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Sep 02 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Sierra Doherty.....Appellant,

v.

Coastal Carolina University.....Respondent,

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
) C/A NO. 2019-CP-26-07922

Sierra Doherty,)
) **ORDER GRANTING LEAVE TO**
Plaintiff,) **FILE AMENDED ANSWER**
) **FILE AMENDED ANSWER**
vs.)
)
Coastal Carolina University,)
)
Defendant.)
)
_____)

This action arises out of an accident that occurred when the plaintiff slipped and fell on ice on the defendant's premises. Defendant has moved for leave of court to file an Amended Answer to affirmatively raise a 12(b)(6) SCRCivP defense. Rule 12(b)(6) was not pled in the original Answer. The defendant is a governmental entity, and it contends it has a meritorious 12(b)(6) defense under §15-78-60(8) of the Tort Claims Act (immunity from snow or ice conditions). Section 15-78-60(8) was pled as an affirmative defense. Plaintiff opposes such an amendment and takes the position that any 12(b)(6) motion that the defendant may file will be treated by the court as a motion for summary judgment and, therefore, an amended answer to assert a rule 12(b)(6) defense is unnecessary.

Rule 15(a) provides that when a party asks to amend his pleading, "leave shall be freely given when justice so requires and does not prejudice any other party." "This rule strongly favors amendments, and the court is encouraged to freely grant leave to amend." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct.

App. 2005) (citing *Jarrell v. Seaboard Sys. R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987).

The complaint alleges the plaintiff slipped on ice. The Answer raises the defense of immunity from snow or ice conditions under the Tort Claims Act. The defendant only seeks to assert the same defense to the same claim but by a different means allowed under the rules of civil procedure. Therefore, the plaintiff will not be prejudiced by the proposed amendment, and justice requires that the defendant be allowed to test the merits of a Rule 12(b)(6) motion should it chose to do so.

THEREFORE, IT IS ORDERED that defendant is hereby granted leave of court to file an Amended Complaint to assert a Rule 12(6)(6) defense.

AND IT IS SO ORDERED.



Horry Common Pleas

Case Caption: Sierra Doherty VS Coastal Carolina University

Case Number: 2019CP2607922

Type: Order/Amend

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2020-11-05 14:25:05 page 3 of 3

ELECTRONICALLY FILED - 2020 Nov 05 2:42 PM - HORRY - COMMON PLEAS - CASE#2019CP2607922

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO. 2019-CP-26-07922
Sierra Doherty,	)	
	)	
Plaintiff,	)	
	)	ORDER GRANTING MOTION TO
vs.	)	DISMISS
	)	
Coastal Carolina University,	)	
	)	
Defendant.	)	
	)	

This matter came before me via Web-Ex on March 2, 2021, for a hearing on defendant's motion to dismiss pursuant to Rule 12(b)(6). Appearing were Patrick J. McLaughlin, attorney for plaintiff, and Joseph P. McLean, attorney for defendant. After hearing arguments of counsel, review of their respective memoranda of law, and review of the complaint in this action, the court grants the motion.

FACTS

This action arises out of an accident that occurred on January 8, 2018, on the campus of defendant Coastal Carolina University (CCU). Plaintiff was a student at CCU at that time. On or about Tuesday, January 3, 2018, winter storm Grayson blanketed the CCU campus with freezing rain, ice, and snow. CCU canceled classes and closed its campus on Wednesday, January 3, and Thursday, January 4. It re-opened on a delayed schedule on Friday, January 5. On Monday, January 8, five days after the storm began and three days

after classes resumed, plaintiff was walking to class when she slipped and fell on an icy sidewalk and was injured.

ALLEGATIONS

The complaint alleges that the ice on the sidewalk was due to a winter storm. *See*, Complaint paragraph 5. It also alleges that CCU treated some of the sidewalks on campus for ice after the winter storm but not the one on which she slipped and fell. *See*, Complaint paragraphs 6, 12(a) and (b), and 18. Finally, it alleges CCU failed to warn of the icy sidewalk. *See*, Complaint paragraph 12(c).

DISCUSSION

CCU is a governmental entity, so its liability in tort is controlled by the S.C. Tort Claims Act. Section 15-78-60(8) of the Tort Claims Act provides “[a] governmental entity is not liable for a loss resulting from:

- (8) snow or ice conditions ... on any public way or other public place due to weather conditions unless the snow or ice thereon is affirmatively caused by a negligent act of the employee.”

The complaint does not allege that a negligent *act* of defendant caused the ice to be on the sidewalk.¹ It only alleges that a negligent *omission* of defendant caused the ice to be on the sidewalk.

Professors Hubbard and Felix instruct that in 1866 the South Carolina Supreme Court defined negligence as:

¹ Plaintiff argues that CCU acted affirmatively by closing and then re-opening campus. However, these acts did not affirmatively cause the ice to be on the sidewalk. A winter storm did.

The omission to do something that a reasonable and prudent man...would do...or doing something which a reasonable and prudent man would not do...

F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts* (4th Ed., 2011) at 65, citing *Bridger v Asheville & Spartanburg R.R.*, 25 S.C. 24, 28 (1886).

“Negligence may consist of an act or an omission. Failure to act is not an act.” *Flynn v North Carolina State Highway and Public Works Commission*, 244 N.C. 617, 94 S.E.2d 571 (N.C. 1956). The distinction is one of passive inaction versus positive conduct, or nonfeasance versus misfeasance. They are different things and the SC. Tort Claims Act recognizes that. While the snow and ice immunity at 15-78-60(8) speaks only of “acts” other sections of the Tort Claims Act speak specifically in terms of “acts or omissions.” See, §15-78-60(20) (act or omission of a person other than an employee); §15-78-60(29) (acts or omissions of members of athletic commissions); §15-78-60(30) (acts or omissions of local foster care review boards); §15-78-60(31) (acts or omissions of employees and volunteers of the S.C. Protection and Advocacy System for the Handicapped); §15-78-60(36) (acts or omission of state constables). The snow and ice immunity in §15-78-60(8) would not apply if CCU caused the ice to be on the sidewalk by some positive act of misfeasance. At most, CCU failed to treat the sidewalk or warn of the presence of ice caused by the winter storm. In other words, plaintiff alleges that CCU failed to act. Therefore, the snow and ice immunity does apply.

The Tort Claims Act is to be construed liberally in favor of limiting the liability of the state. See, Tort Claims Act §15-78-20(f). *See also, Lightner v. Hampton Hall Club, Inc.*,

419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) (the cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible), *quoting Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015); *Nexsen v. Ward*, 96 S.C. 313, 80 S.E. 599, 601 (1914) (the rule sustained by all the courts requires that every word, clause, and sentence must be given some meaning, force, and effect if it can be done by any reasonable construction.); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute)(where the statute's language is plain and unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning).

The court need not look to any other section of the Tort Claims Act, including §15-78-60(25) which provides immunity from liability for supervision, protection, control, confinement, or custody of any student except when the responsibility or duty is exercised in a grossly negligent manner. When the accident occurred, defendant was not supervising, protecting, or controlling the plaintiff /student who was merely walking to class on campus. See, *Gardner v. Biggart*, 308 S.C. 331, 333-34, 417 S.E.2d 858, 859-60 (1992) (inured plaintiff was merely a passenger on defendant's school bus, and the school bus driver was not exercising any duty involving supervision, custody, control or protection at the time of the accident).

Plaintiff has failed to state facts sufficient to constitute a cause of action because there is no affirmative, positive act of defendant which caused the ice to be on the sidewalk. At

most, there was an omission or inaction, but this does not defeat defendant's snow and ice immunity under §15-78-60(8) of the Tort Claims Act. Therefore, this action is hereby dismissed pursuant to Rule 12(b)(6), S.C. Rules of Civil Procedure.

