court: And I, excuse me for interrupting
13 you, I don't mean to cut you off, but let's just say that
14 they breached that, that is an agreement between the City
15 and the service, how does that create a duty from the City
16 to the patrons of the beach under this recreational use
17 statute?

18 Mr. Johnson: Well the City had allowed and had
19 gone under that statute that says the City doesn't have to
20 have lifeguards but it may have lifeguards and the City has
21 done that, and when the City did that the City knew it was
22 important enough to put in this franchise agreement saying
23 that it was important and requires it and imperative to
24 protect the people that come on the beach.

25 The Court: Yeah, but is that creating a legal

1 duty for them, because they've got it in that agreement
2 does that create a legal duty by the City. I don't see --

3 Mr. Johnson: I think when they put it out there
4 in these agreements that they are requiring to protect
5 people that come on the beach then, yes, and I think they
6 don't fall under that recreational use statute whenever
7 they're getting money from the sales of umbrellas, chairs,
8 and anything else that's sold out there. Even says the
9 City can do an audit and if the City doesn't get
10 cooperation from the franchisee the City can end this
11 agreement.

12 Also if I may go on agency, we go on to that a
13 little bit more. This is really important in this case.
14 That vehicle, under this franchise agreement, whoever drove
15 a vehicle on the beach is supposed to go through a training
16 course under this agreement offered by the City Police
17 Department, that was never done, that was never done. Says
18 here franchise employees who operate a motor vehicle in the
19 performance of this agreement shall successfully complete a
20 police department offered training course for the type of
21 vehicle driven on the beach, that was never done, and I've
22 got Mr. Earl Huggins deposition testimony, if I may hand
23 this up, Your Honor ---

24 The Court: But still it still gets back to the
25 critical question as to whether or not there's a duty.

1 Mr. Johnson: Right.

2 The Court: I mean I understand you're saying
3 that they didn't abide by the agreement but still if
4 there's no duty that doesn't create a liability by the
5 City, so the critical question is does the City owe the
6 patrons of the beach a duty of care out of negligence
7 action.

8 Mr. Johnson: Yes, Your Honor, owes a duty to
9 those people who are laying out there, whoever they
10 authorize to put on that beach to do things for the City,
11 okay, which is patrol the beach, owes a duty to make sure
12 that these people are properly trained when they go out on
13 the beach and that's why this ---

14 The Court: That wasn't argued in the lifeguard
15 situation?

16 Mr. Johnson: Well I don't really know what all
17 was argued in that one but my understanding that dealt with
18 training when it comes to swimming but not with training
19 when it comes to this vehicle. I don't know if it was even
20 training when it comes to CPR or anything like that. It's
21 my understanding pretty much a person went out there in the
22 beach, got overcome by a wave and drowned, and I think it's
23 more of the response time, not deficiencies in whether or
24 not they were trained when it comes to CPR, may have been
25 trained, whether or not they had enough people out there,

1 whether or not they were properly trained but I really did,
2 you know, as far as what the duties of making sure the
3 beach was safe to swimmers but not specifically when it
4 comes to operating a dangerous instrument like a motor
5 vehicle and there are cases out there saying a motor
6 vehicle is a dangerous instrument.

7 The Court: All right.

8 Mr. Johnson: So it is a little bit different
9 and my understanding is those just dealt only with swimming
10 except for that one.

11 The Court: All right.

12 Mr. Johnson: If I may argue a little bit
13 further, also it says the City of Myrtle Beach seal shall
14 be on the right sleeve of the lifeguard. Well that is
15 portraying that these lifeguards are City of Myrtle Beach
16 agents by requiring them to have this seal on there and it
17 says that they also must have lifeguard printed on the
18 front of their tee shirts and on the back in gold letters,
19 so by having that seal out there it's to the public under
20 apparent agency relationship. It appears that people who
21 are laying on the beach believe that these lifeguards are
22 City of Myrtle Beach employees, okay, that they have
23 authority through the City to act.

24 Here we have a totally different situation from
25 swimming. I haven't read in the few cases I have read,

1 those two, I didn't see the other ones, they weren't argued
2 in the brief is my understanding from reading the City's
3 brief, but those dealing with swimming were pretty much
4 they should have kept an eye on them, okay, should have
5 kept and it was alleged training what have you, but as far
6 as from the facts really looked to me it went more to just
7 failed to keep an eye on the swimmers when they went out
8 there and didn't go get them. Here we have this employee
9 of Huggins and Huggins, employees the company is being
10 portrayed as an agent of the City because it requires, the
11 City requires there to be a seal of the City of Myrtle
12 Beach on the right sleeve as an apparent agent, doesn't say
13 you shall have your own logo. You shall not have the City
14 of Myrtle Beach on any of your equipment or on your tee
15 shirt, and here the public would have viewed Huggins as an
16 agent of Myrtle Beach.

17 I think there was a duty whenever the City put
18 these lifeguards through Huggins Beach Service on the beach
19 driving a vehicle and they should have made sure that they
20 had gone through this training course cause this training
21 course apparently it was very important to the City to
22 require these lifeguards to go on there, okay, to go on
23 that beach because you think about it, you got a vehicle
24 going on the beach, you got somebody who's not used to
25 normally driving on the beach around a lot of people. If

1 it's during the winter time my understanding people can
2 drive on the beach then because there aren't many people on
3 the beach such as fisherman and we've all seen these
4 vehicles and they've got on the bumpers these pvc pipes to
5 put their rods in, however, that's during a limited portion
6 of time. It's my understanding it's just a couple of
7 months that can be done. Other than that you have to be
8 authorized by the City to go on the beach during the summer
9 and the police, emergency personnel, and Huggins Beach
10 Service, and Huggins was fulfilling these amenities for the
11 beach for the public and as it says in this franchise
12 agreement it's imperative, very important that they have
13 this program.

14 The Court: All right, thank you, anything in
15 reply?

16 Mr. Michael Battle: Yes, Your Honor. There
17 have been several recreational use statute cases starting
18 with the first one, the little league field where the
19 person stepped in a hole in the grass, all of them have
20 been dismissed on summary judgment. The statute says, and
21 it's a broad statute, there is no duty. There's even the
22 case of Cole v. SC&G, which I don't know if it's been
23 handed up to you or not, in which there was a duty to
24 provide lifeguards by at one of the Lake Murray parks.
25 There was, there was an ordinance from DHEC that said you

1 have to provide lifeguards and based on that ordinance,
2 just like Mr. Johnson is trying to argue based on that
3 agreement. based on that ordinance the plaintiff said you
4 owe us a duty, you didn't provide lifeguards, therefore,
5 you've breached that duty and we're entitled to damages.
6 The court said that ordinance is in conflict with the state
7 statute which says no duty. You cannot create a duty from
8 an ordinance or from a contract when you've got a statute
9 that says there's no duty owed for recreational use. We
10 want to encourage recreational use and we don't want to
11 have a situation where people all of a sudden, you know,
12 all up and down the beaches, everywhere, saying, you know,
13 you can't use my land because I'm responsible for whatever
14 happens to you. The court, the legislature made that
15 decision and based on that the court's have upheld every
16 time that there is no duty from the landowner to the
17 individual member of the public. There might be a duty to
18 the public but not to the individual person who has not,
19 who may have been injured as a result of some third party
20 act and this is unquestionably a third party act for
21 somebody named ---

22 The Court: And I understand your argument this
23 is third party act, but don't these other cases the ruling
24 is primarily because there's an unsafe condition whether it
25 be a hole in a ball field or a faulty walkway or a failure

1 to supervise someone? Here the vehicle, there's nothing
2 wrong with the land, it's not anything wrong with the
3 beach, it's the placing of the vehicle on the beach; does
4 that make a difference?

5 Mr. Michael Battle: No, sir, I can't see any
6 difference between the lifeguard not responding in time or
7 a lifeguard not seeing somebody and accidentally hitting
8 him on the beach. It's a dangerous activity and it's, you
9 know, lots of in the, the Minnow case the idea was you
10 shouldn't be having the dual role of selling beaches, I
11 mean they shouldn't have the dual role of renting umbrellas
12 and beach chairs and that takes your mind off of the beach
13 and what's going on out there and that sort of thing and
14 that's a dangerous activity and, therefore, you should be
15 held liable and the court's have said, no, that's, you look
16 at the statute itself there is no duty owed for activities
17 or for conditions and this is an activity that may be
18 dangerous, may not be dangerous. It depends a lot on the
19 person who's doing it just like out on the road we have out
20 here all these public streets and people speed and cause
21 accidents and hit each other does that make them, does that
22 make us responsible for what happens on the road, it's the
23 same sort of thing. You have this lifeguard who, you know,
24 he didn't intend to accidentally hit somebody cause he
25 didn't see him and, and, and then to say well based on that

1 because you allow this lifeguard to be in this particular
2 position and you allow this activity to go on the beach,
3 that is driving which is part of the franchise agreement,
4 therefore, you're liable and, and, and that's not what the
5 recreational use statute says. It says you're not
6 responsible for the activities that take place on your
7 land, you don't owe a duty to that particular person.

8 The Court: What about the fact that the City
9 does get a percentage of the rentals and the fact that he's
10 out there for that purpose?

11 Mr. Michael Battle: That also deals with, comes
12 under the case of Cole V. SC&G where in that case the SC&G
13 were charging people to park along side the, the beach and
14 they were charging them money and then they go on the beach
15 but they didn't charge admission for the going on the beach
16 itself. They just charged to park and what the court said
17 in that thing is that the charge has to arise from the
18 actual activity that was being engaged in.

19 If we had charged Mr. Rabon money to go onto the
20 beach then at that point in time we would owe him a duty
21 and we wouldn't have that recreational use statute, but
22 under the Cole thing it said, you know, it has to be
23 directly related to the activity that's being engaged in
24 and there's no connection between Mr. Rabon lying on the
25 beach and the fact that the City gets a franchise fee from

1 Huggins Beach Service like every other entity in the, on
2 the east coast here in South Carolina.

3 The Court: All right.

4 Mr. Michael Battle: There's a, there's a couple
5 of other things I want to talk about. He talks about
6 agency and that sort of thing. This is a franchise
7 agreement and what has not been alleged and what has not
8 been shown in anywhere if you look at the case of Bass v.
9 Gopal -

10 The Court: Have you given me that one?

11 Mr. Michael Battle: No, but I can.

12 The Court: Okay.

13 Mr. Michael Battle: That's the case out of
14 Greenville, Bass is the case out of Orangeburg and --

15 The Court: Thank you, sir.

16 Mr. Michael Battle: In that case you had the
17 Super 8 Motel, you had all the issues dealing with the one
18 of those and, and, and the stuff there and what the court
19 held in that case, Court of Appeals, the case is up on
20 cert, but the Court of Appeals held in that case that under
21 the current law dealing with franchise agreements, and
22 that's the current business model that's being used, you
23 have to actually show that the individual was exercising
24 control over the day to day activities of the actual
25 franchisee. In other words, we were actually controlling

1 the franchisees day to day operations, clearly not the case
2 in this particular incident. Here what you look at is you
3 look at the franchise agreement and in the franchise
4 agreement what we do is we set certain standards just like
5 a McDonalds. You know everybody in McDonalds has a logo on,
6 that doesn't mean that McDonalds International is
7 responsible for whatever negligence takes place at the
8 individual franchise agreement store or that what they said
9 was when you set standards and, and have policies and
10 guidelines that does not control the day to day operations,
11 therefore, we're not responsible for the individual driving
12 up and down the beach because we're not controlling him.
13 We're not saying who can drive; we're not saying what he
14 has to do or anything along those lines.

15 The Court: All right.

16 Mr. Michael Battle: Thank you, Your Honor.

17 The Court: All right, I'll take it under
18 advisement. I need to read these cases, so I'll let ya'll
19 know.

20 Mr. James Battle: Thank you, Your Honor.

21 The Court: Thank you.

22 End of requested transcript.....
23
24
25

CERTIFICATE OF REPORTER

I, the undersigned Brenda R. Babb, Official Court Reporter for the South Carolina Court Administration, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal in the Court of Common Pleas for Horry County, South Carolina.

I do further certify that I am neither kin, counsel nor interest to any party hereto.

December 5, 2011

Brenda R. Babb
Brenda R. Babb, CVR
OFFICIAL REPORTER

Exhibit A

SCANNED

DATE 10-24-08

BY ABM

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
CITY OF MYRTLE BEACH)

WATER SAFETY FRANCHISE

WHEREAS, the City of Myrtle Beach requires the protection of its tourist and residential population through an efficient and effective Water Safety Program; and

WHEREAS, the successful implementation of a Water Safety Program is imperative along the City's twelve miles of oceanfront; and

WHEREAS, these goals can be optimally achieved through the cooperation of the City of Myrtle Beach and the Concessionaires of beach equipment; and

WHEREAS, the City Council by Ordinance duly adopted on September 9, 2008, has authorized the City Manager to execute franchises with the concessionaires of the beach service in accordance with the terms of this franchise:

NOW, THEREFORE, PURSUANT TO THE FRANCHISE POWER OF THE CITY OF MYRTLE BEACH (City or Franchisor) in consideration of the foregoing premises and the mutual promises of each to the other made agree as follows:

The City grants Huggins Beach Service a franchise to operate a water safety service and beach concession on the public beach of the City in Zones 28 through 38 as described in Attachment "A" for a period time beginning upon second reading of the award ordinance and ending October 1, 2015, subject to the following terms and conditions:

SECTION 1. PERIOD OF OPERATION:

Franchisee shall conduct water safety each year during the period beginning April 15 and ending September 30. Franchisee shall ensure minimum lifeguard staffing in each zone, between the hours of 8:00 a.m. and 5:00 p.m., Monday through Sunday, according to the following schedule:

April 15 through 3 rd week in May:	20% of full complement
4 th week in May through June 1:	50% of full complement
June 2 through 2 nd week of August	Full complement

3 rd week of August	75% of full complement
4 th week of August through Labor Day	50% of full complement
Labor Day through September 30	20% of full complement

Franchisee may rent beach equipment outside said period of operation, provided however, that lifeguards must be on duty at all times that beach equipment is on the beach. The Franchisee shall provide lifeguards as deemed necessary in consultation with the City.

Franchisee shall, in addition, patrol the beach between the hours of 5:00 p.m. and 7:00 p.m. The number of lifeguard personnel shall depend of the number of zones the franchisee controls. In addition to lifeguards, the Franchisee shall provide the following equipment sufficient for each area of responsibility: vehicle, jet ski or similar device, first aid kit, rescue buoy, two-way radio and two-way radio with police frequency provided by the police department.

Franchisee understands and agrees that additional stands and lifeguard personnel may be deemed necessary by the City and hereby agrees to provide such additional lifeguards after consultation with the City.

From the 1st week of June through Labor Day, and during the hours of operation, for every one (1) to six (6) stands that the Franchisee controls, a minimum of one (1) Lifeguard Only is required, and for every six (6) stands thereafter. A "Lifeguard Only" may be mobile only within a six (6)-stand range. Franchisee shall provide the Beach Patrol with the stand number of each Lifeguard Only. During the hours of operation and term of the franchise agreement, for every one (1) to ten (10) stands that the Franchisee controls, a minimum of one off-stand supervisor shall be provided. A supervisor cannot be a Lifeguard Only except during the lunch period.

SECTION 2. STANDARDS OF PERFORMANCE & LIFEGUARD CERTIFICATION

All lifeguards shall be at least seventeen (17) years of age, be of good moral character and abide by the highest standards of cleanliness and physical appearance.

All lifeguards shall:

- (A) Possess adequate vision, hearing acuity, physical ability and stamina to perform the duties of open water lifeguard;
- (B) Must possess a valid lifeguard card.
- (C) Be in good health and demonstrate an ability to swim 500 meters over a measured course in a twelve (12) minute period;
- (D) Possess a Community First Aid Certification or its equivalent;
- (E) Possess a CPR Certification or equivalent for professional rescue; and
- (F) Successfully complete a course consisting of a total of not less than 40 hours in open water life saving which meet the criteria of the United States Lifeguard Association. At the beginning of each season, the Franchisee shall prepare a training schedule for lifeguards and shall present it to the City. Franchisee shall insure that all lifeguards reasonably comply with that schedule. All lifeguards shall qualify by passing the "Minimum Training on Rescue Procedures" before beginning work on the beach.

The City shall, in consultation with Franchisee, establish pre-certification and in-service minimum training requirements and disseminate same to each Franchisee by March 30th of each year. Franchisee shall prepare a lifeguard training curriculum meeting those requirements and ensure that all lifeguard personnel qualify thereunder prior to beginning work and meet all in-service training requirements. Franchisee or designated representative and all franchise lifeguards shall attend all pre-certification and in-service training sessions. Failure to attend shall result in suspension from service until requirement is met.

Franchisee, all lifeguards and other franchise employees are prohibited from consuming alcoholic beverages while on duty or from reporting to work under the influence of alcohol or other controlled substances.

Franchisee shall not employ any individual as a lifeguard or beach concession employee who has been convicted of or plead guilty or nolo contendere to a felony or which is on parole or probation for a criminal offense.

Franchisee and any franchise employee who operates a motor vehicle in the performance of this franchise agreement shall possess a valid motor vehicle operator's

license, and successfully complete a Police Department offered training course for the type of vehicle driven on the beach.

Franchisee and the City shall determine an appropriate schedule for lunch breaks. Lunch breaks shall be staggered or alternated so that only every third lifeguard will be off-stand during designated lunch hours. The off-stand supervisor shall remain on the beach between the hours of 11:30 a.m. and 2:00 p.m. to augment the provision of water safety services during those hours.

Franchisee shall be solely responsible for any required disciplinary action of its lifeguards.