AND IT IS SO ORDERED.

[E-SIGNATURE OF JUDGE TO FOLLOW]



Horry Common Pleas

Case Caption: Sierra Doherty VS Coastal Carolina University

Case Number: 2019CP2607922

Type: Order/Dismissal

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2021-03-04 11:14:05 page 6 of 6

ELECTRONICALLY FILED - 2021 Mar 04 11:49 AM - HORRY - COMMON PLEAS - CASE#2019CP2607922

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP2607922

Sierra Doherty
PLAINTIFF(S)

Coastal Carolina University
DEFENDANT(S)

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), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **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 Alter or Amend Judgment/Motion to Reconsider filed 3/8/2021 is DENIED.

This motion is decided without oral arguments pursuant to South Carolina Supreme Court Order 2021-03-04-01(c)(4).

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/16/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: Sierra Doherty VS Coastal Carolina University

Case Number: 2019CP2607922

Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2021-03-16 13:54:35 page 3 of 3

ELECTRONICALLY FILED - 2021 Mar 16 3:24 PM - HORRY - COMMON PLEAS - CASE#2019CP2607922

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO: 2019-CP-26-_____
Sierra Doherty	)	
	)	
Plaintiff,	)	
	)	
vs.	)	SUMMONS
	)	
Coastal Carolina University,	)	
	)	
Defendant.	)	
_____	)	

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is hereby served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff at her attorney's office, Post Office Box 13057, Florence, S.C. within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you.

WUKELA LAW FIRM

BY: Patrick J. McLaughlin
 PATRICK J. MCLAUGHLIN
 Attorney for Plaintiff
 P.O. Box 13057
 Florence, South Carolina 29504-3057
 T: 843-669-5634, F: 843-669-5150

Florence, South Carolina
 December 11, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO: 2018-CP-26-_____
Sierra Doherty	)	
	)	
Plaintiff,	)	
	)	
vs.	)	COMPLAINT
	)	
Coastal Carolina University,	)	(JURY TRIAL DEMANDED)
	)	
Defendant.	)	
_____	)	

The Plaintiff, Sierra Doherty by and through her undersigned counsel, hereby makes the following claims and allegations:

JURISDICTION

1. That the Plaintiff is a citizen and a resident of the County of Frederick, State of Virginia.
2. That Plaintiff, Sierra Doherty, at the time of this incident, January 8, 2018, was a full-time student registered and attending classes at Coastal Carolina University in the County of Horry, State of South Carolina.
2. That the Plaintiff is informed and believes that the Defendant, Coastal Carolina University (hereinafter "CCU"), at all times relevant to this action, was a public university supported by State funds located in, transacting business in and owning property in Horry County, South Carolina. Additionally, the complained of acts and omissions in this matter took place within Horry County, South Carolina.
3. That the Defendant is subject to personal jurisdiction in South Carolina in that they transact business, operate and own property in Horry County, South Carolina, and in that they caused tortious injury within Horry County, South Carolina.

FACTUAL ALLEGATIONS

4. That on or about January 3, 2018, Winter Storm Grayson brought freezing rain, ice and snow to Horry County, South Carolina causing power outages, business and school closings and dangerous travel conditions. Due to inclement weather and dangerous travel conditions, CCU closed its campus January 3-4, 2018 and re-opened on a delayed schedule resuming classes at 11:00 a.m. on Friday, January 5, 2018.

5. On January 8, 2018, five days after the storm began and three days after the school reopened, 24-year old Sierra Doherty was walking to class on the sidewalk between the Wall Building and Brittain Hall, on a sidewalk that unbeknownst to her was one of the walkways that had not been treated for ice by CCU, a hazardous condition CCU was aware could/would create an unsafe condition. Ms. Doherty slipped on ice on the untreated sidewalk, went air born and attempted to break her fall by extending her arm, suffering a catastrophic injury to her arm resulting in surgery, therapy, scarring, and continued treatment.

6. At the time of this injury, Plaintiff Sierra Doherty was a full-time student registered and attending classes at Coastal Carolina University in the County of Horry, State of South Carolina.

FOR A FIRST CAUSE OF ACTION
(Negligence: Premises Liability against Defendant CCU)

6. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

7. That as the Plaintiff was a full-time student registered and attending classes at Coastal Carolina University, she was an invitee on Defendant CCU's premises.

8. That Defendant CCU owed the Plaintiff, as an invitee, a duty to maintain the premises in a reasonably safe condition.

9. That the Defendant CCU owed the Plaintiff a duty to use reasonable care to discover any risks on the premises and then either put the premises in a reasonably safe condition or warn the Plaintiff of the risk.

10. That Defendant's actions and failures to act amount to a breach of said duties as well as negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct in the following particulars, to wit:

- a. Failing to adequately and properly treat the ice covered walkways before re-opening campus to the students, creating an unsafe condition for students at Coastal Carolina University, South Carolina in a reasonably safe condition;
- b. Failing to adequately and properly remedy the unsafe condition that the Defendant knew or should have known existed;
- c. Failing to adequately and properly warn of the unsafe condition of the walkway.

11. That as a direct and proximate result of Defendant CCU's negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

FOR A SECOND CAUSE OF ACTION
(Negligence, Carelessness, Recklessness Against Defendant)

12. That paragraphs one (1) through eleven (11) are hereby expressly incorporated verbatim herein, where relevant.

13. That the Defendant CCU, acted with negligence, carelessness, and recklessness.

14. That the Defendant CCU owed a duty to the Plaintiff and to any patron/invitee of Coastal Carolina University, to properly and adequately maintain the premises in question in a safe condition so there was no hazard to anyone making use of the walkways.

15. That the Defendant CCU acted in such a way as to present a dangerous hazard to the foreseeable user.

16. That the Defendant CCU breached its duty to the Plaintiff and was negligent, careless, and reckless in the following particulars:

- a. Creating an unsafe condition by failing to adequately and properly keep the walkway clear and in a reasonably safe condition;
- b. Failing to adequately and properly remedy the unsafe condition that Defendant CCU knew or should have known existed.

17. That the Defendant CCU's actions and failures to act amount to negligence, gross negligence, carelessness, recklessness, willful and wanton conduct, and violations of state and federal safety rules, regulations, and laws.

18. That as a direct and proximate result of Defendant CCU's negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

DAMAGES

19. That as a direct and proximate result of the above set out acts and omissions of Defendant CCU; the Plaintiff was damaged in the following particulars:

- a. Actual and Consequential damages resulting from Personal Injury, to wit:
 - (1.) disability, past and future;
 - (2.) pain and suffering, past and future;
 - (3.) stress, anguish and anxiety, past and future;
 - (4.) medical costs, past and future;
 - (5.) lost wages, past and future.

20. That in addition, the Plaintiff is informed and believes that she is entitled to an award of punitive damages in an amount to be determined by a jury.

WHEREFORE, the Plaintiff prays judgment for actual, consequential, and punitive damages against Defendant CCU in an amount to be determined by a jury.

WUKELA LAW FIRM

BY: s/Patrick J. McLaughlin

PATRICK J. MCLAUGHLIN

Attorney for Plaintiff

P.O. Box 13057

Florence, SC 29504-3057

Florence, South Carolina

December 11, 2019.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO. 2019-CP-26-07922
Sierra Doherty,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ANSWER
	)	
Coastal Carolina University,	)	
	)	
Defendant.	)	
	)	

Defendant hereby answers the Complaint of the Plaintiff herein:

FOR A FIRST DEFENSE
(General Denial)

1. Admits the allegations contained in paragraphs 1 through 4.
2. Admits so much of paragraph 5 as alleges that on January 3, 2018, Winter Storm Grayson brought freezing rain, ice, and snow to Horry County, South Carolina; except as so admitted, however, the remaining allegations contained in paragraph 5 are denied.
6. Admits so much of paragraph 6 as alleges that on January 3, 2018, the plaintiff sustained a fall; except as so admitted, however, the remaining allegations contained in paragraph 6 are denied.
7. Admits the allegations contained in paragraph 7.
8. Denies the allegations contained in paragraph 8.

9. Admits the allegations contained in paragraph 9.
10. Denies the allegations contained in paragraphs 10 through 22.

FOR A SECOND DEFENSE
(South Carolina Tort Claims Act)

11. This defendant reiterates the defenses above as if repeated herein verbatim.
12. This action is governed by the South Carolina Tort Claims Act, and this defendant pleads the applicable amenities, provisions, and limitations on recovery as affirmative defenses including §15-78-60(8) of the aforementioned Act.

FOR A THIRD DEFENSE
(Comparative Negligence and Recklessness)

13. This defendant reiterates the defenses above as if repeated herein verbatim.
14. Any injuries or damages sustained by Plaintiff, if any, as set forth in the Complaint, were due to and caused by her own negligence, carelessness, gross negligence, recklessness, willfulness, and wantonness in one or more of the following particulars:
 - a) In failing to look where she was walking;
 - b) In failing to keep a proper lookout;
 - c) In failing to take those measures which a reasonably prudent person would have taken under the circumstances then and there existing; and
 - d) In such other particulars as may be established at trial.
15. Each of the aforementioned acts and/or omissions of Plaintiff contributed as a proximate cause of the accident and Plaintiff's injuries and damages, if any, and said negligent, reckless, willful, and wanton acts and omissions on the part of the plaintiff were

greater than any negligent, reckless, willful or wanton acts and omissions on the part of the defendant resulting in Plaintiff's claim being barred under the doctrine of comparative negligence and recklessness; alternatively, if the negligent, reckless, willful, and wanton acts and omissions on the part of Plaintiff were less than any negligent, reckless, willful, and wanton acts and omissions on the part of this defendant, then Plaintiff's recovery should be reduced in proportion to the extent of her own negligent, reckless, willful, wanton, and unlawful acts which contributed to her injuries and damages.

FOR A FOURTH DEFENSE

(Punitive Damages and Prejudgment Interest Barred)

16. This defendant reiterates the defenses above as if repeated herein verbatim.

17. Plaintiff's claims for punitive damages and prejudgment interest are barred pursuant to §15-78-120(b), S.C. Code.

WHEREFORE, this defendant, having answered the Complaint of the plaintiff, requests the Complaint be dismissed.

CLARKE, JOHNSON, PETERSON & MCLEAN, PA

s/Brown W. Johnson
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Florence, South Carolina 29503
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Attorney for Defendant

Florence, South Carolina

December 18, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO: 2019-CP-26-07922
Sierra Doherty	)	
	)	
Plaintiff,	)	
	)	
vs.	)	SUMMONS
	)	
Coastal Carolina University,	)	
	)	
Defendant.	)	
_____	)	

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is hereby served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff at her attorney's office, Post Office Box 13057, Florence, S.C. within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you.

WUKELA LAW FIRM

BY: Patrick J. McLaughlin
 PATRICK J. MCLAUGHLIN
 Attorney for Plaintiff
 P.O. Box 13057
 Florence, South Carolina 29504-3057
 T: 843-669-5634, F: 843-669-5150

Florence, South Carolina
 December 12, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO: 2018-CP-26-07922
Sierra Doherty	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AMENDED COMPLAINT
	)	
Coastal Carolina University,	)	(JURY TRIAL DEMANDED)
	)	
Defendant.	)	
	)	

The Plaintiff, Sierra Doherty, by and through her undersigned counsel, hereby makes the following claims and allegations:

JURISDICTION

1. That the Plaintiff is a citizen and a resident of the County of Frederick, State of Virginia.
2. That Plaintiff, Sierra Doherty, at the time of this incident, January 8, 2018, was a full-time student registered and attending classes at Coastal Carolina University in the County of Horry, State of South Carolina.
3. That the Plaintiff is informed and believes that the Defendant, Coastal Carolina University (hereinafter "CCU"), at all times relevant to this action, was a public university supported by State funds located in, transacting business in and owning property in Horry County, South Carolina. Additionally, the complained of acts and omissions in this matter took place within Horry County, South Carolina.
4. That the Defendant is subject to personal jurisdiction in South Carolina in that they transact business, operate and own property in Horry County, South Carolina, and in that they caused tortious injury within Horry County, South Carolina.

FACTUAL ALLEGATIONS

5. That on or about January 3, 2018, Winter Storm Grayson brought freezing rain, ice and snow to Horry County, South Carolina causing power outages, business and school closings and dangerous travel conditions. Due to inclement weather and dangerous travel conditions, CCU closed its campus January 3-4, 2018 and re-opened on a delayed schedule resuming classes at 11:00 a.m. on Friday, January 5, 2018.
6. On January 8, 2018, five days after the storm began and three days after the school reopened, 24-year old Sierra Doherty was walking to class on the sidewalk between the Wall Building and Brittain Hall, on a sidewalk that unbeknownst to her was one of the walkways that had not been treated for ice by CCU, a hazardous condition CCU was aware could/would create an unsafe condition. Ms. Doherty slipped on ice on the untreated sidewalk, went air born and attempted to break her fall by extending her arm, suffering a catastrophic injury to her arm resulting in surgery, therapy, scarring, and continued treatment.
7. At the time of this injury, Plaintiff Sierra Doherty was a full-time student registered and attending classes at Coastal Carolina University in the County of Horry, State of South Carolina.

FOR A FIRST CAUSE OF ACTION
(Negligence: Premises Liability against Defendant CCU)

8. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.
9. That as the Plaintiff was a full-time student registered and attending classes at Coastal Carolina University, she was an invitee on Defendant CCU's premises.
10. That Defendant CCU owed the Plaintiff, as an invitee, a duty to maintain the premises in a reasonably safe condition.

11. That the Defendant CCU owed the Plaintiff a duty to use reasonable care to discover any risks on the premises and then either put the premises in a reasonably safe condition or warn the Plaintiff of the risk.

12. That Defendant CCU's actions and failures to act amount to a breach of said duties as well as negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct in the following particulars, to wit:

- a. Failing to adequately and properly treat the ice covered walkways before re-opening campus to the students, creating an unsafe condition for students at Coastal Carolina University, South Carolina in a reasonably safe condition;
- b. Failing to adequately and properly remedy the unsafe condition that the Defendant knew or should have known existed;
- c. Failing to adequately and properly warn of the unsafe condition of the walkway.

13. That as a direct and proximate result of Defendant CCU's negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

FOR A SECOND CAUSE OF ACTION
(Negligence, Carelessness, Recklessness Against Defendant)

14. That paragraphs one (1) through eleven (11) are hereby expressly incorporated verbatim herein, where relevant.

15. That the Defendant CCU, acted with negligence, carelessness, and recklessness.

16. That the Defendant CCU owed a duty to the Plaintiff and to any patron/invitee of Coastal Carolina University, to properly and adequately maintain the premises in question in a safe condition so there was no hazard to anyone making use of the walkways.

17. That the Defendant CCU acted in such a way as to present a dangerous hazard to the foreseeable user.

18. That the Defendant CCU breached its duty to the Plaintiff and was negligent, careless, and reckless in the following particulars:

- a. Creating an unsafe condition by failing to adequately and properly keep the walkway clear and in a reasonably safe condition;
- b. Failing to adequately and properly remedy the unsafe condition that Defendant CCU knew or should have known existed.

19. That the Defendant CCU's actions and failures to act amount to negligence, gross negligence, carelessness, recklessness, willful and wanton conduct, and violations of state and federal safety rules, regulations, and laws.