SECTION 3. LIFEGUARD UNIFORMS & EQUIPMENT

All uniforms shall be of the same color and combination. All lifeguard tee shirts shall be gold with navy blue lettering. "Life Guard" shall be printed on the front. The name of the franchise shall be printed on the back. The City of Myrtle Beach Seal shall be on the right sleeve. The company or non-commercial logo may be printed on the left sleeve.

All lifeguard swim trunks shall be navy blue. "Life Guard" shall be printed in gold letters on the right front leg. Company or non-commercial logo may be applied to left front leg. Pattern may be repeated on the rear of the garment.

Female lifeguard personnel shall wear a navy blue swimsuit. "Life Guard" shall be printed in gold letters on the front.

Outerwear shall be gold, with printing as described above.

Lifeguards shall wear shirts from 10:00 a.m. until 2:00 p.m.

All franchise stands shall be painted white and built according to City specifications. Each stand shall be maintained in good condition and be provided with the following minimum equipment:

Torpedo Buoy

Water Safety Flags (3)

First Aid Kit

Orange Lifeguard Umbrella with "Life Guard" in Navy Blue Letters

City Ordinance/Emergency Phone Number Sign

Every Other Stand Shall Have a Two-way Radio

Lifeguard stands shall be located at such distances and intervals as are determined by the City. In areas in which two franchises join, Franchisee shall not place beach equipment closer than twenty (20) feet to the point of junction. In addition, a twenty (20) foot opening shall be maintained at each street-end and a ten (10) foot opening at each public alleyway. In all cases, Franchisee, in setting up beach equipment, shall endeavor to provide the highest degree of public access possible. Franchisee agrees to remove fifty (50) percent of any un-rented chairs and umbrellas after 2:30 p.m.

Each Franchisee shall have an attended two-way radio with police frequency provided by the Police Department.

SECTION 4. BEACH SERVICE EQUIPMENT

No commercial or retail activity except as authorized herein shall be permitted on the public beach.

In return for the provision of water safety services and other considerations in Section 6, the Franchisee is hereby authorized to rent the following beach equipment:

- Chairs & footrests
- Umbrellas
- Windbreaks
- Floats
- Soft Boogie Boards

Franchisee may not rent any "hard" equipment including but not limited to:

- Surfboards
- Skim Boards
- Sailboats

Franchisee shall not display any signage other than specifically authorized herein as well as its company logo on its beach service equipment.

Franchisee is authorized to operate, in a safe and prudent manner, various types of motor vehicles in support of its water safety and beach concession operations. All such

vehicles shall be maintained in excellent mechanical condition, be neat in appearance and be properly licensed and insured as required by law, and operated by a properly licensed operator.

Except in the case of emergency, Franchisee is prohibited from bringing any chemicals, including but not limited to gasoline, oil and hydraulic fluid onto the public beach and shall be solely responsible for any release from its motor vehicles used on the public beach. In the event of spillage, Franchisee shall contain said spillage and contact Beach Patrol.

The City shall have the right to inspect and approve or disapprove the use of any motor vehicle.

SECTION 5. BEACH CLEANLINESS

Each Franchisee will be responsible for the cleanliness of its franchise zone(s) as assigned. The area of responsibility extends from the water line to the primary dune line. Each Franchisee will be held accountable to the City for the cleanliness of the beach in each respective zone. Re-occurring legitimate complaints about beach cleanliness in a specified zone shall be grounds for franchise termination.

At the beginning of each season, the City will provide trashcans as needed for each stand. The City shall be responsible for the trashcans pick-up on the beach.

SECTION 6. FINANCIAL REPORTING AND FRANCHISE FEES

Franchisee shall provide the City a review of the gross receipts prepared by a Certified Public Accountant no later than December 1 of each year during the term of this Franchise. The City may require an audited financial statement in its discretion.

Franchise fees shall be three percent (3%) of gross receipts, with a maximum of \$1,465.00 per stand, and shall be due and payable no later than December 31 of each year. Franchisee shall be afforded a ten (10) day grace period for payment of franchise fees, after which time a ten percent (10%) late fee will be assessed. Failure to pay franchise fees and any late fees within thirty (30) days of the due date shall be grounds for revocation of the franchise.

The maximum per stand charge shall be increased by ten percent (10%) on December 31st of 2010 and 2012.

SECTION 7. INSURANCE

Franchisee shall provide and pay for the following insurance coverages during the term hereof:

Public Liability – A general liability policy protecting Franchisee against liability or loss due to bodily injury, property damage or personal injury arising out of the performance of its franchise responsibilities and more specifically the provision of water safety service. Policy shall be written on an occurrence form and provide a combined single limit of liability of One Million Dollars (\$1,000,000) per occurrence. Coverage shall be included for: Premises/Operation; Products/Completed Operation; Contractual Liability; Independent Contractors and shall include a broad form property damage endorsement. In the event this policy shall exclude coverage for Lifeguard Liability as a professional service, Franchisee shall be required to provide and pay for professional service coverage protecting Franchise against liability for the acts, errors and omissions of its water safety personnel.

Automobile Liability – A Business Automobile Liability policy protecting Franchisee against liability or loss due to bodily injury and property damage arising out of the operation of a motor vehicle in the performance of this Franchise. Policy shall be written on an occurrence basis and provide coverage for “any auto” with a combined single limit of liability of One Million Dollars (\$1,000,000) per occurrence.

Worker's Compensation & Employers' Liability – A Worker's Compensation policy protecting Franchisee against liability or loss arising out of occupational injury or illness of its employees. This policy shall provide minimum limits of liability of: \$500,000 each accident; \$500,000 disease – each employee; and \$500,000 disease – policy limit.

Policy Endorsements:

Both the general liability and automobile liability policies, as well as any professional services policy shall be endorsed to name the City of Myrtle Beach as an “additional insured.”

All policies shall be endorsed to provide the City of Myrtle Beach sixty (60) days prior written notice of non-renewal, reduction or exhaustion of limits or cancellation.

All policies shall include a "waiver of subrogation" endorsement in favor of the City of Myrtle Beach.

Conditions:

The clause "other insurance" in a policy in which the City of Myrtle Beach is named as an "additional insured" shall not apply to the City of Myrtle Beach.

The insuring company shall have no recourse against the City of Myrtle Beach for the payment of any premiums, deductibles or assessments.

In the event Franchisee should fail to comply with the "loss reporting" requirements of any policy, that failure shall not adversely affect the coverage afforded the City, nor shall the City be responsible for complying with the reporting requirements of any policy.

SECTION 8. INDEMNIFICATION

With respect to the parties, and their officials, agents, employees, volunteers, contractors, or those who act on the Franchisor's or Franchisee's behalf in any authorized capacity:

- a. The Franchisee is informed of risks and obligations in performance of the franchise, and for valuable consideration received in the form of the granted franchise, the Franchisee agrees to assume and fully to take on to itself all of the risks and responsibilities in any way arising from, or associated with its participation in the Franchise, and
- b. The Franchisee does release the City from any and all claims, demands, suits, judgments, damages, actions and liabilities of every name and nature whatsoever, including attorney's fees and costs, whenever occurring, whether known or unknown, contingent or fixed, at law or in equity, that the Franchisee may suffer at any time arising from or in connection with participation in the franchise, including any personal injury, commercial injury or harm or damage to any property or person.

- c. Further, as to non-parties to this agreement, Franchisee further agrees to protect, defend, indemnify and hold the City free and harmless from and against any and all losses, fines, penalties, damages, settlements, costs, charges, professional fees or other expenses and liabilities of every kind and character arising out of or relating to any and all claims, liens, demands, obligations, actions, proceedings, or causes of action of every kind in connection with or arising out of this Franchise and the performance hereof, that are due to acts, errors, omissions or negligence of Franchisee, its officers, agents, employees or subcontractors.
- d. Franchisee further agrees to investigate, handle, respond to, provide defense for and defend the same at its sole expense and agrees to bear all other costs and expenses related thereto. In specific reference to the above, the Franchisee agrees to assume the legal defense, and vigorously defend upon actual notice of claim or suit, and, in doing so, completely indemnify the Franchisor from any loss including any damage model or attorneys' fees and cost, and hold harmless the Franchisor from and against any and all liabilities.
- e. In the event a claim or suit is made against the City or those who act on its behalf, arising from the Franchisee's operation of the franchise, the same shall be transmitted by City immediately, and the Franchisee has the immediate and absolute duty to defend the claim or suit, even if it is groundless, false or fraudulent, so that the Franchisor may not incur attorney's fees and costs arising from the claim or suit of non-parties. Should the Franchisor incur attorney's fees or cost, the Franchisee shall make the Franchisor whole upon demand.
- f. This promise binds heirs, executors, administrators, legal representatives and assigns of the Franchisee and survives this agreement for the length of time necessary under the applicable statute of limitations relating to any claim, suit or cause of action. This hold harmless, indemnification, and duty to defend shall be governed for all purposes by South Carolina law, without regard to such law on choice of law.

- g. Within the time as may be provided by law for the answer or defense of any filed claim or proceeding, but no later than thirty (30) days after the City receives notice of the commencement of any action or other proceeding in respect of which indemnification or reimbursement may be sought hereunder, the City shall notify the Franchisee. If any such action or other proceeding shall be brought against the City and be transmitted to the Franchisee, the Franchisee shall, within thirty (30) days acknowledge in writing its receipt of such notice from the City, and shall acknowledge and confirm the Franchisee's obligation to hold harmless, indemnify, and assume the defense, and it shall be obligated to assume the defense of such action or proceeding with counsel chosen by the Franchisee.
- h. Notwithstanding the foregoing, the City shall have the right to employ separate counsel at the City's sole cost and expense and to control its own defense of such action or proceeding if, in the reasonable opinion of counsel to the City, (a) there are or may be legal defenses available to the City that are different from or additional to those available to the Franchisee and which could not be adequately advanced by counsel chosen by the Franchisee, or (b) a conflict or potential conflict exists between Franchisee and the City that would make such separate representation advisable.
- i. The Franchisee shall not, without the prior written consent of the City, settle or compromise or consent to the entry of any judgment in any pending or threatened claim, action or proceeding to which the City is a party unless such settlement, compromise or consent includes an unconditional release of the City from all liability arising or potentially arising from or by reason of such claim, action or proceeding.
- j. Notwithstanding any other provision contained herein, the franchise may be terminated upon Franchisee's failure to honor this, or other indemnification, hold harmless or duty to defend obligations due and owing to the Franchisor, arising from the operation of Franchisor's beach safety franchise.

SECTION 9. TRANSFER OF FRANCHISE

A Franchisee may transfer his/her franchise to another franchise holder subject to a sixty (60) day notice to and upon approval of the City Manager. City Council must approve by Resolution any franchise transfer. All such approvals shall not be unreasonably withheld.

Violation of any provision of this Franchise Agreement shall result in the suspension of the Franchise Agreement or in the permanent revocation of the Franchise by City Council.

SECTION 10. ASSIGNMENT

This Franchise may not be assigned in whole or in part except upon the written consent of the City of Myrtle Beach.

SECTION 11. TERMINATION

In the event the Franchisee is determined to be in default under the terms of this Franchise, the City shall provide Franchisee written notice of default and afford the Franchisee ten (10) days in which to cure the default. Upon failure of the Franchisee to cure or show reasonable progress towards curing the default, the City shall provide written notice of termination to Franchisee and this Franchise shall be revoked by City Council.

SECTION 12. NOTICE AND CONTACT

Any papers, request, demand, authorization, direction, notice, consent or waiver provided, required or permitted to be made upon, given by, or furnished to the either party with respect to this franchise shall be sufficient for every purpose hereunder if in writing and mailed by United States Mail, certified or registered mail, postage prepaid and addressed as follows:

To the City:

Attention: City Manager

937 Broadway

P. O. Box 2468

Myrtle Beach, SC 29577

To the Franchisee:

Attention:

Mr. Earl Huggins

Huggins Beach Service

601-37th Ave North, Myrtle Beach, SC 29577

WITNESS THE DUE EXECUTION HEREOF ON THE DATE LAST SIGNED:

City of Myrtle Beach

By: Thomas E. Leath, its City Manager

Print name: THOMAS E. LEATH

Witness signature and printed name:

Joan Greve
Joan Greve

Date: 9-11-08

Franchisee

By: Earl Huggins, its Owner

Print name: Earl Huggins

Witness signature and printed name:

Gail Moyer
Gail Moyer

Date: 9-11-08

ATTACHMENT A

ZONE

DESCRIPTION

- 1 From South City Limits to center line of 29th Avenue South
- 2 From center line of 29th Avenue South to center line of 28th Avenue South
- 3 From center line of 28th Avenue South to center line of 27th Avenue South
- 4 From center of 27th Avenue South to center line of 26th Avenue South
- 5 From center line of 26th Avenue South to center line of 25th Avenue South
- 6 From center line of 25th Avenue South to center line of 24th Avenue South
- 7 From center line of 24th Avenue South to center line of 23rd Avenue South
- 8 From center line of 23rd Avenue South to center line of alleyway/walkway at 22nd Avenue South
- 9 From center line of alleyway/walkway at 22nd Avenue South to center line of alleyway/walkway at 21st Avenue South
- 10 From center line of alleyway/walkway at 21st Avenue South to center line of 19th Avenue South
- 11 From center line of 19th Avenue South to center line of alleyway/walkway north of 18th Avenue South
- 12 From center line of alleyway/walkway north of 18th Avenue South to center line of 16th Avenue South
- 13 From center line of 16th Avenue South to center line of 15th Avenue South
- 14 From center line of 15th Avenue South to center line of 13th Avenue South
- 15 From center line of 13th Avenue South to center line of 12th Avenue South
- 16 From center line of 12th Avenue South to center line of 11th Avenue South
- 17 From center line of 11th Avenue South to center line of 10th Avenue South
- 18 From center line of 10th Avenue South to center line of 9th Avenue South
- 19 From center line of 9th Avenue South to center line of 8th Avenue South
- 20 From center line of 8th Avenue South to center line of 7th Avenue South
- 21 From center line of 7th Avenue South to center line of 6th Avenue South
- 22 From center line of 6th Avenue South to center line of Withers Swash
- 23 From center line of Withers Swash to center line of 3rd Avenue South
- 24 From center line of 3rd Avenue South to center line of 2nd Avenue South

25. From center line of 2nd Avenue South to center line of 1st Avenue South
26. From center line of 1st Avenue South to center line of 1st Avenue North
27. From center line of 1st Avenue North to South side of 2nd Avenue North Pier.
28. From North side 2nd Avenue North Pier to center line of 3rd Avenue North
29. From center line of 3rd Avenue North to center line of 4th Avenue North
30. From center line of 4th Avenue North to center line of 5th Avenue North
31. From center line of 5th Avenue North to center line of 6th Avenue North
32. From center line of 6th Avenue North to center line of 7th Avenue North
33. From center line of 7th Avenue North to center line of 8th Avenue North
34. From center line of 8th Avenue North to center line of 9th Avenue North
35. From center line of 9th Avenue North to center line of alleyway/walkway South of Mr. Joe White Avenue
36. From center line of alleyway/walkway South of Mr. Joe White Avenue to center line of alleyway/walkway north of Mr. Joe White Ave
37. From center line of alleyway/walkway north of Mr. Joe White Ave to center line of 12th Avenue North
38. From center line 12th Avenue North to South side of 14th Avenue North Pier
39. From North side of 14th Avenue North Pier to center line of the alleyway/walkway at 16th Avenue North
40. From center line of the alleyway/walkway at 16th Avenue North to center line of City Park at 19th Avenue North
41. From center line of City Park at 19th Avenue North to center line of alleyway/walkway south of 21st Avenue North
42. From center line of alleyway/walkway south of 21st Avenue North to center line of 23rd Avenue North
43. From center line of 23rd Avenue North to center line of 24th Avenue North
44. From center line of 24th Avenue North to center line of 26th Avenue North
45. From center line of 26th Avenue North to center line of alleyway/walkway at 27th Avenue North
46. From center line of alleyway/walkway at 27th Avenue North to center line of alleyway/walkway at 29th Avenue North
47. From center line of alleyway/walkway at 29th Avenue North to center line of 31st Avenue North
48. From center line of 31st Avenue North to center line of 34th Avenue North

49. From center line of 34th Avenue North to center line of 37th Avenue North
50. From center line of 37th Avenue North to center line of 38th Avenue North
51. From center line of 38th Avenue North to center line of 39th Avenue North
52. From center line of 39th Avenue North to center line of 40th Avenue North
53. From center line of 40th Avenue North to center line of 41st Avenue North
54. From center line of 41st Avenue North to center line of 42nd Avenue North
55. From center line of 42nd Avenue North to center line of 43rd Avenue North
56. From center line of 43rd Avenue North to center line of 44th Avenue North
57. From center line of 44th Avenue North to center line of 45th Avenue North
58. From center line of 45th Avenue North to center line of 46th Avenue North
59. From center line of 46th Avenue North to center line of 47th Avenue North
60. From center line of 47th Avenue North to center line of 48th Avenue North
61. From center line of 48th Avenue North to center line of 49th Avenue North
62. From center line of 49th Avenue North to center line of 50th Avenue North
63. From center line of 50th Avenue North to center line of 51st Avenue North
64. From center line of 51st Avenue North to center line of 52nd Avenue North
65. From center line of 52nd Avenue North to center line of 53rd Avenue North
66. From center line of 53rd Avenue North to center line of City Park at South Side of Cabana Section
67. From center line of City Park, South Side of Cabana Section to center line Beach Place
68. From center line of Beach Place to center line of Seaside Place
69. From center line of Seaside Place to center line of alleyway/walkway South side Haskell Circle
70. From center line of alleyway/walkway South side Haskell Circle to center line alleyway/walkway North of 63rd Avenue North
71. From center line of alleyway/walkway North of 63rd Avenue North to center line of 64th Avenue
72. From center line of 64th Avenue North to center line of 65th Avenue North
73. From center line of 65th Avenue North to center line of 66th Avenue North
74. From center line of 66th Avenue North to center line of 67th Avenue North
75. From center line of 67th Avenue North to center line of 69th Avenue North

76. From center line of 69th Avenue North to center line of 70th Avenue North
77. From center line of 70th Avenue North to center line of 71st Avenue North
78. From center line of 71st Avenue North to center line of 72nd Avenue North
79. From center line of 72nd Avenue North to center line of 73rd Avenue North
80. From center line of 73rd Avenue North to center line of 74th Avenue North
81. From center line of 74th Avenue North to center line of 75th Avenue North
82. From center line of 75th Avenue North to center line of 76th Avenue North
83. From center line of 76th Avenue North to center line of 77th Avenue North
84. From center line of 77th Avenue North to center line of 78th Avenue North
85. From center line of 78th Avenue North to center line of 79th Avenue North
86. From center line of 79th Avenue North to center line of 80th Avenue North
87. From center line of 80th Avenue North to center line of 81st Avenue North
88. From center line of 81st Avenue North to center line of 82nd Avenue North
89. From centerline of 82nd Avenue North to Northern City Limits.