20. That as a direct and proximate result of Defendant CCU's negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

DAMAGES

21. That as a direct and proximate result of the above set out acts and omissions of Defendant CCU; the Plaintiff was damaged in the following particulars:

- a. Actual and Consequential damages resulting from Personal Injury, to wit:
 - (1.) disability, past and future;
 - (2.) pain and suffering, past and future;
 - (3.) stress, anguish and anxiety, past and future;
 - (4.) medical costs, past and future;
 - (5.) lost wages, past and future.

22. That in addition, the Plaintiff is informed and believes that she is entitled to an award of punitive damages in an amount to be determined by a jury.

WHEREFORE, the Plaintiff prays judgment for actual, consequential, and punitive damages against Defendant CCU in an amount to be determined by a jury.

WUKELA LAW FIRM

BY: s/Patrick J. McLaughlin
PATRICK J. MCLAUGHLIN
Attorney for Plaintiff
P.O. Box 13057
Florence, SC 29504-3057

Florence, South Carolina

December 12, 2019.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO. 2019-CP-26-07922
Sierra Doherty,	)	
	)	
Plaintiff,	)	AMENDED ANSWER
	)	(TO ADD FIFTH DEFENSE)
vs.	)	
	)	
Coastal Carolina University,	)	
	)	
Defendant.	)	
	)	

Defendant hereby amends its Answer to the Complaint pursuant to leave of court granted in an order dated November 5, 2020, to assert a Fifth Defense as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Admits the allegations contained in paragraphs 1 through 4.
2. Admits so much of paragraph 5 as alleges that on January 3, 2018, Winter Storm Grayson brought freezing rain, ice, and snow to Horry County, South Carolina; except as so admitted, however, the remaining allegations contained in paragraph 5 are denied.
6. Admits so much of paragraph 6 as alleges that on January 3, 2018, the plaintiff sustained a fall; except as so admitted, however, the remaining allegations contained in paragraph 6 are denied.
7. Admits the allegations contained in paragraph 7.

8. Denies the allegations contained in paragraph 8.
9. Admits the allegations contained in paragraph 9.
10. Denies the allegations contained in paragraphs 10 through 22.

FOR A SECOND DEFENSE
(South Carolina Tort Claims Act)

11. This defendant reiterates the defenses above as if repeated herein verbatim.
12. This action is governed by the South Carolina Tort Claims Act, and this defendant pleads the applicable amenities, provisions, and limitations on recovery as affirmative defenses including §15-78-60(8) of the aforementioned Act.

FOR A THIRD DEFENSE
(Comparative Negligence and Recklessness)

13. This defendant reiterates the defenses above as if repeated herein verbatim.
14. Any injuries or damages sustained by Plaintiff, if any, as set forth in the Complaint, were due to and caused by her own negligence, carelessness, gross negligence, recklessness, willfulness, and wantonness in one or more of the following particulars:
 - a) In failing to look where she was walking;
 - b) In failing to keep a proper lookout;
 - c) In failing to take those measures which a reasonably prudent person would have taken under the circumstances then and there existing; and
 - d) In such other particulars as may be established at trial.
15. Each of the aforementioned acts and/or omissions of Plaintiff contributed as a proximate cause of the accident and Plaintiff's injuries and damages, if any, and said

negligent, reckless, willful, and wanton acts and omissions on the part of the plaintiff were greater than any negligent, reckless, willful or wanton acts and omissions on the part of the defendant resulting in Plaintiff's claim being barred under the doctrine of comparative negligence and recklessness; alternatively, if the negligent, reckless, willful, and wanton acts and omissions on the part of Plaintiff were less than any negligent, reckless, willful, and wanton acts and omissions on the part of this defendant, then Plaintiff's recovery should be reduced in proportion to the extent of her own negligent, reckless, willful, wanton, and unlawful acts which contributed to her injuries and damages.

FOR A FOURTH DEFENSE
(Punitive Damages and Prejudgment Interest Barred)

16. This defendant reiterates the defenses above as if repeated herein verbatim.

17. Plaintiff's claims for punitive damages and prejudgment interest are barred pursuant to §15-78-120(b), S.C. Code.

FOR A FIFTH DEFENSE
[Rule 12(b)(6)]

18. The Complaint fails to state facts sufficient to constitute a cause of action and should be dismissed pursuant to Rule 12(b)(6) SCRCivP.

WHEREFORE, this defendant, having amended its Answer to the Complaint of the plaintiff, requests the Complaint be dismissed.

CLARKE, JOHNSON, PETERSON & MCLEAN, PA

s/ Joseph P. McLean

JOSEPH P. McLEAN
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Email: jmclean@cjpmlaw.com

Attorney for Defendant

Florence, South Carolina
November 5, 2020

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2019-CP-26-07922

Sierra Doherty,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
vs.	)	
	)	MARCH 2, 2021
Coastal Carolina University,	)	
	)	
Defendant.	)	
	)	

B E F O R E:

Honorable Benjamin Culbertson
Horry County Courthouse
Conway, South Carolina
** VIA WEBEX REMOTE HEARING **

A P P E A R A N C E S:

Patrick J. McLaughlin, Esquire
Attorney for Plaintiff

Joseph P. McLean, Esquire
Attorney for Defendant

Sallie Beth Todd
Circuit Court Reporter

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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(THERE WERE NO WITNESSES CALLED DURING THIS HEARING.)

Certificate of Court Reporter.....: 17

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE</u>
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(THERE WERE NO EXHIBITS MARKED DURING THIS HEARING.)

1 **THE COURT:** All right. Next is 2019-CP-26-07922, Sierra
2 Doherty versus Coastal Carolina University. If that involves
3 you, please raise your hand.

4 **MR. MCLAUGHLIN:** Good afternoon, Your Honor.

5 **THE COURT:** Good afternoon. Have we got everybody we
6 need?

7 **MR. MCLAUGHLIN:** I see Joe, I see his screen. I don't
8 see him yet though.

9 **THE COURT:** There we go.

10 **MR. MCLEAN:** I think I'm here now.

11 **THE COURT:** All right. Let me get this on the record,
12 2019-CP-26-07922 Sierra Doherty versus Coastal Carolina
13 University. According to my roster this is a motion to
14 dismiss. Please give the court reporter your names and who
15 you represent.

16 **MR. MCLAUGHLIN:** Patrick McLaughlin with Wukela Law Firm
17 for the plaintiff Sierra Doherty.

18 **THE COURT:** All right.

19 **MR. MCLEAN:** And I am Joe McLean for the defendant
20 Coastal Carolina University.

21 **THE COURT:** All right. Mr. McLean, this is your motion?

22 **MR. MCLEAN:** Yes, it is, Your Honor.

23 **THE COURT:** All right. Let me hear from you.

24 **MR. MCLEAN:** Thank you, Your Honor. This is the motion
25 of defendant Coastal Carolina University to dismiss under Rule

1 12(b)(6). I have filed a brief memorandum of law setting
2 forth the position of my client on this matter, and I would
3 call that to the Court's attention if you haven't already had
4 a chance to review it.

5 Briefly, I would like to point out a few key points.
6 This is an accident -- this lawsuit arises out of an accident
7 which occurred when Ms. Doherty, who was a student at Coastal
8 Carolina University, slipped and fell on an icy sidewalk.
9 Back in January of 2018 there was a winter storm -- excuse me
10 -- that passed through the Horry County area with ice,
11 freezing rain, and snow. And Coastal Carolina closed its
12 campus and canceled classes for students for several days in
13 response to the weather event. When they resumed classes on
14 the first day back after classes where resumed the plaintiff
15 Ms. Doherty was walking to class on the sidewalk on the
16 Coastal Carolina campus when she slipped on an icy patch on
17 the sidewalk, fell, and received some injuries; I believe she
18 broke her arm in particular.