RECORDED STATEMENT
CRAIG RISBOURG

BLANK

Q: So how long had you been on the beach that day?

A: I come on duty at 8:00 AM, and this happened about 1:30, so that would be probably five, 5 ½ hours.

Q: What time were you planning to get off that day?

A: 5:00 PM.

Q: All right, so Craig, just tell me what happened, best that you can recall.

A: At the time, when the lifeguard goes to lunch, I supervise his area of operations, so at that time the lifeguard in that area was off for lunch and I just finished patrolling the beach and I stopped right there at 8th Avenue and facing.....and I just sat there for a minute and I was observing the water, watching the water and making sure there wasn't anything going on, and like I said, I just patrolled that entire area from 2nd Ave to 8th Ave and when I left, when I took off in the area after about a minute and a half, I made a right turn and just within a few – after I took off, I heard a noise, so I got out of the truck and then I had rolled over the guy. Obviously you know, he was in my blind spot in my truck when I took the right turn and I just didn't see him.

Q: Was he to your right then to the best you can detect?

A: To my right, yes. It was absolutely to my right.

Q: Would you call it like to the middle? I know you can't tell because you never saw him, but would you say probably he was like beside your right tire or up a front to the right?

A: I would imagine he was maybe like five or ten feet to my right, you know?

Q: Toward the or the back?

A: Towards the front right, yeah.

Q: Okay.

A: So in other words, I made a right hand turn from where I was at, you know, maybe I may have went a few feet forward and turned right, you know? I can't really exactly how far before the turn, but it happened quick.

Q: Right.

A: And I wasn't expecting this to happen, so

Q: Yeah, I know.

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A: So I just kind of took off and made a right turn and then boom, boom, boom, and I stopped right away, you know, got out and looked and the guy was under the truck.

Q: Okay, did he have a lot of beach equipment there?

A: No, it was just him and his t-shirt, that's it. He didn't even have a beach towel.

Q: Okay.

A: I saw a t-shirt, a can of Skoal and maybe a pair of sunglasses on the beach, that's it.

Q: No alcohol or anything?

A: I didn't see any.

Q: Did he have anybody with him?

A: No, he was alone.

Q: Okay. happen?

A: Well as soon as I stopped and I got out and looked under the truck and saw him, I called the police immediately, within seconds after this. I have them on speed dial on my phone, so I called them right away.

Q: Right.

A: And they had Dan Lance come down and I guess I was right there and just watched them pick him up. They put these inflatable bags they put up under the side of the truck, lifted the truck and then they took him out.

Q: How did you make the decision to not move the vehicle until they got there? Was that just to.....?

A: Training. You don't move it, no.....You know what I mean? Any time there's a possibility of a spinal injury, you don't move.

Q: Okay, so the TAPE SLIDING.....so the best course is to leave everything as is. Were you able to administer him any emergency aid?

A: No.

Q: What kind of injuries did you observe?

A: What I could see was scratches on his face and chest and it appeared he was bleeding some from around his nose, his face, maybe he got scraped. Maybe he was laying on his back, you know, and whatever was on the bottom of the truck scraped him, you know? And of course, he was

Q: run over his body?

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A: I don't think so, no. I think I straddled him.

Q: Okay. So you didn't leave the truck rolled up on him. You just left the truck where it was?

A: No, no, he was between the tires. He was parallel with the truck, he was parallel with the ocean. So when I turned right and I was going parallel, he went between the tires.

Q: Okay. Between the front tires? His body was facing the same position like your truck?

A: His seat would have been facing south and his head would have been facing north. The truck would have been facing south.

Q: Okay. All right. Okay, and was he conscious?

A: Yes.

Q: Okay. What did he say? Did he say anything?

A: He was just moaning, I can't breathe.....oil pan was right on his chest at the time, you know?

Q: Okay.

A: He was complaining he was having trouble breathing.

Q: All right. Have you ever had an accident before.....injury?

A: Yes. With an injury? No, none that I know of, no.

Q: All right. Driving record?

A: It's okay.

Q: All right.....TAPE SLIDING....had you had anything to drink that day, alcohol?

A: No, we left the scene of the accident, Me and Earl, and we went down to the Clinic here and I took a breathalyzer and a urine test and was perfectly clean.

Q: Excellent. Good. Okay.

A: Did that immediately after the accident.

Q: What at?

A: It's a walk-in clinic on 21st Avenue. I'm sure Earl knows the name of it. I don't know the name off hand, I just know that it's a walk in clinic?

Q: Like an Urgent Care kind of place?

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A: Like that. Yeah. It's one of these places you can walk in and just see a doctor, you know? You don't have to have an appointment or anything like that.

Q: And who did you say went with you?

A: Me and Earl. Earl drove me there.

Q: Is that Earl Huggins?

A: Earl Huggins drove me there, yeah.

Q: Okay, did he come to the scene after the accident?

A: Yes he did. He was there within – as soon as I called the police, I called him. And he was there. He was on the scene – I don't know if he got there before they actually got him out from under the truck, but he was there, you know, he was there quick. He was there within a few minutes.

Q: All right. Have you heard any updates on the condition of the guy from the

A: Earl went there to go check on him last night. He's in the hospital. He's had some surgery. And they won't release any information. I tried to get the police to tell me what was going on with him several times and they tell me they can't give me any information. But Earl went down there last night and he would know better than I would on that.

Q: He what?

A: Yeah, Earl Huggins went to the hospital last night to see the guy.

Q: Did he see him? Was he able to ...?

A: Yes he did see him.

Q: Okay.

A: So it would be best to talk to him about the guy's condition. He'd be able to tell you better. I didn't actually see him.

Q: All right. Anything else you can think of Craig, that would was there any witnesses that saw this happen?

A: I don't think anybody saw it actually happen, but some people saw it right after the fact, you know?

Q: Okay,.....TAPE SLIDING.....

A: No I didn't.

Q: Do you know what police officer investigated, led the investigation?

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A: No Mam I don't.

Q: Was it a Myrtle Beach PD?

A: Yeah, as a matter of fact, he gave me a careless operation ticket. Let met see if I can find my wallet. I'll give you his name. He wrote it on the ticket. Just a second. Let's see.....anything else you want to ask me about the

Q: I think I've about got everything I need. What's that?

A: Let me find these cars, and I'll walk to the car and get my wallet.

Q: Did they give you like a green form?

A: A green form? They gave Earl a form to send into you. If that's what you're talking about.

Q: Yeah, that's what I'm talking about.

A: Can I call you right back with that?

Q: I'm going to go ahead and end this statement. Have you understood all my questions?

A: Yes.

Q: And all your answers been true and correct?

A: Yes Mam.

Q: And do me a favor Craig and confirm your social security number on here for identification purposes?

A: 434-78-1069.

Q: Okay great. I'm going to turn this off now, okay?

A: Thank you.

STATE OF SOUTH CAROLINA	]	IN THE COURT OF COMMON PLEAS
	]	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	]	
	]	CIVIL ACTION NO.: 2010-CP-26-6873
Adam Corey Rabon, as Guardian, for	]	
Erik Randall Rabon,	]	
	]	
PLAINTIFF,	]	NOTICE OF TAKING DEPOSITION
	]	(Craig J. Risbourg)
-VS-	]	
	]	
Huggins Beach Service, Inc., the City of	]	
Myrtle Beach, and Craig J. Risbourg,	]	
	]	
DEFENDANTS.	]	

TO THE ABOVE-NAMED DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 30(a) of the South Carolina Rules of Civil Procedure, the Attorney for the Plaintiff above, will take the deposition(s) of the following person(s) at the time and place set forth hereinafter upon oral examination before the herein described Court Reporter and/or Notary Public for South Carolina, for purpose of discovery or for use as evidence at trial in the above entitled cause, or for both purposes, pursuant to the South Carolina Rules of Civil Procedure.

WITNESS: CRAIG J. RISBOURG

DATE, TIME: Friday, June 10, 2011 at 2:00p.m.

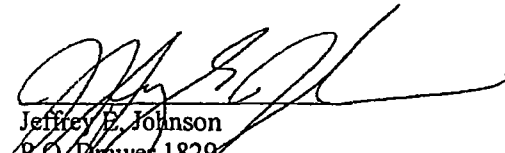
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COURT REPORTER: Alderman Court Reporting

(Signature Page to Follow)

May 23, 2011
Conway, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

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

ADAM COREY RABON, AS GUARDIAN,
FOR ERIK RANDALL RABON,

Plaintiff,

vs.

HUGGINS BEACH SERVICE, INC.,
THE CITY OF MYRTLE BEACH,
AND CRAIG J. RISBOURG,

Defendants.

DEPOSITION OF EARL HENRY HUGGINS, JR.

DATE TAKEN: June 10, 2011

TIME BEGAN: 10:27 a.m.

TIME ENDED: 1:47 p.m.

LOCATION: Law Offices of Jeffrey E. Johnson
1409 Second Avenue
Conway, SC 29528-1829

REPORTED BY: Ryan P. Alderman
Court Reporter
Notary Public for South Carolina



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APPEARANCES:

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.....On behalf of Adam Corey Rabon

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.....On behalf of Huggins Beach Service, Inc. and
Craig J. Risbourg

James R. Battle, Esquire
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Conway, SC 29528

.....On behalf of the City of Myrtle Beach

ALSO ATTENDING: (None)

STIPULATIONS: The within deposition was taken pursuant to the South Carolina Rules of Civil Procedure.

WAIVER: Examination and reading of the deposition are waived by the witness and by the parties.

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(No exhibits introduced.)	

1 Earl Henry Huggins, Jr., being duly sworn, testified as
2 follows:

3 EXAMINATION BY MR. JOHNSON:

4 Q. Good morning, Mr. Huggins, my name is Jeff Johnson
5 as you know, and I represent Mr. Erik Randall
6 Rabon in connection with this matter. Before we
7 get started, let me kind of lay out the ground
8 rules, if you will, for a deposition. Have you
9 ever had your deposition taken before?

10 A. Yeah.

11 Q. Okay. So you may or may not still be familiar
12 with kind of what the rules are; but whenever we
13 start the deposition -- you know, of course, I
14 can't prevent you from talking to your attorney
15 once it starts; but if you do, I have the right to
16 ask you what y'all talked about, okay. So
17 whenever the deposition begins, like it already
18 has, if you have any questions, ask me, okay?

19 A. Okay.

20 Q. And you can't confer with your attorney. Like I
21 said, if you do, then I get to ask you what y'all
22 talked about. Whenever I ask you a question, I
23 will assume that you understood it and will rely
24 on your understanding of that question when you give
25 me an answer. So if you don't understand my

1 question, have me repeat it. I don't care how
2 many times you have me repeat it. I want you to
3 understand the question before you answer it,
4 okay?

5 A. Okay.

6 Q. Whenever you give me an answer, make sure it's a
7 verbal response that is clear that can be
8 understood by the court reporter and put on the
9 record such as a yes or a no, not an uh-huh or
10 huh-uh, because those are kind of hard to
11 understand sometimes; but give me a clear
12 understandable answer, okay?

13 A. Okay.

14 Q. All right. You're doing very good so far. Also,
15 if at any time you need to take a break, let me
16 know, okay?

17 A. Okay.

18 Q. I will take a break at any time. And with that
19 being said, give me your full name.

20 A. Earl Henry Huggins, Jr.

21 Q. All right. What's your date of birth?

22 A. 8/8/55.

23 Q. That makes you how old now?

24 A. Fifty-five.

25 Q. All right. Where were you born?

1 A. Cheraw, Florence, South Carolina.
2 Q. Cheraw or --
3 A. Florence Hospital but I was living in Cheraw at
4 the time.
5 Q. Okay, got you. Your family was from Cheraw, but
6 you were born in Florence; is that right?
7 A. In the hospital there, yep.
8 Q. Yeah. All right. Go ahead and give me your
9 current address.
10 A. It's 601 35th Avenue North. That's in Myrtle
11 Beach, South Carolina 29577.
12 Q. How long have you lived there?
13 A. A year and a half.
14 Q. Where did you live before then?
15 A. 601 37th Avenue North, --
16 Q. Made a --
17 A. -- Myrtle Beach 295 --
18 Q. -- long move, didn't you?
19 A. Two blocks.
20 Q. 30 what Avenue?
21 A. 37th.
22 Q. 37th. And that's North, correct?
23 A. Yes, sir.
24 Q. All right. Are you planning on moving any time
25 soon?

- 1 A. No, sir.
- 2 Q. Okay. How long did you live on 37th Avenue?
- 3 A. Nineteen years.
- 4 Q. Okay. Why did you move?
- 5 A. The apartment I was staying in was getting too
- 6 small with neighbors, and I decided to build a
- 7 house on a lot that I had on 35th.
- 8 Q. So 601 was an apartment?
- 9 A. Townhouse apartment.
- 10 Q. Townhouse, okay. You said something about some
- 11 neighbors. Were you having any problems with your
- 12 neighbors?
- 13 A. They were just coming and going a lot,
- 14 different rentals. It was rental -- a lot of
- 15 rentals going on in there, too, just a lot of
- 16 rental, so.
- 17 Q. Were you renting?
- 18 A. No, I owned there.
- 19 Q. Okay. How long have you lived in Horry County?
- 20 A. Year-round since probably '80. So what's that, 30
- 21 years?
- 22 Q. Okay. Are you married?
- 23 A. No.
- 24 Q. You ever been married?
- 25 A. No.

1 Q. Have any children?

2 A. No.

3 Q. Okay. Are you related in Horry County to anyone
4 by blood or marriage?

5 A. Yes.

6 Q. Okay. Who?

7 A. Sue Huggins Davis, my aunt.

8 Q. Uh-huh.

9 A. Annis Huggins Sexton. And then she has some
10 children, so I guess I'm kin to them through
11 blood. They aren't living here now. They were,
12 though.

13 Q. What are their last names?

14 A. Their last names are Sexton, too.

15 Q. Okay. If you would, give me the last names of the
16 families that you're related to by blood or
17 marriage in Horry County.

18 A. Owens, Sexton, Davis.

19 Q. Okay. Do you have any brothers or sisters?

20 A. Yes. Oh, excuse me, one of them lives here, too.

21 Q. Okay. And that's why I --

22 A. Yeah, it jarred it.

23 Q. I kind of hesitated on the marriage thing, anybody
24 related to you by blood or marriage. I said well,
25 he might have some siblings. What's his name or

1 her name?

2 A. My sister, her name is Gary Jeffcoat.

3 Q. Spell that first name.

4 A. G-A-R-Y.

5 Q. Jeffcoat?

6 A. Jeffcoat, yes, sir.

7 Q. Who is she married to?

8 A. Well, his last name is Jeffcoat. I keep wanting
9 to call him Jeff. Jay Jeffcoat.

10 Q. Jay Jeffcoat?

11 A. Yeah.

12 Q. Okay. What does she do for a living?

13 A. She's an engineer with Santee Cooper.

14 Q. What's her husband do?

15 A. He's an engineer with Santee Cooper.

16 Q. Okay. How about Sue Davis; where does she work?

17 A. She's retired. Sue is 83, I think.

18 Q. Been retired awhile?

19 A. Yeah. She has two, two sons that live here, too.

20 Q. Okay. Are you a member of any social clubs?

21 A. No. I go to the Vineyard Church some, but that's
22 not a social club.

23 Q. Vineyard Church?

24 A. Yes, sir.

25 Q. Where is that located?

1 A. It's 27th Avenue North.

2 Q. In Myrtle Beach?

3 A. Yes, sir.

4 Q. Okay. Any other organizations that you're a
5 member of, Sertoma, Kiwanis, Pilot Club, anything
6 like that?

7 A. (The witness shakes head.)

8 Q. No, okay.

9 MR. POWELL: Give a verbal response. Don't
10 shake your head.

11 A. No.

12 Q. You graduate high school?

13 A. Yes, sir.

14 Q. Okay. Where did you graduate?

15 A. Cheraw High.

16 Q. What year?

17 A. 1973.

18 Q. Any school after high school?

19 A. Yes.

20 Q. Where?

21 A. Catawba College, Pensacola Junior College, College
22 of Charleston, Coastal Carolina.

23 Q. What years did you attend Catawba?

24 A. '73 to '74.

25 Q. Pensacola?

1 A. '75, '76.

2 Q. The College of Charleston?

3 A. '78, '78 through '80.

4 Q. And Coastal?

5 A. '85 and '86, I think, or '86 and '87.

6 Q. If you would, tell me, after high school what type

7 of work did you do?

8 A. I lifeguarded in the summers for my dad.

9 Q. Where?

10 A. Myrtle Beach.

11 Q. What was the name of his business?

12 A. Huggins Beach Service.

13 Q. Okay. Is that the same business that you have?

14 A. Yes, sir.

15 Q. Okay. And what other jobs have you had?

16 A. During the summer I did that. Other jobs? Pretty

17 much -- pretty much that. I did construction one

18 summer while I was in college.

19 Q. Who did you work for, the name of the company?

20 A. I wouldn't know who it was. It was so long ago.

21 Q. Was it in Horry County?

22 A. Yeah. And we were building a high-rise up at the

23 Hilton. That was like '75 or '76. I don't

24 remember if it was Baldwin or one of those big

25 guys.

1 Q. Dargan maybe?

2 A. It might have been.

3 Q. You just don't recall?

4 A. Huh-uh.

5 Q. Okay. What other types of jobs?

6 A. All my life you mean?

7 Q. Uh-huh.

8 A. I taught school and coached football and track.

9 Q. Okay. Did you get a degree from college?

10 A. Yes, sir.

11 Q. Okay. Which one? Which college?

12 A. Well, Pensacola Junior I got an associate's
13 degree. I don't know what it -- actually what it
14 was in, just general educational.

15 Q. Education degree or --

16 A. I got one of those later on. But I got an
17 Associate's Degree from Pensacola Junior College,
18 and I got a BS in Business Administration at the
19 College of Charleston. Then I went up to Coastal
20 Carolina and got a Secondary Teaching Degree.

21 Q. Okay.

22 A. I've sold real estate. I've been a licensed
23 realtor since 1986, too.

24 Q. Okay. Catawba, you didn't get any degree from
25 there, right?

1 A. No, sir.

2 Q. Okay. And Pensacola, you say you got an

3 associate's degree but don't remember what --

4 A. Liberal arts or something.

5 Q. Okay. And Pensacola, what was your degree in?

6 A. In Pensacola it was.

7 Q. What was the name of the degree?

8 A. I, I can't remember.

9 Q. Okay. College of Charleston, what did you say it

10 was?

11 A. BS, Business Administration.

12 Q. Oh, okay. And that's an associate's degree?

13 A. No, it's bachelor's.

14 Q. Bachelor's degree?

15 A. BS.

16 Q. Oh, I'm sorry. Okay. I was thinking you went

17 there two years, the reason I said that, okay.

18 And Coastal you got a teaching degree, secondary

19 education?

20 A. Yes, sir.

21 Q. Okay. Four year degree, right?

22 A. No, it was a two year degree.

23 Q. Two year degree, okay. Did you take your state

24 teaching exam?

25 A. Yes, sir.

1 Q. Pass it?

2 A. Yep.

3 Q. And would that have been about '86 when you took

4 it?

5 A. (The witness nods head.)

6 Q. Okay. Pass it the first time?

7 A. Yep.

8 Q. All right. Any other degrees or licenses that you

9 hold?

10 A. I have a Real Estate License, South Carolina Real

11 Estate License.

12 Q. When did you get it?

13 A. 1986.

14 Q. All right. Do you currently sell real estate?

15 A. Yes, sir.

16 Q. Okay. What broker do you operate through?

17 A. Century 21 Boling in Myrtle Beach.

18 Q. How long have you been with that broker?

19 A. Three years.

20 Q. Okay. Before that?

21 A. Caldwell Banker Chicora.

22 Q. Okay. How long were you there?

23 A. And before that I was with Leonard Call, so.

24 Q. Leonard who?

25 A. Leonard Call.

1 Q. How long were you with Caldwell?

2 A. Two years, three years.

3 Q. And Leonard the whole time before that?

4 A. No, in between it was -- I, I was with Leonard,
5 Leonard from '93 to '98 or '99.

6 Q. Okay. How long were you a teacher?

7 A. My last year of teaching was in '90 -- the year
8 '90 to '91. Taught about 3 years, 3 to 4 years.

9 Q. Okay. Where did you teach?

10 A. Taught at Cheraw, Green Sea, and Chesterfield.

11 Q. Okay. Do you remember the name of the school in
12 Green Sea, or was it just Green Sea Elementary?

13 A. Green Sea Floyds High School.

14 Q. That's right, secondary education. Okay. How
15 long were you there at Green Sea?

16 A. A year.

17 Q. Okay. Why did you leave teaching?

18 A. My father was getting old, and I needed to help
19 him more with the lifeguarding business, and the
20 school year was getting too long. The school
21 year, I was having to leave the last week of July
22 to go to a coaching clinic, so. Then the beach
23 business, the season started getting a lot longer,
24 so I got out of teaching and went into real estate
25 and the beach business.

- 1 Q. Okay. Have you ever been fired from any job?
- 2 A. No.
- 3 Q. No. And you said you coached some at school, too?
- 4 A. Yes.
- 5 Q. All right. What did you coach?
- 6 A. Junior varsity football and varsity track and
- 7 varsity tennis.
- 8 Q. So JV football, varsity track, and varsity tennis,
- 9 right?
- 10 A. Yes.
- 11 Q. And that was at what schools?
- 12 A. I did football at Cheraw, football and tennis at
- 13 Green Sea, and football and track at Chesterfield.
- 14 Q. Okay. On your driver's license, do you hold a CDL
- 15 license?
- 16 A. CDL?
- 17 Q. Commercial driver's license.
- 18 A. No.
- 19 Q. Okay. It's just a regular --
- 20 A. Regular driver's license.
- 21 Q. Okay. Any restrictions on your driver's license?
- 22 A. No.
- 23 Q. Do you know your driver's license number?
- 24 A. 4719070, South Carolina.
- 25 Q. Do you mind if I see it? Do you got it with you?

- 1 A. I don't have it with me.
- 2 Q. Okay. But no restrictions on it?
- 3 A. No.
- 4 Q. Okay. What businesses have you owned?
- 5 A. Huggins Beach Service.
- 6 Q. Any others?
- 7 A. No.
- 8 Q. How long have you owned it?
- 9 A. 2000, 2000 -- no, about 1998.
- 10 Q. Since that time, have you solely owned the
- 11 business?
- 12 A. Yes.
- 13 Q. Were you ever a partner with anyone in that
- 14 business?
- 15 A. Yeah, my father and I were partners before he had
- 16 a stroke. He had the stroke in '98.
- 17 Q. So you were a part owner in that business prior to
- 18 1998?
- 19 A. Yeah. It was -- it's a corporation, and he
- 20 owned -- I owned a part of the corporation, and he
- 21 owned part of the corp -- he owned the majority
- 22 part of it.
- 23 Q. How long were you and he partners in that
- 24 business?
- 25 A. '92 to '98.

- 1 Q. Did he sell his shares to you in that business?
- 2 A. Yeah.
- 3 Q. Who handled that transaction?
- 4 A. It was basically just between him and me and my
- 5 mother.
- 6 Q. Okay.
- 7 A. He had a -- he had a stroke and was incapable of
- 8 doing anything.
- 9 Q. Okay. Was there any type of resolution drafted
- 10 transferring the shares at that time or at any
- 11 time after he left the business?
- 12 A. Any kind of?
- 13 Q. Corporate resolution.
- 14 A. Corporate resolution?
- 15 Q. Yeah, a document providing that he is selling
- 16 these shares to you.
- 17 A. Yeah. Yeah.
- 18 Q. Okay. And do you know where that document is?
- 19 A. Where the transfer of stock is? Yeah, I have it
- 20 at my house.
- 21 Q. Okay. Was there any attorney or accountant
- 22 involved in drafting that or preparing --
- 23 A. Bret, Bret Davis helped me with the minutes and
- 24 the, the transfer of stock here.
- 25 Q. When was that done?

- 1 A. I guess it started like '98, yeah, '98, and then
2 recently transferred some more shares over a
3 couple of years ago.
- 4 Q. Before or after this accident we're here for
5 today?
- 6 A. Oh, it was before.
- 7 Q. All right. Huggins Beach Service, is it a
8 corporation?
- 9 A. Yeah.
- 10 Q. How is it taxed? Is it taxed as a Subchapter "S"
11 or a "C" Corporation?
- 12 A. I'd have to look at it and see. I think it's -- I
13 think it's an "S". I'm not sure, though.
- 14 Q. Who's the accountant?
- 15 A. Ernest Rabon.
- 16 Q. I know Ernest. How long has he been the
17 accountant?
- 18 A. Since '98.
- 19 Q. Since about 2008 until, until present, who signed
20 the tax returns?
- 21 A. Me.
- 22 Q. If you would, tell me what assets -- what, what
23 is the full name of your business?
- 24 A. Huggins Beach Service, Inc., Incorporated.
- 25 Q. Huggins Beach Service, Inc.?

1 A. Yes, sir.

2 MR. POWELL: Does it have an "S" on it?
3 Services or Service?

4 THE WITNESS: Service.

5 MR. POWELL: Service.

6 BY MR. JOHNSON:

7 Q. I'm going to show you the pleading that's been
8 previously clocked. Here in the caption -- is
9 your business properly identified in this caption?

10 A. Yes, sir.

11 Q. All right. At the time of this accident, meaning
12 the day of, even the day before, what assets did
13 this corporation have? When I say corporation,
14 I'm talking about Huggins Beach Service, Inc.

15 A. Approximately 300 umbrellas, 500 chairs, 12
16 lifeguard towers, 10 umbrella boxes, 8 umbrella
17 A-frames, --

18 Q. How many, eight?

19 A. Eight. One Chevrolet Colorado truck, pickup
20 truck, one John Deere Mule -- I mean, John Deere
21 Gator. Excuse me.

22 Q. Okay. Anything else?

23 A. (The witness shakes head.)

24 Q. Does it own any land?

25 MR. POWELL: That's a no?

1 THE WITNESS: No. No. I'm sorry, yeah -- no.

2 MR. JOHNSON: Thank you, Mr. Powell.

3 BY MR. JOHNSON:

4 Q. Any real estate the corporation owns?

5 A. No.

6 Q. So there's no deed in the name of Huggins Beach
7 Service, Inc.?

8 A. No.

9 Q. All right. What debts does the business have at
10 the time or just before this accident?

11 A. I would have to see a document to let you know
12 exactly, somewhere around 20, 25,000 dollars in
13 debt.

14 Q. Is that with a bank?

15 A. Line of credit with Wachovia.

16 Q. Okay. How long have you had that line of credit?

17 A. I can't recall. I'm thinking 1998.

18 Q. Okay. The 300 umbrella -- well, let me ask
19 you -- ask you this blanket question: Any of these
20 assets you told me about, are they encumbered by
21 any type of note?

22 A. I don't -- I don't think so.

23 Q. Okay. Do you know what I'm asking?

24 A. Yeah, whether there's a lien, --

25 Q. Yeah. Is there any, --

1 A. -- lien on them.

2 Q. -- any type of lien or secured by a bank note or
3 anything like that?

4 A. Wachovia told me I've got something secured with
5 them, but I, I asked them to tell me what it was,
6 and I'm not sure.

7 Q. Okay. They say -- make sure I understand you
8 right. Wachovia told you that they do have a
9 security interest in some of your Beach Service
10 property?

11 A. Yeah.

12 Q. Okay. Do you know what it could be?

13 A. Huh-uh. I can't remember if I had to put up some
14 personal real estate at the time to secure the
15 credit line or, or what because I, I really
16 didn't, didn't, didn't remember doing it. But
17 I -- when I -- the changeover with Wells Fargo,
18 and that type of thing, I asked them about it.

19 Q. So are you saying that you really don't know if
20 the Beach Service property is encumbered or if it
21 is your personal property that is encumbered?

22 A. Exactly.

23 Q. And when I say personal property, I'm referring to
24 both real estate and moveable items.

25 A. Right.

1 Q. Okay. The assets that you told me previously that
2 you had at the time of this accident and the day
3 before this accident, have any of those assets
4 been sold, transferred, assigned, anything?

5 A. I sold the John Deere Gator.

6 Q. When did you sell it?

7 A. In August of last year.

8 Q. How much did you sell it for?

9 A. Two thousand dollars.

10 Q. Who did you sell it to?

11 A. Tom Ruttan.

12 Q. How do you know him?

13 A. I quail hunt with him.

14 Q. What's his last name?

15 A. R-U-T-T-A-N.

16 Q. R-U-T-T-A-N?

17 A. Yes, sir.

18 Q. What's he do for a living?

19 A. He's a preacher.

20 Q. Where's he preach?

21 A. Chesterfield.

22 Q. What year, model was that John Deere Gator?

23 A. I'd have to see a document. I can't remember. It
24 was old.

25 Q. Was it more than five years old?

1 A. It's right at five, I think.

2 Q. The Chevrolet truck, do you still have it?

3 A. Yes.

4 Q. What year, model is it? Is that the same one that
5 was involved in this accident?

6 A. Yeah. I'm not exactly sure.

7 THE WITNESS: Do you know what -- remember
8 what year, model it is? Do we have a record of
9 that?

10 MR. POWELL: I can't --

11 THE WITNESS: I'm sorry.

12 BY MR. JOHNSON:

13 Q. He ain't going to tell you anything.

14 MR. POWELL: I don't know, but I can't help
15 you --

16 BY MR. JOHNSON:

17 Q. Mr. Powell, he, he ain't going to help you.

18 MR. POWELL: It's yellow -- no, it's white. I
19 can't remember.

20 A. I think it's 2005 or 2006, somewhere around there.

21 Q. Okay. But that's the same one that was involved
22 in this accident?

23 A. Yeah.

24 Q. Okay. Is it paid for?

25 A. Yeah.

1 Q. No notes owed on it or anything?

2 A. No.

3 Q. Are you planning on selling it?

4 A. Not this year.

5 Q. The money that you got for the sale of this John
6 Deere Gator, what did you do with it?

7 A. Purchased a -- or used it as a down payment to
8 purchase a Kawasaki Mule.

9 Q. What year, model is that Mule?

10 A. 2010.

11 Q. Okay. Did you buy it new?

12 A. Yes, sir.

13 Q. Okay. Is it used in your business now?

14 A. Yeah.

15 Q. Okay. Currently what assets does the Beach
16 Service have?

17 A. Basically the same amount of umbrellas, chairs,
18 lifeguard towers, A-frames, and umbrella boxes.

19 Q. Let me ask you this: Have you got anything new --

20 A. Yeah.

21 Q. -- since then?

22 A. Got a John Deere -- no, excuse me, Kawasaki Mule.
23 I have two Kawasaki Mules.

24 Q. Okay.

25 A. Yeah, I traded the -- sold the Gator. Bought one

1 Mule, sold the Gator, and got another Mule.

2 Q. How many -- how many John Deere Gators did you
3 have?

4 A. I had one.

5 Q. Okay. And you bought two Kawasaki Mules?

6 A. Yeah. I bought one of the Mules in May, and I
7 bought the other Mule --

8 Q. May of this year?

9 (Whereupon there was a pause in the proceedings.)

10 A. Bought the other -- the other Mule in September.

11 Q. Okay. May and September -- well, September of
12 last year and May of this year? When did you
13 buy --

14 A. No, May, May of 2010, and September 2010.

15 Q. All right. Both of them new when you bought them?

16 A. Yes.

17 Q. Okay. Anything in addition in assets besides the
18 two Mules that you told me about?

19 A. No.

20 Q. Okay. Besides selling that one John Deere Gator,
21 any other assets have you sold, transferred,
22 gotten rid of in other words?

23 A. No.

24 Q. All right. I asked you what debts the business
25 had at the time of this accident or the day

1 before. Currently any new debts?

2 A. No.

3 Q. Are these Kawasaki Mules encumbered by any notes,
4 or are they paid in full?

5 A. They're encumbered by notes.

6 Q. With whom?

7 A. The finance company.

8 Q. Is it Kawasaki or Sheffield?

9 A. Sheffield is one of them, And CNH Capital maybe is
10 the other one.

11 Q. How much are owed on those?

12 A. I'm not exactly sure, somewhere in the
13 neighborhood of \$4,000 on each one, 4, I think, 4
14 on the blue one, the one I got in May, and I think
15 5, 5 on the one I got in September.

16 Q. Okay. This credit line, what things do you use it
17 for in the business?

18 A. Just about everything.

19 Q. Such as? I don't know much about what the Beach
20 Service pays for. Tell me a little bit, what it
21 needs to operate.

22 A. Well, it needs radios. It needs four-wheelers.
23 It needs buoys, flags, whistles, lifeguard towers,
24 uniforms, chair parts, paint, umbrella covers,
25 umbrellas, chairs, gas. You know, I could

1 bring you -- but that's all I can think of right
2 now, but it -- it's a lot.

3 Q. Got you. Does it pay rent? Do you use it to pay
4 rent to anybody for anything?

5 A. No.

6 Q. Okay.

7 A. Usually it's tapped into in the winter.

8 Q. Okay. Four-wheelers, do you lease those, rent
9 those, or own those?

10 A. Own those.

11 Q. Okay. Who owns those?

12 A. Huggins Beach Service, Inc.

13 Q. Okay. The reason I was asking, when I asked you
14 the assets, you didn't tell me about
15 four-wheelers.

16 A. Well, that's what I call the Mules.

17 Q. Oh, okay. Okay.

18 A. I'm sorry, just mis -- we call them golfcarts,
19 four-wheelers, Mules, or whatever but --

20 Q. Got you. Got you, okay. I think those are called
21 what, RTVs or something like that instead of ATVs,
22 recreational terrain vehicles; is that right,
23 something like that?

24 A. Yeah, but like a big -- like a golfcart with
25 four-wheel drive is what they are.

1 Q. Got you, all right. And the buoys you're talking
2 about, are those like the personal safety buoys
3 you throw out to people, and they hang onto them,
4 and the lifeguard brings them back?

5 A. Yeah.

6 Q. That's the buoys you're talking about?

7 A. Yeah.

8 Q. All right. If you would, tell me what -- how many
9 employees you had at the time of this accident.

10 A. Three not counting myself.

11 Q. And who are they?

12 A. Rhett Deaton, --

13 Q. How do you spell his name?

14 A. D-E-A-T-O-N.

15 Q. R-H-E-T?

16 A. Yes.

17 Q. R-H-E-T-T?

18 A. T-T.

19 Q. Okay. Who else?

20 A. Martin. I can't remember his last name. He's
21 from Poland.

22 Q. Okay. And who else?

23 A. Craig Risbourg.

24 Q. Is that all?

25 A. I'd have to look at the records to see, but I'm

1 pretty sure that's it. I might have had one other
2 guy helping out, but I can't remember.