19 In examination of the complaint, Your Honor, we revealed
20 that the allegations of negligence against Coastal Carolina
21 are that it failed to treat the sidewalk for ice, and that it
22 failed to warn of the presence of ice. And I think it's
23 important for me to point out, Your Honor, that these are
24 alleged omissions, not commissions, but alleged omissions,
25 failure to act on the part of Coastal Carolina University.

1 There are allegations of a nonfeasance as opposed to a
2 malfeasance; they didn't do something they were supposed to
3 do; they didn't treat the sidewalk; they didn't warn of the
4 ice. And that's an important distinction under the law of
5 South Carolina, under the Tort Claims Act, which governs here.

6 And I did go back and found an old case from the North
7 Carolina Supreme Court that I attached as an exhibit to my
8 memo; and it discusses the distinction between an act and an
9 omission. And in that case, in the North Carolina case which
10 a copy is provided to the Court, the highway department failed
11 to fix a hole in the road. And the applicable statute made
12 the State Highway Department of North Carolina only liable for
13 its actions of negligence; and the North Carolina Supreme
14 Court drew a clear distinction between acts and omissions and
15 said that if the General Assembly meant for the highway
16 department in North Carolina to be liable for acts and
17 omissions it could have said so, but this is back in 1956.
18 Admittedly the case has some age on it, and it is from another
19 jurisdiction, but it drew a clear distinction between acts and
20 omissions.

21 In our Tort Claims Act, Your Honor, the South Carolina
22 Tort Claims Act does exactly the same thing. If you look at
23 the applicable section to the facts of this case, that's the
24 snow and ice exception, under 15-78-60 subsection 8 which
25 provides that a governmental entity is not liable for a loss

1 resulting from snow or ice conditions on any public way or
2 public place unless the snow or ice is affirmatively caused by
3 a negligent act of the employee of the governmental entity.
4 It requires an affirmative act, not an omission, and all
5 that's been alleged in this case are omissions.

6 Other places in the Tort Claims Act, as Your Honor is
7 aware, speak in terms of acts or omissions and I've cited
8 those other sections in my memorandum. Acts or omissions of
9 persons other than employees, acts or omissions of Foster Care
10 Review Boards, and there's several others that I've cited.
11 But the snow and ice exception does not provide -- it provides
12 immunity, let me put it that way, it provides immunity unless
13 the snow or ice was caused by an affirmative act of the
14 governmental entity. And all that's been alleged in the
15 complaint are omissions, failure to treat, failure to warn.
16 We think it's very -- we think the law is pretty clear here.
17 Obviously, the Tort Claims Act has to be construed in favor of
18 limiting the liability of the state. Snow and ice are
19 different that a man-made condition, or a man-made defect and
20 so they should be treated differently under the law and they
21 are treated differently under the law.

22 And to this analogy just to boil it down to practical
23 terms is DOT -- DOT can't be liable for every automobile
24 accident that happens on an icy, snowy highway. They can
25 only be liable if they affirmatively caused the ice or snow to

1 be there. But that's what the statute says and that's why ice
2 and snow is treated differently than a man-made substance. So
3 we believe that absent an allegation of an affirmative act
4 that caused the snow and ice to be on the campus of Coastal
5 Carolina University, Coastal Carolina University is immune
6 from liability. And we believe the action should be dismissed
7 for failure to state facts sufficient to constitute a cause of
8 action.

9 **THE COURT:** All right. Thank you.

10 Mr. McLaughlin.

11 **MR. MCCLAUGHLIN:** Thank you, Your Honor. Judge, I will
12 take this, I guess two ways. First is that I did plead in my
13 memorandum that I filed, the last part of it, Your Honor,
14 there's a lot of evidence supporting the allegations but in
15 other words, I believe the discovery today has generated
16 enough to where we could argue this as a motion for summary
17 judgment. I'm going to hold off getting into that and just
18 concentrate on the 12(b)(6) and then if Your Honor wants me to
19 address any of that stuff, I will.

20 The first thing, Judge, is that I disagree with Joe that
21 we didn't plead acts. Paragraph 5 of the complaint, we
22 specifically plead that Coastal Carolina closed its campus.
23 We also specifically plead in that paragraph that they
24 reopened it, in Paragraph 12. It's not just that we allege
25 that they failed to treat the sidewalk, we actually allege in

1 12(a) that they failed to adequately and properly treat the
2 sidewalk. We allege in Paragraph 12(b) that they failed to
3 adequately and properly remedy unsafe sidewalks that they knew
4 about. And in Paragraph 12(c) we allege that they failed to
5 adequately and properly warn about unsafe conditions. These
6 are all actions that they did take. We know that ---

7 **THE COURT:** Wait a minute. I don't understand your
8 argument. If you're saying they failed to adequately warn,
9 how is that an affirmative action that they took?

10 **MR. MCLAUGHLIN:** Because they tried to warn, Your Honor,
11 and they failed to do it properly. They failed to get across
12 to her. They actually -- we know now that they tried to treat
13 some of the sidewalks. They know -- we know that they closed
14 the campus because they knew of an unsafe condition, and that
15 actually on -- on Friday they opened on a delay specifically
16 because they knew about the fact that the conditions were ripe
17 for what they -- they referred to as melting and refreezing.
18 They knew that was going to be a problem. That was the reason
19 why after they originally closed the campus, which is an
20 action we know now, it's -- they have an entire emergency
21 operations level that they go to to do these things. So they
22 instituted it and they closed, they kept it there. They then
23 came back and instituted a new emergency operation level to
24 open on a delay, specifically because of the conditions that
25 they knew were ripe for melting and refreezing. And then come

1 Monday they moved back to regular normal operating, and they
2 let students get there before the delay and that's when the
3 accident occurred.

4 So we allege that they did, in other words alleging that
5 somebody treated a sidewalk but didn't do it right, that's an
6 act. You know they're trying to treat it, if you do it poorly
7 then you're doing it, you're just doing it wrong. But that
8 gets into -- outside of the -- we believe we have plead
9 affirmative acts.

10 That gets into the second part of the 12(b)(6), which is
11 the 15-78-60 (25), Judge, the student/prisoner gross
12 negligence exception. And basically what that reads, if 15-
13 78-60 is an exception to immunity to the waiver of liability
14 that gets them out of being responsible then I would argue
15 that 15-78-60 (25) is an exception to that exception that gets
16 them back under liability. And, Judge, what we know from that
17 is there is clear case law in South Carolina and it's cited in
18 the memo as *Steinke vs LLR* case, which is 336 S.C. 373; and
19 then the *Etheredge case versus Richland School District One*,
20 which is 330 S.C. 447. Both of those are cited on Page 2 of
21 my memorandum. Those cases clearly say that if -- if that
22 gross negligence standard for students applies at all, it
23 applies for every single one of those exceptions. So once you
24 read that in once you've got to read it in on every single
25 other exception that is under there.

1 So even if Joe's right, even if the complaint doesn't
2 plead -- adequately plead an affirmative act, we don't need to
3 because the gross negligence exception is going to apply to
4 it. And of course we know gross negligence includes in it
5 fail -- the definition of it is in the *Etheredge* case and it's
6 specifically that it's not doing something you know you should
7 do is gross negligence. And if you think about what Joe just
8 said, what was the example he used for Your Honor? Applying
9 ice -- snow and ice are different, right? And then he went
10 into the thing about the DOT, they're not responsible for
11 every wreck that happens on there. If snow and ice are
12 different, students are different than the regular general
13 public on a roadway and -- because students you exercise
14 control over them. You say when they can and they can't come
15 to class. What we know now after doing depositions is,
16 Coastal Carolina admits there was no reason for her to be
17 there if the campus would have been closed. The only reason
18 she was there is because they had classes and she had to be
19 there. And so I think once you get to that gross negligence
20 standard, even if Joe's right you've got to plead an act, once
21 you get to the gross negligence standards it doesn't matter
22 because that gross negligence takes that out.