3 Q. Okay. Who's working for you now?

4 A. At the present time? I got 14, 14 employees right
5 now. I didn't bring a list of them in here with
6 me.

7 Q. Fourteen, okay. Why have you got more now?

8 A. Time of the year. See, in May it's -- in April
9 and May, there's very few people on the beach; and
10 there's no need for lifeguards, for, for very many
11 of them, at that time of the year. And as summer
12 progresses, we hire more and more. So by June the
13 2nd, we, we usually have nine or ten towers open
14 versus in May we only have two open.

15 The first -- the first three weeks in May we
16 only have two towers open. And then we go to June
17 and have nine, ten open, June and July, middle of
18 August, and then it starts -- the season starts
19 winding down, so that's why.

20 Q. Okay. What was Rhett Deaton's duties?

21 A. He was a lifeguard.

22 Q. How about Martin whatever his last name is?

23 A. Lifeguard.

24 Q. And Craig?

25 A. Lifeguard manager, predominately manager.

1 Q. Does Craig Risbourg still work for you?

2 A. No.

3 Q. When did he stop working for you?

4 A. June the -- June the 5th of last year.

5 Q. Why did he leave your employment?

6 A. When he came over to work for me last year, he
7 told me at the beginning he could only stay for a
8 few months. He's got a fiancée and a kid -- or a
9 kid he's going to adopt in the Phillippines, and
10 he told me he had -- would come over to help for a
11 couple of months, but he had to leave the first of
12 June to go back to them.

13 Q. When did he start working for you?

14 A. That season or in the beginning?

15 Q. Any time. When did he first start working --

16 A. 1992.

17 Q. 1992. So in 1992, he first started working for
18 your business?

19 A. Yes, sir.

20 Q. Okay. Did he just work a portion of the year or
21 the whole year whenever he would work for you?

22 A. A portion of the year.

23 Q. Okay. What portion of the year would he work for
24 you?

25 A. Mostly June, July, and August. But some years he,

1 he worked April and May and September, too. He
2 started off as a lifeguard for me; and then as
3 time went by, he became manager.

4 Q. How long was he with you before he started
5 becoming the manager?

6 A. Around nine -- six years.

7 Q. What years did he work for you, '92 -- what other
8 years did he work for you?

9 A. He worked for me periodically from '92 'til, 'til
10 June the 5th of last year; so what's that, 19
11 years?

12 Q. Did he work every year for you?

13 A. No.

14 Q. Okay. Do you know what years he did not work for
15 you?

16 A. Not specifically.

17 Q. Okay. Did he work for you most of those years?

18 A. Yes.

19 Q. Okay. Why would he work for you in April and May
20 sometimes?

21 A. Lifeguards are required to be on -- the City
22 requires us to have lifeguards on the beach; and
23 he lifeguarded those years, so.

24 Q. Okay. When he didn't work for you, where else did
25 he work?

1 A. I know he had a job with Time Warner Cable some;
2 and then he got a job with American Tower
3 Corporation, I think, '90 -- '99 to 2000. But
4 you'd have to -- you know, probably have to, to
5 get more specific --

6 Q. Okay. Do you know what he did at Time Warner
7 Cable?

8 A. Yeah, he sold cable.

9 Q. Sold cable?

10 A. Yeah.

11 Q. Cable packages or --

12 A. Yeah.

13 Q. Do you know what he did at American Tower?

14 A. Yeah, he was a lease acquisition specialist.
15 Leased land for cell phone towers. That's more or
16 less in a nutshell what it is. But, yeah, I
17 forgot I did that, too.

18 Q. Okay. You did that, too?

19 A. I did that, too.

20 Q. All right.

21 A. That was part of my real estate ventures.

22 Q. Uh-huh. Every year whenever he would come back to
23 work for you, would he have to fill out an
24 application?

25 A. No.

1 Q. Okay. When he first started working for you, did
2 he have to fill out an application?

3 A. Yeah.

4 Q. Do all of your employees fill out an application
5 when they first apply?

6 A. When, when Craig first started working for me, no,
7 he didn't. Our policy in the last couple of years
8 has been most of them do. Most of them do, but
9 all of them don't.

10 Q. Okay. Why don't all of them have to fill out an
11 application?

12 A. I know a lot of them. They, they come back year
13 after year, and I don't go through the process
14 over and over again.

15 Q. Okay. Do you keep a file with all those
16 applications in them?

17 A. My manager -- one of my managers is, is keeping
18 one, and I have had some in the past, but I don't
19 have them now.

20 Q. Who would have them?

21 A. For this year?

22 Q. Any year.

23 A. Any year? I threw most of them away through the
24 years. I don't keep them for long periods of
25 time.

- 1 Q. When is the last time you threw them away?
- 2 A. I can't remember specifically.
- 3 Q. All right. Whenever you would hire your
- 4 employees, would you do any type of investigation,
- 5 background check, anything like that?
- 6 A. I call for references on most of them.
- 7 Q. Okay. How would you find out about their
- 8 references?
- 9 A. I'd ask them and get résumés for most of them.
- 10 Q. Would you keep those résumés in a file?
- 11 A. Short periods of time usually.
- 12 Q. How far back do you currently have those résumés?
- 13 A. I don't know.
- 14 Q. On the job applications, same answer?
- 15 A. Same answer.
- 16 Q. Don't know, okay. But do you have some?
- 17 A. I could probably find some, yeah. I don't know
- 18 where, you know.
- 19 Q. Okay. Do you have an office where you keep your
- 20 business materials?
- 21 A. Yeah.
- 22 Q. Okay. When I say business materials, I'm talking
- 23 about paperwork.
- 24 A. Yeah.
- 25 Q. Where is that office located?

- 1 A. 601 35th Avenue North. It's in my --
- 2 Q. In your home?
- 3 A. -- third bedroom in my home.
- 4 Q. Okay. Do you claim that as an office on your
- 5 taxes?
- 6 A. Partially, yes.
- 7 Q. Okay. Do you have a filing cabinet you keep that
- 8 stuff in?
- 9 A. Yeah.
- 10 Q. Okay.
- 11 A. See, I just moved from 35th to 37th. I did a lot
- 12 of downsizing when I moved.
- 13 Q. Got you.
- 14 A. I threw away a lot of stuff.
- 15 Q. All right. But you knew -- did you know this
- 16 lawsuit was pending whenever you moved?
- 17 A. I moved before the lawsuit, sir.
- 18 Q. You did, okay. When was that? When was it you
- 19 moved?
- 20 A. I moved in August 2009.
- 21 Q. Okay. What other type of background check or
- 22 investigation would you do when you hired your
- 23 employees besides calling references?
- 24 A. What kind of background check did I do besides --
- 25 Q. Uh-huh, besides checking with references.

1 A. -- references? Nothing.

2 Q. Are there any requirements that your business has
3 for employees in order for them to be hired?

4 A. Yes.

5 Q. Okay. What are those requirements?

6 A. They must have a certified lifeguard training card
7 and CPR training card; and they must swim 500
8 meters in -- 500 yards, excuse me, in less than 12
9 minutes. In, in our City Franchise Agreement,
10 there's a whole list of them, if you'll just go to
11 that.

12 Q. Do you do those?

13 A. Yes, sir.

14 Q. Did you keep a record of all those things that
15 they were supposed to provide to you and perform?

16 A. Yeah.

17 Q. Okay. Where do you keep those records?

18 A. I've thrown most of them away.

19 Q. When did you throw them away?

20 A. When I moved.

21 Q. Okay. Do you have them, these records, since you
22 moved?

23 A. Some of them, yeah.

24 Q. Okay. Which ones would you have not kept?

25 A. I don't know, lifeguards that weren't going to

1 work for me again.

2 Q. Okay. I know they had to provide you with a
3 lifeguard certificate, CPR certification
4 certificate. Any other certificates?

5 A. The only thing they had to have was -- well,
6 before the foreigners started coming -- after the
7 foreigners come in, have a J-1 visa, the
8 foreigners do now.

9 Q. Okay.

10 A. But had -- have a Social Security card, you know.

11 Q. Any tests that you would have your employees
12 complete before they'd be hired? You told me
13 about the swimming test. Any others?

14 A. No.

15 Q. Who would administer these tests -- well, the
16 swimming test?

17 A. Me, my manager, and the City of Myrtle Beach.

18 Q. And the manager would have been Craig Risbourg?

19 A. Yeah.

20 Q. Who from the City of Myrtle Beach was present?

21 A. One of the police officers. They change variably,
22 whoever, whoever they -- the City sends, wants to
23 send, for the beach patrol. It's usually one of
24 the beach patrol officers.

25 Q. That's what I was about to ask. Any other tests

1 that the City of Myrtle Beach would have one of
2 its people come out and be part of?

3 A. No.

4 Q. Okay. So just the swim test was the only one
5 somebody with the City of Myrtle Beach would come
6 and observe?

7 A. Yeah.

8 Q. Any tests or any type of service that the City of
9 Myrtle Beach would provide to your company and its
10 employees?

11 A. Any kind of service provided? No.

12 Q. Okay. Besides come and evaluate the swimming
13 test, did the City of Myrtle Beach have anything
14 else to do with your company?

15 A. Well, they provide a -- for the drivers, the
16 training for the drivers, a training instructor on
17 that course.

18 Q. Training for drivers?

19 A. For the drivers of the veh -- motor vehicles.

20 Q. Okay. And who with the City would be present for
21 that?

22 A. Tommy Hunt. And I'm not sure who else. They
23 usually have somebody else with him.

24 Q. Okay. What's his position with the City of Myrtle
25 Beach?

- 1 A. The beach patrol. I'm not sure what rank he has.
- 2 Q. Okay. And was this offered for all of your
- 3 employees?
- 4 A. It's only for the drivers, people who would be
- 5 driving.
- 6 Q. All right. And who are they? Let me ask you
- 7 this. You probably won't know when I'm talking
- 8 about. Who were these drivers that were
- 9 designated by your company from when you first got
- 10 the franchise with the City of Myrtle Beach?
- 11 A. Who were the drivers then?
- 12 Q. From then 'til now.
- 13 A. Me, Craig Risbourg, Gordon Smith, and Justin
- 14 Foxworth.
- 15 Q. Okay. So only those -- and I'm including you.
- 16 One, two, three, four people were the only drivers
- 17 at any time for your business?
- 18 A. Since when?
- 19 Q. Since --
- 20 A. Since its conception?
- 21 Q. Well, since you took over --
- 22 A. Since I took over?
- 23 Q. -- the business and had a franchise with the City
- 24 of Myrtle Beach.
- 25 A. Brian Chadwell was my manager in '90 -- the years

1 all run together, 2000 -- Brian Chadwell managed
2 for me some while he was in Coastal and teaching
3 school around here. I'm not sure what years those
4 were.

5 Q. Okay. Anybody else?

6 A. No, not that I can recall.

7 Q. Okay. Did all the people whose names you just
8 gave me go through a driver's course with the City
9 of Myrtle Beach?

10 A. No, the City just started offering that.

11 Q. When was that offered? When would it -- when did
12 the City begin offering that service to your
13 company?

14 A. 2009 I think it was.

15 Q. Okay. And did y'all have that course?

16 A. Yeah.

17 Q. Okay. And who all participated in that course?

18 A. Me, Craig, Gordon, and Justin.

19 Q. Okay. How many times have y'all been through that
20 driver's course?

21 A. Craig went through it once, I've gone through it
22 twice, Gordon has gone through it twice, and
23 Justin has gone through it once and is about to go
24 through it again.

25 Q. Okay. Where was that test held?

1 A. Down at Springmaid -- it's a, a lot between
2 Springmaid Pier and Damon's Grill. It's a parking
3 lot down there. It's kind of a beach and sand
4 dunes area that had never really got developed.

5 Q. And what vehicle did y'all drive when going
6 through this course?

7 A. Chevrolet Colorado.

8 Q. Did you get any type of certificate whenever y'all
9 completed that course?

10 A. No.

11 Q. Were there any type of -- any type of paperwork
12 that y'all had to sign whenever you started and
13 completed --

14 A. I think we signed a sheet with Tommy Hunt.

15 Q. Would he give y'all a copy of it?

16 A. No, I don't have a copy of it. No.

17 Q. What things would y'all do at this course? What
18 did it entail?

19 A. We set up cone -- he set up cones, and we had to
20 drive through the cones without hitting any of
21 them. And simulated lane changes. They talked
22 about putting cones in the trucks and placing them
23 out in front of your vehicles when you stop,
24 safety hints.

25 Q. Anything else?

1 A. Not that I can remember.

2 Q. Any type of written test that was given?

3 A. No.

4 Q. Anything else that was done?

5 A. We went through them on -- we went through the
6 same course, the same thing, with -- what, what
7 did you call those things, R -- RTVs? I call them
8 golfcarts, four-wheel drive golfcarts. We did
9 that, too, at the scene. We used the truck and
10 those.

11 Q. The truck and the RTVs?

12 A. (The witness nods head.)

13 Q. Whose were those, the RTVs? Yours?

14 A. Mine.

15 Q. Okay. And what did y'all do with the RTVs?

16 A. The same -- basically the same thing, same course.

17 Q. Okay. Was this, this test -- it was just held in
18 this parking lot?

19 A. Yeah.

20 Q. All right. Whenever you hire new employees,
21 references, those certifications you've told me
22 about -- well, you said you called their
23 references, you would get their lifeguard
24 certification, their CPR certifications, they'll
25 go through the swim test, --

1 A. Uh-huh.

2 Q. -- and those that were going to be drivers would
3 be drivers. Anything else that you required those
4 employees to give to you or that you went out and
5 got on those employees?

6 A. That's it.

7 Q. That was it?

8 A. That I can think of.

9 Q. Okay. After this test or before this test for
10 these drivers, was there any information your
11 employee drivers or you for the business were
12 required to give to the City of Myrtle Beach?

13 A. After the what? Rephrase.

14 Q. Before you started -- before this driving test was
15 done and any time after the driving test, was
16 there anything that the City of Myrtle Beach
17 required your employees to give them or required
18 you to give them?

19 A. They've always required basically an information
20 sheet on each employee, which is attached
21 somewhere in here. And that, that has their time
22 in the swim, Social Security number, driver's
23 license number if they have a driver's license,
24 emergency contact information.

25 Q. Anything else?

1 A. Address. But it's --

2 Q. Okay. Do you know of anything that the City of
3 Myrtle Beach went -- itself went out and got for
4 your employees or, or for your business about
5 these drivers?

6 A. No, I'm not sure.

7 Q. Okay.

8 A. I don't know what, what they've done after I give
9 them the information. I don't know what --

10 Q. Tommy or anybody else or -- with the City of
11 Myrtle Beach have any meeting with you and say
12 hey, we've gone out and done an investigation on
13 these drivers, and this is what we found? Did
14 you ever have any type of meeting with anybody
15 with the City of Myrtle Beach about that?

16 A. Through the years, through the years, yeah, some
17 of the -- they, they, they have called me about a
18 specific lifeguard, asked me some questions and
19 saying they had happened to have heard some stuff
20 or got some stuff on them.

21 Q. What was that about?

22 A. I don't know. It's just been through, through the
23 years we've -- I, I stay in contact with those
24 guys a lot. I mean, it's a day in and day out
25 thing. It's not like I don't see them, with Tommy

1 Hunt and Phillip Caine --

2 Q. Who were these people that they would call you on,
3 these lifeguards?

4 A. These are just different lifeguards through the
5 years.

6 Q. Do you remember any of their names?

7 A. No.

8 Q. Okay. Were those things just what they have heard
9 on the streets about your lifeguards; is that what
10 you're saying?

11 A. Pretty much, yeah, from what I can remember. I, I
12 don't know where the information came from really
13 that they got.

14 Q. All right. Now, nobody with the City of Myrtle
15 Beach ever had any meeting with you saying hey,
16 we've gone and pulled their rap sheets; we've
17 pulled their driving history, anything like that,
18 have they?

19 A. I can't recall that.

20 Q. Okay. You and Craig Risbourg, were y'all friends?

21 A. Yes.

22 Q. Close personal friends?

23 A. Yes.

24 Q. How long have y'all been close personal friends?

25 A. Since probably '93. He started working for me in

1 '92, and then we became friends the first year he,
2 he, he, he worked for me.

3 Q. Okay.

4 MR. JOHNSON: Let's take a quick break; is
5 that fine with you, about a five minute break?

6 MR. POWELL: Yeah.

7 (Whereupon there was a pause in the proceedings.)

8 BY MR. JOHNSON:

9 Q. All right. As far as the driving course with the
10 City of Myrtle Beach, did you receive any
11 paperwork afterwards?

12 A. No.

13 Q. Did any -- you or any of your drivers have to sign
14 anything required by the City of Myrtle Beach?

15 A. I think we did a sign-in sheet the day we took it.

16 Q. Sign-in sheet?

17 A. Yeah, I'm pretty sure.

18 Q. All right. And when was that held again? How
19 many times have you done it?

20 A. I've done it twice.

21 Q. Okay. When?

22 A. It was in -- last year in June, I think, and this
23 year we did -- I did it in I want to say like the
24 middle of April.

25 Q. So June of last year and sometime around the

1 middle of April of this year; is that correct?

2 A. Yeah.

3 Q. What about Craig Risbourg; how many times has he

4 done it?

5 A. He did it in June of last year.

6 Q. June of last year?

7 A. Yeah, because he -- he's not working this year,

8 so.

9 Q. Gordon Smith, you told me he's done it twice. The

10 same, June of last year?

11 A. I think he did it like in July. I can't -- but he

12 did it later on.

13 Q. Okay. And this year?

14 A. Yeah.

15 Q. Okay. And Justin Foxworth, the same thing? He

16 did it around June?

17 A. Of last year.

18 Q. Of last year and this year?

19 A. Yeah.

20 Q. Around --

21 A. June or July because he, he -- somewhere around

22 there, June or July of last year.

23 Q. Okay. And y'all took these driving courses after

24 this accident happened, correct?

25 A. Yeah.

1 Q. Okay. As far as the City of Myrtle Beach having
2 y'all go through any driving courses, y'all didn't
3 do any with the City of Myrtle Beach before this
4 accident happened, correct?

5 A. Correct.

6 Q. Okay. Before this accident, how often would the
7 City of Myrtle Beach come out there to your
8 business and review your books, say books -- say
9 files, books, anything?

10 A. They came on the beach every day and reviewed the
11 operations; but as far as looking at umbrella and
12 chair rentals, anything like that --

13 Q. I'm talking about paperwork.

14 A. Paperwork?

15 Q. Uh-huh.

16 A. Oh.

17 Q. How often would they come to you and review your
18 paperwork before this accident?

19 A. Whenever we sent it in.

20 Q. When was that?

21 A. Basically whenever I got a new employee and filled
22 out information and we would have to go swim for
23 them, and that's when they would do it.

24 Q. What information would you fill out and send
25 them?

1 A. Driver's license number if they had one. We get
2 some foreigners that don't have them. Like I went
3 over it once, but I'll go over it again: Visa
4 number, Social Security number, emergency contact,
5 basically the address, all that.

6 Q. All right. Who prepared that form? I assume it
7 was a form that you would fill out?

8 A. Yeah.

9 Q. Who prepared that form? Did you prepare it?

10 A. Me or one of my managers.

11 Q. Okay. When I say prepare it, I'm talking about
12 who actually prepared the form.

13 A. Oh, the form, the City prepared the form.

14 Q. Okay. It came from the City?

15 A. Yeah, it was some, some like identification form
16 type thing.

17 Q. Okay. Now, the City wouldn't come out to your
18 business and require a copy of their rap sheet, a
19 copy of their driver traffic report, driving
20 history, anything like that, would it?

21 A. No.

22 Q. Okay. So before this accident, the only thing the
23 City of Myrtle Beach got you to send them was a
24 form to fill out when you hired the employee, and
25 they would come out and observe the swim test; is

1 that correct?

2 A. Yeah, and the operations on the beach, too. I
3 mean, they --

4 Q. All right. Who would do that every day?

5 A. One of -- beach patrol, it was one of their
6 assignees, or it'd be Tommy Cook or Phillip
7 Caine -- I mean Tommy Hunt, Tommy Hunt. Sorry.

8 Q. All right. The City of Myrtle Beach, did anyone
9 come with the City of Myrtle Beach such as beach
10 patrol or anybody and help rent out your umbrellas
11 or chairs or anything like that?

12 A. No.

13 Q. Okay. Craig Risbourg, what was his function, his
14 duties, as manager?

15 A. As manager? He supervised the lifeguards and just
16 basically for their daily operations and as an
17 extra set of eyes as far as observing swimmers and
18 taking care of whatever he needed to do. Lost
19 children, helped out with lost children, purse
20 thieves, basically everything that the lifeguard
21 does. He helped -- he'd help back them up and
22 helped them with their duties.

23 Q. Okay. Did you ever do any type of background
24 investigation on him?

25 A. No.

1 Q. Okay. Why not?

2 A. He and I, like I said, became personal friends,
3 lived together a lot, shared a lot of histories.
4 I knew his father, his sister. I just knew him on
5 a personal level, so I didn't feel it was
6 necessary.

7 Q. Okay. Did he ever tell you anything about his
8 driving history?

9 A. Yeah.

10 Q. What did he tell you?

11 A. In his younger years that he had some traffic
12 tickets and was, was -- basically that he -- down
13 in Louisiana and, I think, Florida, he lived
14 around and played music, traveled a lot, kind of
15 lived, lived a pretty free lifestyle and -- but he
16 had changed and was doing -- had had a change in
17 life and heart and spiritually and was doing a lot
18 better, and I observed that, that he did.

19 Q. You say a free lifestyle. What does that mean?

20 A. Traveled a lot and played music.

21 Q. Okay. Did he tell you about any arrests that he
22 had?

23 A. Yeah.

24 Q. Okay. What arrests did he tell you?

25 A. I can't remember them specifically.

1 Q. Have any idea what they were for?

2 A. Traffic.

3 Q. Just traffic?

4 A. Yeah.

5 Q. What kind of traffic? What do you mean? Are you
6 talking about just speeding tickets?

7 A. Speeding tickets.

8 Q. Anything else he told you about?

9 A. I can't remember.

10 Q. Did he ever tell you he had any arrests for
11 alcohol-related violations, anything like that?

12 A. He might have had a DUI, but I can't remember.

13 Q. Do you know when that DUI was, --

14 A. No.

15 Q. -- could have been?

16 A. No.

17 Q. He tell you anything else about his criminal or
18 traffic history?

19 A. No.

20 Q. So right now he told you about speeding tickets, a
21 possible DUI. Anything else?

22 A. We had so many conversations I can't remember
23 specifics.

24 Q. Okay. When did y'all live together?

25 A. Some in '92. It -- through the 19 year period,

1 it's been a lot off and on.

2 Q. Since the -- during the 1990 period you mean?

3 A. From 1992 to -- 'til the present, present. But we
4 haven't -- yeah, 'til -- yeah, 'til now.

5 Q. Until he left to go to the Phillippines?

6 A. Yeah.

7 Q. The reason I'm asking is you said -- during the
8 19s you said. I assumed you meant 1990s.

9 A. Nineteen years, yeah.

10 Q. Nineteen years, okay. So y'all lived together
11 about 19 years?

12 A. Yeah, off and on.

13 Q. Off and on?

14 A. Yeah.

15 Q. Why would y'all live together?

16 A. He, he traveled some during that period. He was
17 in Nashville. I, I went to Nashville. I was
18 telling you I was doing those towers, and I stayed
19 with him for a few months when he was in
20 Nashville. And then when -- he would go to New
21 Orleans some and live down there in the winter and
22 then come back here and stay with me a few months
23 during the summer usually 'til he found a place of
24 his own.

25 Q. Okay. Did he have a South Carolina driver's

1 license?

2 A. Yeah.

3 Q. How long did he have a South Carolina driver's
4 license?

5 A. I don't know.

6 Q. Do you know how long he could have had a South
7 Carolina driver's license?

8 A. No.

9 Q. Okay. Were there any restrictions on his driver's
10 license --

11 A. No.

12 Q. -- that you know of?

13 A. No.

14 Q. None?

15 A. None.

16 Q. Did you keep a copy of his driver's license in
17 your files?

18 A. Yeah.

19 Q. Okay. Do you have that at your office?

20 A. I think so. I'm not sure.

21 Q. When did you get that copy?

22 A. I don't remember when I got the first -- the first
23 time I got it. I've had copies of it off and on
24 through the years.

25 Q. Okay.

- 1 A. Progressive has a policy before I -- when I had to
2 add, add a driver. They run a check, like a three
3 year check, Progressive does, and said it was --
4 you know, if everything is good. They have to
5 prorate the cost of insur -- or rate the cost of
6 insurance. So I called and had it checked out,
7 and everything was fine.
- 8 Q. Did you get that in writing from Progressive?
- 9 A. They added him to the policy, and it reduced it.
- 10 Q. I mean, you have that in writing where they had
11 done an investigation into his background?
- 12 A. No.
- 13 Q. Okay.
- 14 A. I know what -- by talking to them on the phone,
15 the conversation with them.
- 16 Q. Who did you talk to on the phone?
- 17 A. I talked to whoever the -- when I dialed that
18 1-800 number, whoever answered the phone.
- 19 Q. But you don't know who it was?
- 20 A. No.
- 21 Q. All right. How long have you had a franchise with
22 the City of Myrtle Beach?
- 23 A. Myself personally or the family?
- 24 Q. Well, since you've had the corporation.
- 25 A. Since I've had the corporation? I'm not exactly

1 sure of the dates.

2 Q. Okay. Was it since '92 I think you said you took
3 over the business solely?

4 A. No, I took over in '98.

5 Q. Oh, you took over -- okay.

6 A. My dad was still alive. He had his stroke in '98.
7 He was still alive. He didn't die 'til 2005 --

8 Q. I'm sorry to hear that.

9 A. -- 2004.

10 Q. I'm sorry to hear that. That's right. That's
11 where I got '92. I think you started with your
12 dad in '92 until '98, right?

13 A. Yes, sir.

14 Q. And then you took over --

15 A. Yeah, when he had the stroke.

16 Q. All right. Were you the only one that got the
17 franchise for Huggins Beach Service, Inc. from the
18 City of Myrtle Beach in '98?

19 A. In '98? '98, I think, yeah. I, I can't remember
20 what year. See, the contract goes -- the
21 franchise is for a 7 year period at a time; and I
22 think in '98, it was me and my dad jointly, I
23 think, when it came up for renewal. I'd, I'd have
24 to look at the documents to tell you specifically.
25 But I think in 2001, it was solely me.

- 1 Q. From 2001 you've had the franchise with the City
2 of Myrtle Beach to present --
- 3 A. Yeah.
- 4 Q. -- for Huggins Beach Service, Inc.?
- 5 A. Yeah.
- 6 Q. All right. And then before then, you and your
7 daddy had the franchise together; and then before
8 then, to your knowledge, just your daddy had the
9 franchise?
- 10 A. Yeah.
- 11 Q. Okay. Was it always a franchise --
- 12 A. Yeah.
- 13 Q. -- agreement? Okay.
- 14 A. I think when they originally started in '48, it
15 was just a business license, I think.
- 16 Q. Got you. Do you have a cell phone?
- 17 A. Yes, sir.
- 18 Q. What's your cell phone number?
- 19 A. 843-340-9084.
- 20 Q. Did you have that same number at the time of this
21 accident?
- 22 A. Yes.
- 23 Q. Did you have any other cell phone numbers?
- 24 A. For me?
- 25 Q. Uh-huh.

- 1 A. No.
- 2 Q. Did you have any for any of your employees?
- 3 A. Yeah.
- 4 Q. All right. What were those numbers?
- 5 A. I can't remember.
- 6 Q. At the time of the accident, did you have any cell
7 phone numbers other than 340-9084 for any of the
8 employees?
- 9 A. Yeah.
- 10 Q. Do you remember the numbers?
- 11 A. No.
- 12 Q. Okay. Do you still have those numbers in use for
13 your business?
- 14 A. No.
- 15 Q. What numb -- what cell phone numbers do you
16 currently have in use for your business?
- 17 A. 843-340-9084. Well, that's personal and business.
18 I use it for personal and business.
- 19 Q. And that's the only one?
- 20 A. Yeah.
- 21 Q. And at the time of this accident, any other cell
22 phone numbers that were used for the business?
- 23 A. Yeah.
- 24 Q. What?
- 25 A. I don't remember.

1 Q. Who had those numbers?

2 A. It was -- it -- I could probably go back and find
3 the records from --

4 Q. Or should I say who was the employee who would use
5 that number?

6 A. Craig.

7 Q. Craig. Did the Beach Service have a phone that it
8 paid for for him?

9 A. Yeah, that cell phone.

10 Q. Okay. You don't remember the number?

11 A. I'd hate to guess. I, I figure I'd get close, but
12 I'm not sure.

13 Q. Who was your service through at the time?

14 A. T-Mobile, who -- yeah, I think it was T-Mobile
15 back then.

16 Q. Who's it through now?

17 A. T-Mobile. I think they had a buyout or something.

18 Q. Where did you go to get the phones, the service?

19 A. T-Mobile.

20 Q. Where is it located is what I mean?

21 A. Down behind the Coastal Grand Mall.

22 Q. Okay. You don't know the address?

23 A. No.

24 Q. Okay. Do you know Craig Risbourg's current cell
25 phone number?

1 A. No.

2 Q. Okay. He's in the Philippines?

3 A. Yeah.

4 Q. Okay. At the time of this accident, what
5 insurance policies did you have for the Beach
6 Service?

7 A. I had a general liability -- I guess that's what
8 it's called; that's what I call it -- for the
9 Beach Service; and I had a policy with Progressive
10 for the vehicle, for the trucks, truck and
11 Explorer. Well, at the time of the accident, I
12 had it for the truck, yeah.

13 Q. That's the Colorado?

14 A. Colorado truck, yeah. I also had -- I don't know
15 how to phrase that insurance, but I -- on, on the
16 equipment, insurance on the umbrellas and chairs
17 in case they were destroyed during a rain --
18 lightening storm or wind storm, for that. And I
19 had a -- yeah.

20 Q. Who was that through?

21 A. John T. Cook. I think he's coming in in a little
22 while. He might could help you more. He's
23 probably got records of them all.

24 Q. What was the amount of coverage on the equipment?
25 Was that just to replace the equipment?

1 A. Yeah.

2 Q. Okay. Auto, Progressive, what was the liability
3 limits on it?

4 A. A million.

5 Q. And on the general liability?

6 A. A million.

7 Q. Okay. And did you go and meet with Mr. Cook about
8 needing the insurance; and he said hey, this is
9 what you need; these are the types of policies you
10 need? How did that happen?

11 A. The City of Myrtle Beach recommended the type
12 policy we had to have and went and talked with --
13 I met Mr. Cook years ago. I went and talked to
14 him, and he was able to find it.

15 Q. Did you take the franchise agreement with you --

16 A. Yeah.

17 Q. -- and showed it to him? Okay. And the City
18 required that amount of insurance?

19 A. Yes.

20 Q. Okay. Did anybody with the City of Myrtle Beach
21 meet with you and discuss with you about insurance
22 coverage needs?

23 A. Yeah.

24 Q. Okay. Did they tell you you had the option to get
25 more insurance if you wanted it or just told you

1 you just need a million?

2 A. I can't remember.

3 Q. Okay.

4 A. I do know Progressive limit -- Progressive only
5 offers a million. Most -- I've, I've shopped
6 around for carriers, and their limit for
7 commercial or business policies is a million
8 dollars in the State of South Carolina right now.

9 Q. Did the City of Myrtle Beach tell you to go to
10 Progressive and get your policy?

11 A. No.

12 Q. Okay. So you could have gone to another insurance
13 company?

14 A. Yeah, and I checked around.

15 Q. Okay. Whenever you got this franchise agreement,
16 who did you meet with? I'm talking about the one
17 that was in existence at the time of this
18 accident.

19 A. Who did I meet with? What are you talking about,
20 meet?

21 Q. Whenever you got the contract and signed it, did
22 you meet with somebody at --

23 A. Tom Leath.

24 Q. Tom Leath, all right. What was your and Tom's
25 conversation about the franchise agreement?

- 1 A. We didn't go over anything about it. He just
2 signed it, and I signed it.
- 3 Q. Okay.
- 4 A. There had been numerous conversations through the
5 Beach Advisory Committee and City Council and
6 talks back and forth about what we needed, and
7 that type of thing, before they came up with the
8 final draft. Once the final draft was ready, it
9 was signed by me and the City Manager.
- 10 Q. Okay. Did they go through the agreement with you?
- 11 A. The agreement had been gone through in previous
12 sessions.
- 13 Q. How was it gone through?
- 14 A. Pretty much step by step, page by page.
- 15 Q. So they had a copy of the franchise agreement in
16 front of them?
- 17 A. Yeah, Beach Advisory Committee.
- 18 Q. Did you have a copy of it with you whenever you
19 were involved in those meetings?
- 20 A. Yeah.
- 21 Q. You did? Do you still have copies of those
22 agreements?
- 23 A. No.
- 24 Q. Did you mark on those agreements?
- 25 A. No.

1 Q. Were there any changes to those agreements that
2 you recall?

3 A. From the beginning of the conversation with -- to
4 the end, end of the -- end of the final draft,
5 yeah, there were -- there was changes.

6 Q. It's kind of the reason you have these meetings,
7 isn't it, to make changes?

8 A. Yes.

9 Q. So whenever you, you met with the City of Myrtle
10 Beach representative back in September of 2008, to
11 sign it, y'all didn't go through the requirements
12 of the franchise agreement at that time?

13 A. That had already been gone through before, no.

14 Q. I didn't ask you that.

15 A. No.

16 Q. I'm talking about at that time. No?

17 A. No.

18 Q. Okay. Craig Risbourg, at the time of this
19 accident, did he have a vehicle of his own?

20 A. No.

21 Q. Okay. Did he have any insurance of his own?

22 A. No, not that I know of.

23 Q. Okay. What was your understanding whenever you
24 took out this general liability policy as to what
25 it would cover?

1 A. Operations and procedures of the Beach Service.

2 Q. Okay. Anybody ever go any -- over any exclusions
3 with you whenever you took out that policy?

4 A. Yeah.

5 Q. Okay. What exclusions did they tell you about?

6 A. The automobile.

7 Q. All right. Who told -- who went over that with
8 you?

9 A. I think it was Julie with John T. Cook. I can't
10 remember.

11 Q. What did she tell you?

12 A. That there was an exclusion on the automobile.
13 That they would do the general liability policy,
14 but they couldn't insure the automobiles. That
15 you'd have to find a different -- that had to be
16 done separately through people that specialize
17 more or less in automobile coverage.

18 Q. Okay. What was your understanding that the
19 general liability policy would cover then?

20 A. The umbrellas, if the wind blew them away and they
21 hit somebody. Or if the lifeguard was going out
22 on a rescue and for some reason the people drowned
23 or got hurt, then the policy would cover any kind
24 of claims against us on that. And pretty much
25 that's it.

1 Q. Okay. Anything else she told you about as far as
2 the general liability policy and the auto policy?

3 A. Not that I can remember. She said it would cover
4 the -- what did we call them -- RTVs. It covered
5 the RTVs but not the street cars so to speak.