23 Now, he deals with that by saying gross negligence
24 doesn't count in this case and he cites to the *Gardner vs*
25 *Biggart* South Carolina case. And what he tries to argue in

1 the memo, Your Honor, is that you never -- you don't go there.
2 You don't need to ever go to that gross negligence exception
3 to the exception under 60 subsection 25 because this South
4 Carolina case here says it doesn't matter. Your Honor, I
5 would respectfully say that this case, the *Gardner* case,
6 doesn't have anything to do with what we're talking about. It
7 has to do with a bus accident. And so what the -- what the
8 Court said in *Gardner* was -- in fact the defense was trying to
9 argue that the gross negligence standard applied in *Gardner*,
10 and the Court said no it doesn't, this is just a simple bus
11 wreck case and simple negligence applies to that. We know
12 simple negligence applies to it because there's another
13 statute 59-67-765 which specifically says it's simple
14 negligence. So yes, technically in that case it says gross
15 negligence doesn't apply to the bus driver in this because he
16 wasn't supervising, it's because he was just operating the
17 bus.

18 Here we've got a situation where at a minimum we are
19 alleging in the complaint that Coastal Carolina controlled
20 access to the campus. That they closed it and they reopened
21 it. And that in and of itself creates a material question of
22 fact about gross negligence. And the case law is pretty clear
23 that you know gross negligence, I think it's in the *Etheredge*
24 case where it talks about the fact that gross negligence is a
25 mixed question of law in fact. It should be presented to a

1 jury unless the evidence supports only one reasonable
2 inference. Your Honor, I would respectfully argue that the
3 way we've alleged it, and if we did like the standard says all
4 reasonable inferences in our favor under the 12(b)(6), that's
5 enough to create a question that needs to be submitted to a
6 jury that they were exercising some control over Ms. Doherty
7 which led to her falling.

8 I get somewhat (inaudible) in some of the evidence we
9 have. I don't want to belabor the point by going through a
10 lot of the evidentiary things that we know about now. But
11 that's in the memo and we believe that it all supports -- the
12 reason why they're making this argument, Judge, is there's a
13 good gross negligence argument in this case, a very good gross
14 negligence argument. The University not only knew at the time
15 this happened of the hazardous conditions, they have a plan
16 that specifically points out the dangers when you've got other
17 incidents like this. And there's e-mail communications, and
18 all of this is in the back half of that memo, where they're
19 sending it out saying amongst themselves that they know these
20 conditions are ripe; we know this is a hazard that could
21 occur, and it winds up being exactly the hazard that this
22 young lady ran into that day and what made her get hurt. And
23 so that's why they're arguing so hard about this because it's
24 a good gross negligence case.

25 I believe that we have enough there to survive the

1 12(b)(6) standard. And certainly if we need to move into
2 summary judgement the rest of that motion has a lot of
3 evidentiary stuff that will support that. And in the
4 alternative, Judge, I would just point out that even if Your
5 Honor feels like McLaughlin, I don't know that you alleged it
6 good enough on here, the cure there is to let Ms. Doherty do
7 an amended complaint where we could simply spell it out even
8 better on what acts they did or didn't do, and I think that
9 obviously kick the can on down the road.

10 **THE COURT:** All right.

11 Mr. McLean, anything in reply?

12 **MR. MCLEAN:** Yes. Very briefly, Your Honor. This is --
13 all this is is a 12(b)(6) motion. I have not moved for
14 summary judgment. All this is is a 12(b)(6) motion, and of
15 course your review is limited to the complaint itself. I
16 didn't want to take the deposition of Coastal Carolina
17 University. This matter was before Your Honor six weeks ago
18 or so when I had a 12(b) motion pending at that time. As soon
19 as I filed that motion, Mr. McLaughlin noticed a 30(b)(6)
20 deposition of Coastal Carolina University. I moved for a
21 protective order, and for reasons that I understand and
22 appreciate, the Court ruled that that deposition should go
23 forward, and it did. That doesn't change the fact that this
24 is a 12(b)(6) motion. It is the identical motion that I had
25 filed before the deposition was taken and so I don't want to

1 spill over into summary judgment today. This is a 12(b)(6)
2 motion.

3 As for affirmative acts, yes, Coastal Carolina did close
4 their campus. Yes, they did reopen their campus. But that
5 did not cause the snow or ice to be there. That's what the
6 statute requires, an affirmative act that causes the snow or
7 ice to be there.

8 And as far as the gross negligence standard is concerned,
9 the *Gardner* case mentioned by Mr. McLaughlin, that case is very
10 applicable here. In that case the defendant said you have to
11 prove our school bus driver was grossly negligent in order to
12 recover. And the Court said no, you don't because at the time
13 of the school bus accident the minor plaintiff who was a
14 passenger was simply sitting on the bus, simply riding on the
15 bus. And the bus driver was not supervising, controlling,
16 protecting, those words that are in the statute, the student.
17 The student was simply riding on the bus. They said gross
18 negligence does not apply. Likewise here, Ms. Doherty was
19 walking to campus -- excuse me, walking to class on campus.
20 The school was not directing her, supervising her, any of
21 those matters that would have shifted this over to gross
22 negligence. So this is not a gross negligence case, this is a
23 case of immunity for snow and ice conditions unless an
24 affirmative act of the governmental entity caused the snow or
25 ice to be present. And so I respectfully submit again that

1 we're entitled to a motion dismissing this case.

2 THE COURT: All right.

3 MR. MCLEAN: To an order dismissing this case. Thank
4 you.

5 THE COURT: All right. Well I'm going to take it under
6 advisement. I need to look at the Tort Claims Act. I'll look
7 back at your memos. Let me get each one of you to submit a
8 proposed order. How long do y'all need to do that?

9 MR. MCLEAN: I could have one by a week.

10 THE COURT: Well 14 days?

11 MR. MCLEAN: Oh sure. Fourteen, yes, sir.

12 THE COURT: All right.

13 MR. MCLAUGHLIN: That's plenty of time for me as well,
14 Your Honor.

15 THE COURT: All right. Submit proposed order within 14
16 days. I'll be doing my research in the interim and I'll let
17 you -- submit the proposed order to me, if you'll just do it
18 by e-mail in Word form in case, I need to make any changes or
19 alterations, okay?

20 MR. MCLAUGHLIN: So just to make sure I understand, just
21 send them to you directly.

22 THE COURT: That's correct.

23 MR. MCLAUGHLIN: And you'll handle doing any e-filing or
24 you'll direct us to?

25 THE COURT: That's correct. I mean don't submit a .pdf

1 where I can make any changes to it or anything of that nature.
2 I'll take care of the e-filing, and if I need to edit it, I'll
3 edit it and e-file it, okay?

4 MR. MCLAUGHLIN: Understood.

5 THE COURT: Okay. Thank you very much.

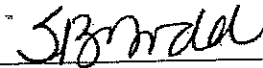
6 (HEARING IS ADJOURNED.)

C E R T I F I C A T E

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I, the undersigned, Sallie Beth Todd, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the Transcript of Record of the hearing held in the interest of Sierra Doherty versus Coastal Carolina University in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on March 2, 2021 via WebEx remote hearing.

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



Sallie Beth Todd, CVR
Official Reporter

May 7, 2021.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO. 2019-CP-26-07922
Sierra Doherty,	)	
	)	
Plaintiff,	)	RESPONSE OF DEFENDANT TO
	)	PLAINTIFF'S MOTION TO
vs.	)	ALTER/AMEND/RECONSIDER
	)	
Coastal Carolina University,	)	
	)	
Defendant.	)	
	)	

**TO: PLAINTIFF ABOVE-NAMED AND PATRICK J. McLAUGHLIN, ESQUIRE,
HER ATTORNEY:**

Plaintiff has moved that the court alter, amend, and/or reconsider its order and judgment granting defendant's Rule 12(b)(6) motion to dismiss. Specifically, plaintiff argues the motion should have been converted to a Rule 56 motion for summary judgment and denied or, in the alternative, the order of dismissal should be amended to allow her to file an amended complaint.