6 Q. Okay. I'm going to ask you --

7 MR. JOHNSON: Y'all provided this to me. It's
8 a picture of a Jet Ski.

9 BY MR. JOHNSON:

10 Q. Do you know whose Jet Ski that is?

11 A. That appears to be the City of Myrtle Beach's.

12 Q. Okay.

13 A. Wait a minute. Wait a minute. Yeah.

14 Q. Okay. Do you remember seeing it?

15 A. I've seen it a lot, yeah.

16 Q. You have, okay. And did y'all ever use that Jet
17 Ski?

18 A. Me personally, no; or my employees, no.

19 Q. Employees. How --

20 A. No, the City uses it.

21 Q. Okay. Did y'all ever hook up to it or anything to
22 move it out of the way or move it anywhere?

23 A. No, I have -- I have my own Jet Ski that I have
24 to -- the company has its own Jet Ski that we put
25 down there.

- 1 Q. Okay. You didn't tell me that earlier about an
2 asset.
- 3 A. Oh, I forgot. I'm sorry.
- 4 Q. All right. That's not your Jet Ski?
- 5 A. No.
- 6 Q. What color is your Jet Ski?
- 7 A. Red.
- 8 Q. Okay. How long have you had that Jet Ski of
9 yours?
- 10 A. I got it in, in July of 2009, I think it was.
- 11 Q. Still got it?
- 12 A. Yeah.
- 13 Q. Okay. Whose name is that Jet Ski registered in?
- 14 A. Huggins Beach Service, Inc.
- 15 Q. All right. Does the City of Myrtle Beach leave
16 these Jet Skis on the beach overnight?
- 17 A. No, not that I know of. I hadn't -- most of the
18 times I've seen them, they pull -- they put them
19 on the beach in the morning and take them off late
20 afternoon or something, but I, I can't say that
21 for sure.
- 22 Q. Okay. Anybody told you the City of Myrtle Beach
23 brought this Jet Ski out the morning of this
24 accident?
- 25 A. No. It looks like the City seal on there or, or a

1 police thing right here, is what I -- what I was
2 going by.

3 Q. Got you.

4 A. But I might be wrong. Like I said, I could be
5 wrong.

6 Q. You said you've seen it several times, though,
7 right?

8 A. Yeah.

9 Q. Okay.

10 A. It's just not blown up enough quite to, --

11 Q. I understand what you're saying.

12 A. -- to specifically see it.

13 Q. All right. Do you have any type of umbrella
14 policy yourself?

15 A. On the Beach Service?

16 Q. On you personally or the Beach Service.

17 A. When you say -- no, I don't think so. When you
18 say umbrella, I'm starting to think about the
19 umbrellas that, that we use.

20 Q. Yeah. Let me ask you this.

21 A. No -- yeah, I don't have one.

22 Q. Do you have any type of insurance, liability
23 insurance, yourself besides Huggins Beach Service
24 type insurance?

25 A. Any kind of liability insurance myself?

1 Q. Uh-huh. Do you have any insurance that covers
2 you?
3 A. Health insurance, life insurance.
4 Q. Uh-huh. No liability, though?
5 A. Errors and omissions in real estate.
6 Q. Okay. Anything else?
7 A. No.
8 Q. All right. If you would, this accident, do you
9 remember when it happened?
10 A. Yeah.
11 Q. May 14th, 2010? Does that sound right?
12 A. Yeah.
13 Q. All right. Who all was working for you that day?
14 A. Rhett Deaton, Martin Pavilacka (ph) or Pavilacko,
15 something like that, and Craig Risbourg.
16 Q. Okay. Was anybody -- had anybody shown up to work
17 so far that morning?
18 A. Had anybody shown up to work?
19 Q. So far that morning when this accident happened.
20 A. Well, yeah. I mean, they had to be at work at
21 8:00.
22 Q. Okay.
23 A. We were there earlier that day, though.
24 Q. All right. Where was Rhett?
25 A. During the time of the accident?

- 1 Q. Uh-huh.
- 2 A. I'm not exactly sure. I, I didn't -- I wasn't
3 there on the beach when the accident occurred.
- 4 Q. Okay. How about Martin; where was he at the time
5 of the accident?
- 6 A. I'm not exactly sure either.
- 7 Q. All right. Is there a particular place that Rhett
8 Deaton is supposed to work?
- 9 A. Yeah, he, he should have been on Stand 31, which
10 is on 5th Avenue North in front of the Bay View
11 Resort.
- 12 Q. Okay. And you cover what areas of the Beach, the
13 Avenue from?
- 14 A. 2nd Avenue North to Pier 14, which is like 13th
15 Avenue North.
- 16 Q. Okay. And where did this accident happen?
- 17 A. Somewhere between 7th and 8th Avenue North, best I
18 can -- I got there after the -- after -- you know,
19 not, not completely after the scene; but I got
20 there, you know, in about 15 minutes, 10 minutes,
21 something like that.
- 22 Q. Where was Martin at the time? Well, where should
23 he have been at the time?
- 24 A. Stand 41, which is on 12th Avenue North.
- 25 Q. Okay. And was Craig supposed to be on a stand?

- 1 A. No.
- 2 Q. Okay. What was he supposed to be doing?
- 3 A. He was supposed to be patrolling the area between
- 4 the two lifeguards or patrolling at that area of
- 5 beach and monitoring Stand 31's area specifically
- 6 during that period of time. Stand 31 should have
- 7 been on lunch at that time, that period.
- 8 Q. Okay. What time of day did this happen? Do you
- 9 remember?
- 10 A. Around 1:30.
- 11 Q. And where were you when it happened?
- 12 A. I was leaving my house on -- the house on 35th.
- 13 Q. What had you been doing earlier that day?
- 14 A. I could have been doing some -- checking on some
- 15 real estate and some Beach Service stuff, too.
- 16 Q. All right. What time did Craig Risbourg show up
- 17 that morning?
- 18 A. 6:00.
- 19 Q. Okay. Were y'all living together at the time?
- 20 A. He -- the, the day of the accident I don't think
- 21 we were. I think he was at Myrtle Street property
- 22 for a couple of days.
- 23 Q. What was he doing there?
- 24 A. I beg your pardon?
- 25 Q. What was he doing there?

- 1 A. It's a property that I bought that I rent out to
2 lifeguards.
- 3 Q. Okay. He stayed there a couple of days?
- 4 A. Yeah. He was -- he was move -- moving over there
5 for awhile until other -- the other lifeguards
6 came in, and then he was moving in with me. He
7 lived with me when he first got here that, that
8 year for a few weeks and then moved over there for
9 about a week and then moved back in with me.
- 10 Q. Okay. Did you see him the night before this
11 happened?
- 12 A. No, I don't --
- 13 Q. Did you see him the --
- 14 A. I, I can't remember. I don't think so, but I
15 don't --
- 16 Q. Did you see him the day before?
- 17 A. The day before, yeah.
- 18 Q. At work?
- 19 A. Yeah.
- 20 Q. What did he say he was going to go do after work?
- 21 A. I can't remember.
- 22 Q. Okay.
- 23 A. I saw him at 6:00 that morning and was with him
24 the day of the accident.
- 25 Q. You were with him 6:00 that morning?

1 A. Yeah.

2 Q. Okay.

3 A. The City had called us to -- the Today Show was
4 on -- being featured at the boardwalk. I remember
5 this. And they'd asked us to set some umbrellas
6 up for the Today Show, so it was an extremely
7 early morning. They had -- they were filming at
8 7:00 in the morning that day, so we had to go down
9 to the beach real early and get them up for the
10 Today Show.

11 Q. Okay. Who was staying there with him at that
12 place?

13 A. I think Martin was, but I'm not sure.

14 Q. What's the address where he was staying?

15 A. 217 North Myrtle Street.

16 Q. Myrtle Beach?

17 A. Myrtle Beach, Unit No. 3.

18 Q. Anybody else staying with Craig besides Martin?

19 A. No, not at that time I don't -- I don't -- I don't
20 think.

21 Q. Why was he staying over there instead of with you?

22 A. I got a three day rule at my house. No, I'm
23 kidding. I had some friends coming into town to
24 visit and asked him if he could go over there and
25 stay for awhile while they were here, stay in

1 my -- he was in my extra bedroom.

2 Q. Okay. Did he ever pay you rent when he stayed

3 with you?

4 A. No.

5 Q. Did he pay you rent whenever he stayed over at

6 Myrtle Street?

7 A. Yeah.

8 Q. He did? How much did he pay you for staying

9 there?

10 A. I can't remember.

11 Q. Is that the only time he paid you rent for staying

12 with you or in one of your places?

13 A. Yeah.

14 Q. Okay.

15 A. And I don't think -- I don't think he paid that

16 time either. Like I said, we were friends.

17 Q. Yeah. Did y'all have any conversation about what

18 he did the night before?

19 A. I can't remember.

20 Q. Okay. What did he do for hobbies?

21 A. Played music.

22 Q. What did he play?

23 A. Guitar.

24 Q. Any other instruments?

25 A. No, not that I know of.

1 Q. Did he go to any bars or any -- anywhere like that
2 frequently?

3 A. No.

4 Q. No. How about drink alcohol; did he drink alcohol
5 regularly?

6 A. No.

7 Q. Do you know if he drank any alcohol the night
8 before this accident?

9 A. I can't swear to it, but I don't think so.

10 Q. Okay. How about the day of the accident?

11 A. No.

12 Q. Okay. How was his health?

13 A. Pretty good health.

14 Q. Okay. Would he take the swimming test?

15 A. Yeah.

16 Q. When was the last time he took the swimming test?

17 A. What day did he -- I think he took it April the
18 2nd.

19 Q. Of this year?

20 A. Of 2010. He didn't work this year.

21 Q. Okay. April the 2nd, 2010, he took the swimming
22 test?

23 A. Yeah.

24 Q. Do you have any documentation that he took the
25 test and how he performed on the test?

1 A. I think so.

2 Q. Okay. Where is that documentation?

3 A. I think it's been provided to you.

4 Q. Okay. Where do you normally keep it, though?

5 A. I try to keep a record of files for the guys that
6 do that; and the City gets a copy of it, too.

7 Q. Okay. You keep it at your house in your office?

8 A. Yeah.

9 Q. Okay. How did he perform on that test?

10 A. Did good, passed.

11 Q. How about medications; was he taking any
12 medications?

13 A. Yeah, he's on some medicines.

14 Q. What medicines?

15 A. I don't know, something for rheumatoid arthritis.

16 Q. Anything else?

17 A. No.

18 Q. Taking that same medication at the time of this
19 accident?

20 A. You'd have to ask him. I don't know.

21 Q. So whether -- was he taking any medications at the
22 time of this accident?

23 A. I don't know.

24 Q. Okay. Do you know if he had any doctors he was
25 seeing?

1 A. Yeah.

2 Q. Who were they?

3 A. I don't know their names, somebody that
4 specializes in rheumatoid arthritis is all I know.

5 MR. JOHNSON: Let's go off the record for a
6 minute.

7 (Whereupon there was a pause in the proceedings.)

8 BY MR. JOHNSON:

9 Q. As far as the cell phone that Craig was using at
10 the time of this accident or he had possession of
11 or use of at the time of this accident, can you go
12 back and see if you can find information on it and
13 give it to your lawyer? Will you do that for me?

14 A. Okay.

15 Q. All right. The next thing is -- all right. Who
16 contacted you about this accident?

17 A. Mr. Risbourg.

18 Q. Okay. What did he tell you?

19 A. There had been an accident down on the beach with
20 the truck, and he was driving. And he heard a --
21 heard a noise under the truck, and he stopped and
22 got out and looked, and somebody was under the
23 truck. Please hurry. That he'd already called
24 911, and he was scared.

25 Q. Anything else he told you?

1 A. Not in that conversation there, no.

2 Q. What did you tell him?

3 A. I told him I'd be right there.

4 Q. Okay. Did you call anybody?

5 A. No, I went and drove straight to the beach.

6 Q. Who called 911, police, EMS, anything like that?

7 A. He did.

8 Q. Okay. Did you call anybody?

9 A. No.

10 Q. Okay. How do you know he did it?

11 A. He told me he did.

12 Q. When did he tell you?

13 A. When he called me to ask me if I could come

14 to -- tell me to please come to the beach right

15 now.

16 Q. Okay. And you were at your house at the time?

17 A. I was leaving my house already headed to the

18 beach.

19 Q. Did, did you call anybody when you got the call

20 from Craig until you got to the scene?

21 A. No.

22 Q. Okay. And when you got to the scene, where did

23 you park?

24 A. Probably 30 yards north of the truck, where he was

25 stopped.

1 Q. Did you pull up on the beach?

2 A. Yeah, I was on the beach. I pulled right down
3 there to it.

4 Q. How did you get on the beach?

5 A. Drove on it.

6 Q. What were you driving?

7 A. Ford Explorer.

8 Q. Okay. Is that your personal vehicle?

9 A. Yeah. I use it for, for the beach some, too.

10 Q. Okay. How do you get on the beach with a vehicle?

11 A. I enter on -- there's a drive-on-the-beach on 12th
12 Avenue North, and then there's another one on 7th
13 Avenue North. I came down the one on 12th Avenue
14 North I believe it was, drove on the beach and
15 came -- was north heading south.

16 Q. Okay. And what did you do when you got to the
17 scene? Kind of walk me through what you did until
18 you left.

19 A. I stopped on the way and got a backboard out; and
20 by the time I got to the scene, I stopped and got
21 out, and EMS was already there. And I'm not sure
22 if the police were already there or not, but I
23 know EMS was already there. So I looked up under
24 the truck -- I looked at Craig, and he didn't look
25 good. He was distraught, you know. So I looked

1 up under the truck and --

2 Q. Who is he?

3 A. Craig.

4 Q. Okay.

5 A. Looked up under the truck and saw Erik under the
6 truck or the victim under the truck.

7 Q. Okay. And how was he positioned under the truck?

8 A. His feet were like coming out the front of the
9 truck, and his chest was right where some -- the
10 wheel -- the bottom of the truck thing where the
11 wheels connect to, right there. His chest was
12 right, right around that area there, and that's,
13 that's where it had pinned -- appeared to be his
14 chest was rubbing up against that or pinned up
15 against that.

16 Q. How about his head?

17 A. His head was back -- you know, his head was -- his
18 feet were like going toward 2nd Avenue Pier, and
19 his head was like towards Pier 14.

20 Q. Was his head towards the bumper or towards the
21 tailgate?

22 A. His body was more closer to the front of the
23 truck.

24 Q. Okay.

25 A. And his head, you know, -- his feet were like

1 sticking out -- almost sticking out the front of
2 the truck.

3 Q. Okay. That's what I mean. And as far as the
4 position his head was pointing, was towards the
5 tailgate of the truck?

6 A. Yeah. Yeah.

7 Q. And his feet were pointing away from the vehicle,
8 away from the front of the vehicle?

9 A. Yeah.

10 Q. Okay. That was my understanding. Did it appear
11 to you that when Craig drove into Mr. Rabon that
12 it was -- the front of the truck went over his
13 head first, over the head portion of his body
14 instead of the leg portion of his body first?

15 A. I don't know. I would assume that, but I don't
16 know.

17 Q. Got you. Did you hear Mr. Rabon say anything?

18 A. Yeah.

19 Q. What did you hear him say?

20 A. He wasn't making really sentences. It was like
21 help and words like that and just kind of growling
22 a little bit, like (the witness demonstrated).

23 Q. Okay. Did he make any screaming sounds or
24 anything like that while you were there?

25 A. I didn't hear really any screaming. He was kind

1 of growl -- growling a little bit.

2 Q. Okay. Was he saying any words?

3 A. I don't recall any.

4 Q. Okay. Were you able to see his face?

5 A. Yeah.

6 Q. Okay. What did his face look like?

7 A. It had some blood. It appeared to have some blood

8 from what I remember, a little bit of blood on it,

9 so I couldn't really --

10 Q. You're rubbing your face. Are you talking about

11 around the nose area?

12 A. Yeah.

13 Q. Okay. Where did it look like it was coming from?

14 A. I don't know.

15 Q. Did you see any blood anywhere on his head besides

16 his nose area?

17 A. Not that I can remember.

18 Q. Did anybody try to talk to him that you recall?

19 A. Yeah, I did.

20 Q. Okay. What were you saying to him?

21 A. Calm down, everything will be all right. We've

22 got help on the way.

23 Q. Did he ever respond to you?

24 A. Not really.

25 Q. You say not really. What does that mean?

1 A. Well, he made some, you know, some groaning noise;
2 but he didn't say, you know, explicitly okay, I'll
3 calm down.

4 Q. Do you think he understood what you were saying
5 but just couldn't --

6 A. Yeah.

7 Q. -- verbally respond? Is that a yes?

8 A. Yes.

9 Q. Okay. What happened next? Well, let me ask you
10 this: Did you speak with Craig any more up until
11 that point?

12 A. No.

13 Q. Okay.

14 A. When I -- when I pulled up and saw it and, you
15 know, Craig was there -- and I just looked up
16 under the truck and didn't, didn't -- I said
17 something about we've got to get him out. I said
18 we've got to have somebody -- I said we've got to
19 get him out. And Craig or somebody there had said
20 the EMS is here. They're going to do that. They
21 had some kind of air bags they were using.

22 Q. Where was Craig during this time you were there?
23 Was he just in one place or walking around? What
24 was he doing?