CONVERSION OF MOTION

A motion to dismiss is converted to a summary judgment motion when "matters outside the pleadings are presented to and not excluded by the Court..." Rule 12(b), SCRCivP. Defendant strategically moved to dismiss under Rule 12(b)(6) and not for summary judgment under Rule 56 and in so doing did not present any matters outside the complaint to the court. Plaintiff cannot thwart defendant's strategy and unilaterally convert defendant's motion to something it is not by presenting matters outside the complaint in her response. The court may treat a 12(b)(6) motion as a motion for summary judgment. *Baird v Charleston County*, 333 S.C. 519, 5611 S.E.2d 69 (1999). But it did not, and the court

properly granted the motion to dismiss based on the lack of any allegation in the complaint that an act of defendant caused the ice and snow to be on the sidewalk where plaintiff slipped and fell.

AMENDED COMPLAINT

Defendant raised the snow and ice immunity of §15-78-60(8) of the Tort Claims Act in its answer filed on December 18, 2019, thereby putting plaintiff on notice of the eventual grounds for dismissal of this case before the statute of limitations ran on January 8, 2020. Plaintiff did not amend her complaint to allege an act of defendant that caused the ice and snow to be on the sidewalk. She asked the court for the first time in her response to the motion to dismiss that if the motion is granted that she be allowed to file an amended complaint. However, even if plaintiff is allowed to file an amended complaint now, an amended complaint would be futile because the statute of limitations has run.

Dismissal of a complaint does not bar a subsequent action brought before expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint. *Spence v Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006), citing *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986); *Hennegan v. Atlantic Coast Line R. Co.*, 211 S.C. 357, 45 S.E.2d 331 (1947). Plaintiff cites the *Spence* case for the proposition that she should be allowed to file an amended complaint even though the statute of limitations has run. Such a situation may hypothetically exist “[w]hen a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms

the dismissal may modify the lower court's order to find the dismissal is without prejudice. When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint.” 628 S.E.2d at 881. This hypothetical situation simply does not exist in this case and even if it did plaintiff’s relief would be in the appellate court.

CONCLUSION

The court has not misunderstood, failed to fully consider, or failed to rule on any issue raised by either party on the motion to dismiss. *See, Elam v South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E2d 772 (2004). Plaintiff’s motion to alter, amend, and/or reconsider the order and judgment granting defendant’s Rule 12(b)(6) motion to dismiss should be denied.

CLARKE, JOHNSON, PETERSON & MCLEAN, PA

s/Joseph P. McLean

JOSEPH P. McLEAN, SC Bar #11839

Post Office Box 1865

Florence, South Carolina 29503

Tel: (843) 669-2401

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Email: jmclean@cjpmlaw.com

Attorney for Defendant

Florence, SC
March 15, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO. 2019-CP-26-07922
Sierra Doherty,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MOTION TO AMEND ANSWER
	)	
Coastal Carolina University,	)	
	)	
Defendant.	)	
	)	

**TO: PLAINTIFF ABOVE-NAMED AND PATRICK J. McLAUGHLIN, ESQUIRE,
HER ATTORNEY:**

PLEASE TAKE NOTICE that defendant, by and through undersigned counsel, hereby moves for an order allowing the filing of an Amended Answer to raise the defense of failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCF. This motion is made pursuant to Rule 15(a). Undersigned counsel has consulted with opposing counsel prior to filing this motion in an attempt to obtain his consent to an Amended Answer. However, opposing counsel is unable to consent. See the attached Memorandum of Law for legal authorities in support of this motion.

CLARKE, JOHNSON, PETERSON & MCLEAN, PA

s/ Joseph P. McLean

Florence, SC
April 22, 2020

JOSEPH P. McLEAN, SC Bar #11839
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Tel: (843) 669-2401
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Email: jmclean@cjpmlaw.com
Attorney for Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO. 2019-CP-26-07922
Sierra Doherty,	)	
	)	
Plaintiff,	)	
	)	MEMORANDUM OF LAW IN
vs.	)	SUPPORT OF MOTION TO AMEND
	)	ANSWER
Coastal Carolina University,	)	
	)	
Defendant.	)	
	)	

Rule 15 SCRCP allows for an amended pleading by leave of court, “and leave shall be freely given when justice so requires and does not prejudice any other party.” *See*, Rule 15 (a) SCRCP; *See also*, *Kelly v. South Carolina Farm Bureau Mut. Ins. Co.*, 316 S.C. 319, 450 S.E.2d 59 (Ct. App. 1994).

1. Justice requires Amended Answer.

This action arises out of an accident when plaintiff slipped and fell on an icy sidewalk on property owned and maintained by defendant. Defendant is a governmental entity. Section 15-78-60(8) of the Tort Claims Act provides [a] governmental entity is not liable for a loss resulting from:

- (8) snow or ice conditions ... on any public way or other public place due to weather conditions unless the snow or ice thereon is affirmatively caused by a negligent act of the employee.

Defendant pled §15-78-60(8) as an affirmative defense in its Answer. Defendant did not plead Rule 12(b)(6), but it has a meritorious Rule 12(b)(6) defense under

§15-78-60(8). Therefore, justice requires that defendant be permitted to raise a Rule 12(b)(6) defense via an amended answer.

2. Amendment will not prejudice plaintiff.

The prejudice contemplated under Rule 15(a) is not that the plaintiff is forced to litigate the merits of a valid defense. Rather the prejudice is some result flowing from the amendment that puts the plaintiff at a disadvantage in the litigation which it would not have faced if the amended pleading had been included in the original pleading. *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017).

Defendant pled §15-78-60(8) as an affirmative defense in its Answer. There is no new issue to be presented if defendant is allowed to amend its Answer. All it seeks to do now is preserve its opportunity to move to dismiss under Rule 12(b)(6) should it choose to do so. Further, this action was filed on December 12, 2019, and defendant filed its answer on December 18, 2019. Written discovery has begun, but no depositions have been taken. This case is still at a very early stage. Plaintiff will not be put at any disadvantage if defendant is permitted to file an amended answer to raise a 12(b)(6) defense.

3. Conclusion.

The law strongly favors amendments to pleadings, and a court is encouraged to freely grant leave to amend. *Patton v. Miller, supra*. Allowing an amended answer will facilitate a decision of this case on the merits, not on technical rules of pleading. Defendant should be allowed to file an amended answer to plead a 12(b)(6) defense.

[E-SIGNATURE OF COUNSEL ON PAGE 3]

CLARKE, JOHNSON, PETERSON & MCLEAN, PA

s/ Joseph P. McLean

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Post Office Box 1865

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Fax: (843) 662-1779

Email: jmclean@cjpmlaw.com

Attorney for Defendant

Florence, South Carolina

April 22, 2020

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Sierra Doherty,

PLAINTIFF,

vs.

Coastal Carolina University

DEFENDANT,

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2019-CP-26-07922

RESPONSE TO DEFENDANT'S
MOTION TO AMEND ANSWER

TO: HON. DANIEL D. HALL, PRESIDING JUDGE FOR OCTOBER 12 2016 TERM OF
NON-JURY COMMON PLEAS COURT AND JOSEPH P. MCLEAN, ATTORNEY FOR
DEFENDANT COASTAL CAROLINA UNIVERSITY

The Plaintiff, by and through her undersigned counsel, responds to the Defendant's motion to amend answer to raise the defense of failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCP, made pursuant to Rule 15(a) SCRCP.