25 A. I really wasn't watching Craig.

- 1 Q. Okay. How did -- how was Erik retrieved from
2 underneath the vehicle? And what I'm asking is
3 how did they jack -- did they have to jack the
4 truck up?
- 5 A. Yeah, they used air bags to push the truck up, and
6 then they slid a backboard up under him and got
7 him out on that and slid him out on that.
- 8 Q. Who was that? Who --
- 9 A. EMS.
- 10 Q. EMS, okay. How long is your understanding that he
11 was underneath that vehicle?
- 12 A. I'm, I'm thinking five, ten minutes, but I don't
13 know.
- 14 Q. How long did it take you to get there when you got
15 the phone call?
- 16 A. Well, I was on 30 -- 35th and already headed this
17 way so approximately like 5 minutes.
- 18 Q. Five minutes?
- 19 A. 3 to 5. It's, it's 35th to 12th.
- 20 Q. How long was he under that vehicle while you were
21 there if you can recall?
- 22 A. I really don't know; but I'm thinking five or ten
23 minutes, five minutes. The EMS, EMS did a pretty
24 good job and all.
- 25 Q. Okay. Well, did they bring the ambulance onto the

1 beach, or did they have to walk him a distance to
2 get him in the ambulance?

3 A. They, from what I remember, they put him on a
4 backboard, and they carried him on the backboard
5 to the ambulance. Because the ambulance can't --
6 it doesn't function very well in that sand because
7 it's soft. It won't --

8 Q. So they carried him?

9 A. (The witness nods head.)

10 Q. Okay. I'm sorry, say that again. Did they carry
11 him --

12 A. Yeah.

13 Q. -- a distance? Okay. And where did they carry
14 him to? It wasn't clear in my mind.

15 A. I think to the walkway right there at 6th Avenue.
16 There's a street -- I mean 7th Avenue, 7th or 8th.
17 I can't remember.

18 Q. Okay.

19 A. Yeah, it's right there at 7th.

20 Q. And was the ambulance there in the parking lot, or
21 you don't know?

22 A. I think so. That's usually protocol; but I can't
23 remember specifically, you know.

24 Q. Right, I'm -- right, I'm just asking what you
25 remember seeing.

1 A. Yeah.

2 Q. Okay. Do you remember seeing the ambulance?

3 A. Yeah.

4 Q. Okay. Do you remember where you saw it when they
5 loaded him?

6 A. God, I wish you had asked me this three days
7 after, you know. Not, not exactly, no.

8 Q. Okay. What did you do after -- well, let me ask
9 you this: Did you walk while they -- along with
10 everybody when they were transporting him towards
11 the ambulance?

12 A. For a little while when they first, first got him
13 up out from under the truck because he was moving
14 then. He was -- he was on the backboard, and he
15 didn't appear -- didn't, didn't appear to be -- I
16 mean, he was hurt, but he was -- he was making
17 noises and moving his arms. And so I talked to
18 Craig some, and I talked to the police officers
19 some, and the EMS was doing their thing.

20 Q. Okay. So you talked to Craig some more?

21 A. Yeah.

22 Q. What did y'all talk about?

23 A. Just asked what happened.

24 Q. What did he tell you?

25 A. That he was -- had been patrolling the beach, and

1 he pulled in around between -- it was right there
2 by 8th Avenue and stopped the truck and was
3 looking out at the swimmers, observing them,
4 making sure they don't -- we have to -- chest deep
5 safety rule, so they can't go out past chest deep.
6 Was watching the swimmers, looking north and south
7 and straight out ahead.

8 And he'd been in that area for maybe 10
9 minutes so decided to turn south and go towards
10 2nd Avenue Pier; and after he turned south to go
11 toward 2nd Avenue Pier, he heard a noise up under
12 the truck, and he stopped and got out to look, and
13 somebody was up under it.

14 Q. All right. So did he tell you where he first
15 started when he came on the beach just before this
16 happened? Let me ask this a little bit clearer
17 maybe: Did Craig tell you where he entered on the
18 beach before this happened?

19 A. No. He'd already -- he had been on the beach for,
20 for awhile already. Because he had come by the
21 Chesterfield Motel, which is between 7th and 8th,
22 and stopped there to talk to the hotel owner of
23 the Chesterfield Inn, who was sitting under an
24 umbrella.

25 Q. What's her name?

1 A. Karen Mitchell.

2 Q. She owns the Chesterfield Inn?

3 A. Yes, sir.

4 Q. Jenny used to own that, didn't she? Remember
5 Jenny?

6 A. Yeah.

7 Q. Okay. I was -- anyway, a side note there, anyway.

8 MR. JOHNSON: Go off the record for just a
9 minute?

10 (Whereupon there was a pause in the proceedings.)

11 BY MR. JOHNSON:

12 Q. All right. How long had he been driving on the
13 beach that day?

14 A. Off and on since 6:00 when we got down there for
15 the Today Show, 6:30.

16 Q. All right. And you say he stopped to talk to one
17 lady who owned a motel just before this happened?

18 A. Yeah.

19 Q. And he drove a little distance and stopped and
20 kind of scanned the area?

21 A. Yeah.

22 Q. Did he tell you how long he was stopped?

23 A. From what I remember him saying, he was about --
24 he'd stopped for about five or ten minutes right
25 there.

1 Q. All right. Did he tell you what he did while he
2 was stopped for five or ten so minutes?

3 A. Yeah, he said he was, you know, observing the --
4 observing the swimmers, watching them to make sure
5 everything was okay. And I asked him was he on
6 the cell phone. He said no.

7 Q. Okay.

8 A. So observing the swimmers. And just, you know,
9 after a time, everything seemed safe, and he
10 pulled south to head back towards 2nd Avenue Pier.

11 Q. Okay. Did he tell you he had got out and looked
12 at anything when he stopped for the five or ten
13 minutes?

14 A. No. Huh-uh.

15 Q. Okay. Did he tell you anything else about him
16 whenever he stopped, what he did when he stopped,
17 besides just looking the area over?

18 A. That's all.

19 Q. All right. Do you know if he turned the vehicle
20 off when he was parked for five or ten minutes?

21 A. I don't know.

22 Q. You don't know, okay. What did he tell you he did
23 next?

24 A. After he turned south?

25 Q. Well, when he started -- after he was parked, what

1 did he do after that? I guess he started to do
2 whatever? Tell me --

3 A. Yeah, I went over it once, but I'll go over it
4 again.

5 Q. Yeah.

6 A. He was, like I said, observing the swimmers in the
7 ocean in that area, and he -- everything was fine;
8 so he turned south to go towards 2nd Avenue Pier,
9 to go down there. And like I said, at that time
10 of the year, we only have 2 lifeguards in a 13
11 area block so riding down that way to monitor the
12 water safety in that area down there.

13 Q. Okay. And you say he turned south. Had he
14 completely turned around, make -- was it like a
15 U-turn that he did?

16 A. No. No.

17 Q. No?

18 A. What, what I was -- like I said, I, I wasn't
19 driving there, so I really don't know.

20 Q. Okay. Was he heading in the opposite direction
21 than what he was whenever he had stopped? What
22 I'm getting to, when he stopped, he -- was he
23 pointing north?

24 A. When he stopped, he was pointing east towards the
25 ocean.

1 Q. Towards the ocean?

2 A. Uh-huh.

3 Q. Okay. So then he just turned to the right?

4 A. To -- which is south.

5 Q. And, and completed like a U-turn?

6 A. I think he just did an L-turn.

7 Q. Okay.

8 A. He was right there stopped, pulled off, you know.

9 Q. What I'm getting to is whenever --

10 A. He couldn't drive into the ocean, so he stopped.

11 Q. When he was driving down the beach and --

12 A. Karen, oh, okay.

13 Q. Then he was heading north. And it sounds to me

14 like what he was doing is he had turned, you know,

15 to the right, stopped pointing east like you said,

16 and then what he wanted to do was make a U-turn,

17 but he stopped for a period of time and then

18 completed that U-turn and headed south; is that

19 right?

20 A. Yeah. Yeah.

21 Q. Did he tell you or do you know how far he went

22 before he hit Erik?

23 A. Well, he told me it was just a few seconds before

24 he heard noise under the --

25 Q. Okay. Did he say he saw him at all?

- 1 A. No.
- 2 Q. Okay. I mean, he said he didn't see him at all?
- 3 A. No, didn't see him at all. That's what the whole
- 4 mystery is about. He never saw him.
- 5 Q. Okay. Has anybody told you what Erik was doing
- 6 that day on the beach?
- 7 A. No.
- 8 Q. Do you know what Erik was doing on the beach that
- 9 day?
- 10 A. No.
- 11 Q. Okay. Has anybody approached you and talked with
- 12 you on Erik's behalf?
- 13 A. His uncle and I talked, yeah.
- 14 Q. Yeah. What did his uncle want?
- 15 A. I was coming down the beach the next day, and it
- 16 was because Frid -- it happened on Friday, and
- 17 Saturday it got really busy. And he talked and
- 18 introduced himself and told me who he was and just
- 19 trying to figure out what happened and what, what
- 20 was going on.
- 21 Q. Okay. Anything else?
- 22 A. No.
- 23 Q. Did he take pictures of your vehicle or anything?
- 24 A. I don't know.
- 25 Q. Okay. Did you give him any information?

1 A. I talked to him -- talked to him for a little
2 while, a few minutes, you know.

3 Q. Give him any documents or any insurance
4 information or anything?

5 A. No.

6 Q. Okay. Did he tell you anything about Erik?

7 A. No. That he was hurt pretty bad.

8 Q. Okay. Have you and Craig talked about this
9 accident since this happened?

10 A. Oh, yeah.

11 Q. Okay. And what has he told you?

12 A. Basically the same thing I told you as far as
13 that's the way it happened.

14 Q. Okay. Anything else y'all talked about as far as
15 this accident besides how it happened?

16 A. Having stress, you know, he was stressed out after
17 it, and I was. And, you know, I mean, we -- if
18 you know somebody as well as I know Craig, we, you
19 know, talked about a lot of things, you know,
20 but --

21 Q. All right. And after this accident happened, Erik
22 was in the ambulance; what did you do after that?

23 A. Went up to the parking lot there right between
24 Chesterfield and the Diplomat -- I believe it was
25 that parking lot -- and talked with Craig and told

1 him I would give him after -- take the afternoon
2 off. You know, we didn't need him down there
3 driving after the stress that happened.

4 And I talked to the police officer that was
5 there. He was in the parking lot, too, there.

6 Q. Do you remember his name?

7 A. No, I don't.

8 Q. How did y'all get to that parking lot? Did you --
9 did you drive?

10 A. Yeah. That parking lot is actually the on/off
11 access.

12 Q. Okay. And did you and Craig ride together?

13 A. I don't remember.

14 Q. Okay. Did you drive your vehicle, or did you
15 drive the Colorado?

16 A. I think I drove the Colorado, then came back and
17 got mine because he was distraught. I think
18 that's what I -- what I did. Like I said, if
19 you'd had asked me the day after or two, I could
20 have told you, but specifically that my memory
21 would have been better.

22 Q. Okay. Have you -- after that I take it you called
23 your insurance company?

24 A. Yeah, called them and then took Craig by
25 Doctor's -- well, I did -- I took him by Doctor's

1 Care, did an alcohol and drug test on him.

2 Q. Okay. How did that turn out?

3 A. What do they call it when there's -- they don't
4 find any alcohol or drug -- drugs? Negative, I
5 guess. Yeah, negative.

6 Q. Okay. And has anybody called you from the
7 insurance company to give a recorded statement?

8 A. Recorded statement? No.

9 Q. Okay. Any type of -- has anybody with the
10 insurance company called you and taken your
11 statement?

12 A. They -- you know, I don't know. I've talked with
13 the insurance company, and we've had to send them
14 reports on different things like that. I can't
15 remember exactly what we've sent them and what we
16 haven't.

17 Q. What kind of reports would you send them?

18 A. I think an accident report. I think that's what
19 it was.

20 Q. Anything else besides the accident report?

21 A. I think that was it.

22 Q. How about Craig; did he give a recorded statement
23 to any insurance company?

24 A. I don't think so unless they're recording it and,
25 you know, wasn't telling us but --

1 Q. Did he ever give a statement to any insurance
2 company?

3 A. Yeah, he talked to them.

4 Q. How many times?

5 A. Several.

6 Q. Several times. The same insurance company or
7 different ones?

8 A. The same one.

9 Q. The same one? Which one was that?

10 A. Progressive.

11 Q. How about Northland; did Northland ever call Craig
12 and ask him what happened?

13 A. I'm not sure. I don't think so, but I'm not sure.

14 Q. Okay. Any investigator come by and talk with you
15 at any time, with the insurance company?

16 A. They called me about taking some pictures of the
17 vehicle, and I had to put the vehicle where they
18 could come up and take some pictures of it, so
19 that -- that's pretty much the only time. I
20 remember when the insurance company -- they had
21 different levels of people that were calling me,
22 and I'm not sure if they were titled investigators
23 or what they were. They called and talked to me.

24 Q. Okay. And what did you provide to them?

25 A. Whatever they asked for.

1 Q. What was that?

2 A. Just, you know, told, told them what I -- what had

3 happened and, you know, --

4 Q. As far as documents, pictures, anything like that,

5 did you provide anything --

6 A. Huh-uh, --

7 Q. -- like that?

8 A. -- not that I remember.

9 Q. Okay. Just the accident report?

10 A. Yeah.

11 Q. Nothing other than the accident report?

12 A. No.

13 Q. How about the pictures; you said maybe somebody

14 with the insurance company asked you to take

15 pictures?

16 A. No, not me. They were going to take the pictures,

17 and I parked the truck for them so they could take

18 pictures of the truck.

19 Q. Okay. How about that Colorado that Craig was

20 driving; was there any type of special safety

21 equipment that was on that truck of any kind?

22 A. It had a first aid kit and a -- and a buoy.

23 Q. And a buoy. Anything else?

24 A. Not that I can remember.

25 Q. Any type of flashing lights, strobe lights,

1 anything like that?

2 A. No.

3 Q. Any type of beeper, horn, anything like that?

4 A. No.

5 Q. Okay. So nothing to really make anybody aware
6 that this vehicle is getting close; that it was
7 moving?

8 A. I just told you that, what you asked for. There
9 was nothing on there.

10 Q. Right. Okay. So that would be a no to my
11 question?

12 A. What was your question? It sounded like you told
13 me something instead of asking a question.

14 Q. Okay. So you're telling me there was nothing on
15 that vehicle, such as any type of horn, beeper,
16 lights, to let somebody know who may be laying out
17 on the beach that this vehicle was getting close;
18 is that correct?

19 A. That's correct.

20 Q. Okay.

21 MR. JOHNSON: Give me just a break.

22 (Whereupon there was a pause in the proceedings.)

23 BY MR. JOHNSON:

24 Q. After this happened, did you ever see Erik Rabon
25 at any time since you saw him last getting into

1 that ambulance?

2 A. Yeah.

3 Q. Okay. Tell me when.

4 A. The hospital.

5 Q. All right. You went to the hospital?

6 A. Yeah.

7 Q. And how many times did you go to the hospital?

8 A. Two or three. I can't remember.

9 Q. Okay. Who did you see and talk to when you went?

10 A. The first time his -- one of his ex-girlfriends
11 was there that he has a -- he has a kid by. She
12 was there. I think her name might be Shannon. I
13 talked to her some. And then went back again with
14 me and Bret Davis.

15 Q. Is Bret Davis kind of like your business attorney?

16 A. Yeah. And he's a friend of Erik. I was a friend
17 of Erik, too.

18 Q. Oh, you knew Erik?

19 A. Yeah.

20 Q. Okay. How did you know Erik?

21 A. Just like we're talking about Horry County, is
22 small, a small town, you know, a small town.

23 Q. Where would you see him periodically?

24 A. Down on the Boulevard some and, and around. He,
25 he worked at Starbucks for a little while there,

1 and we had a lot of mutual friends. I didn't know
2 him real well, though, mutual friends.

3 Q. Okay.

4 A. So that's why it was really -- when this thing
5 happened, I didn't know it was Erik at the time
6 under the truck, but a couple of days later I
7 found out, and it's like wow.

8 Q. Got you. Got you. What was your opinion of Erik?

9 A. He'd been struggling. He'd been struggling the
10 last few years. I know he liked to lift weights
11 and body build; but as far as life the last few
12 years, he'd been struggling some.

13 Q. Okay.

14 MR. JOHNSON: Anything else?

15 BY MR. JOHNSON:

16 Q. I think that's it. Have I been courteous and kind
17 to you here --

18 A. Yes, sir, you have.

19 Q. Do you want to go back -- is there anything you
20 want to go back and clarify or, or whatever in
21 your answers?

22 A. Can I ask him?

23 MR. POWELL: Huh-uh.

24 THE WITNESS: Okay.

25 BY MR. JOHNSON:

1 Q. That's a good question, though. If I had to ask
2 my lawyer a question --

3 A. I was going to -- did he say -- did he hear
4 anything that needed to be clarified. Do you need
5 anything clarified?

6 Q. Your answers are your answers.

7 A. Okay.

8 Q. All right. Thank you very much; and you have a
9 good day, sir, have a good Frid -- oh, I'm sorry.
10 I'm sorry. These two gentleman may have some
11 questions.

12 MR. BATTLE: I don't have any questions.

13 MR. POWELL: I don't have any.

14 (Deposition concluded at 1:47 p.m.)
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C E R T I F I C A T E

I, the undersigned, Ryan P. Alderman, Notary Public in and for the State of South Carolina, do hereby certify that the foregoing statement under oath was taken on the aforementioned date;

That the within deponent was sworn to tell the truth, and that the foregoing is an accurate transcription of the testimony taken under oath;

That all exhibits entered herein are attached hereto (if requested by counsel) and made a part of this statement under oath.

I further certify that I am neither counsel nor solicitor to any of the parties in said suit, nor interested in the event of the cause.

In witness whereof, I have hereunto set my hand and seal on June 30, 2011.

 **COPY**

Ryan P. Alderman
Notary Public for South Carolina
My Commission Expires: 04/09/2020

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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

RECEIVED

AUG 03 2012

SC Court of Appeals

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant hereby certify that the record on Appeal contains all material proposed to be included by any of the parties and not any other material.

July 17, 2012



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