Plaintiff's counsel would note to the Court that he and opposing counsel did discuss this matter prior to the filing of the defendant's motion. Attorney McLean, who is a fine attorney and who Plaintiff's counsel believes he enjoys a good working relationship with, took over this matter after the Defendant had already filed an answer on December 18, 2019. Upon taking over the file, Attorney McLean notified Plaintiff's counsel on April 16, 2020 that he felt the South Carolina Tort Claims Act (SCTCA) contained an exception to the waiver of liability under the SCTCA that applied to the facts of this case:

The governmental entity is not liable for a loss resulting from:
(8) snow or ice conditions or temporary or natural conditions on any public way
or other public place due to weather conditions unless the snow or ice thereon is
affirmatively caused by a negligent act of the employee.
S.C. Code §15-78-60(8).

Attorney McLean explained that in light of this, he felt the need to amend the answer to assert a 12(b)(6) defense.

While understanding opposing counsel's position, Plaintiff's counsel explained via email:

I think I would be doing my client a disservice and not doing my job if I outright consented to an affirmative defense that could prejudice her claims without some concession.

As such, I am fine consenting to allowing your client's to amend their answer to assert a 12(b)(6) answer to argue 15-78-60(8) requires dismissal, provided your clients will stipulate that the gross negligence standard applies to the subsection 8 exception. As the South Carolina Supreme Court has held numerous times, "when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception. *Steinke v. SCDLLR*, 336 S.C. 373 (S.C. 1999); *Etheridge v. Richland School Dist. 1*, 330 S.C. 447, 463 (Ct. App. 1998) (when an action is brought alleging gross negligence by a governmental entity pursuant to an exception contained in Section 15-78-60, all other applicable exceptions must be read in light of the exception containing the gross negligence standard), *cert. granted on other grounds*, April 8, 1999.

S.C. Code 15-78-60(25) provides that the government is liable for a "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, . . . or client of any governmental entity" **when "the responsibility or duty is exercised in a grossly negligent manner."**¹ As a student-ice case, subsection 25, and its gross negligence standard would apply to the subsection 8 exception.

If you can stipulate to that, I can consent to an amended answer.

Email correspondence dated April 16, 2020.

Opposing counsel explained he understood Plaintiff's counsel's position, but felt the need to file the motion.

Allowing the Defendant to amend their answer and assert a 12(b)(6) defense is

¹ S.C. Code §15-78-60(25) lays out an "exception to the exception." Meaning, if the governmental entity exercises a responsibility or duty in a grossly negligent manner, they are not excepted from the waiver of liability. As the Plaintiff was a student with the Defendant, S.C. Code §15-78-60(25) applies and that gross negligence "exception to the exception" has to be read in to any exception applicable to the case pursuant to *Etheridge*.

unnecessary and would be a waste of time. Any argument the defense wishes to make that S.C. Code §15-78-60(8) bars suit can be made via a Rule 56 SCRC motion for summary judgment.

The Plaintiff has alleged gross negligence. See ¶¶10-11 of the Complaint. The *Etheridge* case is going to require that snow/ice exception be read in light of the exception containing the gross negligence standard. *Etheridge v. Richland School Dist. 1*, 330 S.C. 447, 463 (Ct. App. 1998). The parties have already exchanged initial discovery in this case, part of which includes a video of the sidewalk intersection where the fall occurred. The Defendants' response included the following email from Keith Williams, the Defendants' Fire Inspector, documenting the following:

As you can see from the photos attached the sidewalk was ice covered, the portion she fell on appears to have melted and frozen back over last night. The area was extremely slick, as even we had trouble standing on it.
Exhibit 1, Williams email dated January 8, 2018.

As that email documents, there was a hazardous condition to the sidewalk and Defendants' own fire inspector says that condition developed overnight. Given the weather conditions, there is clearly a factual issue to submit to a jury as to whether the Defendant was grossly negligent in not detecting and curing this hazardous condition before allowing students to transverse this area during a winter storm.

Any motion filed under 12(b)(6) would ultimately be converted into a motion for summary judgment, as *Etheridge* requires that gross negligence "exception to the exception" be applied. The Plaintiff would be entitled to have the Court consider evidence showing there was a question of material fact for a jury to consider regarding whether the Defendants had been grossly negligent.

Based on the above, the Plaintiff respectfully requests that the Court deny the

Defendant's motion. In the alternative, if the Court decides to allow the Defendant to amend their answer, the Plaintiff requests that the order allowing such find that the exception to the waiver of immunity outlined in S.C. Code §15-78-60(8) be read as to incorporate the gross negligence "exception to the exception" standard as required via S.C. Code §15-78-60(25) and *Etheridge*.

Respectfully submitted

October 7, 2020
Florence, South Carolina

WUKELA LAW FIRM

BY: s/ Patrick J. McLaughlin
PATRICK J. MCLAUGHLIN
Attorney for Plaintiff
PO Box 13057
Florence, SC 29504
patrick@wukelalaw.com
T: 843-669-5634, F: 843-669-5150

EXHIBIT 1

Patrick McLaughlin

From: Rose Marie H. Johnson
Sent: Monday, January 8, 2018 11:01 AM
To: Keith Williams
Cc: Anthony Carter; Melissa Jarrard
Subject: RE: Accident 1-8/2018 Between Brittian & Wall Building

Thank you Keith. This information is most helpful. I will forward it to the office of university counsel for further involvement.

Thank you,
Rose Marie

From: Keith Williams
Sent: Monday, January 8, 2018 10:30 AM
To: Rose Marie H. Johnson <rmj@coastal.edu>
Cc: Anthony Carter <acarter@coastal.edu>
Subject: Accident 1-8/2018 Between Brittian & Wall Building

Good morning,

Just want to forward the information Fire Safety had on the accident this morning between Brittian and Wall Building.

Name of Student: Sierra Doherty
Police Department was going to fill out the incident report.
The incident number will be 2018 0004

The patient informed me she was walking from Brittian to the Wall Building. She fell on the ice covered sidewalk. She stated she slipped and fell backwards on her left arm. Her pain was coming from her elbow on her left arm.

Horry County EMS arrived on scene and transported patient to Conway Medical for evaluation and treatment. The patient was experiencing severe pain in her left arm and elbow.

As you can see in the photos attached the sidewalk was ice covered, the portion she fell on appears to have melted and frozen back over last night. The area was extremely slick, as we even had trouble standing on it.

If you need additional information please contact our office.

Best regards,
Keith Williams
Fire Inspector
Coastal Carolina University
PO Box 261954
Conway, SC 29528
Work (843) 349-5005
Cell (336) 432-7742
E-mail: kwilliams@coastal.edu

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO. 2019-CP-26-07922
Sierra Doherty,	)	
	)	
Plaintiff,	)	
	)	MEMORANDUM OF LAW IN
vs.	)	SUPPORT OF MOTION TO
	)	DISMISS
Coastal Carolina University,	)	
	)	
Defendant.	)	
	)	

This negligence action arises out of an accident which occurred on the campus of defendant Coastal Carolina University (CCU). Plaintiff was a student at CCU, she was walking to class, and she slipped and fell on an icy sidewalk. CCU is a governmental entity, so its liability in tort is controlled by the S.C. Tort Claims Act. Section 15-78-60(8) of the Tort Claims Act provides “[a] governmental entity is not liable for a loss resulting from:

- (8) snow or ice conditions ... on any public way or other public place due to weather conditions unless the snow or ice thereon is affirmatively caused by a negligent *act* of the employee (emphasis added).”

The ice on the sidewalk was due to winter storm Grayson. *See*, Complaint paragraph 1. Plaintiff does not contend that a negligent *act* of defendant caused the ice to be on the sidewalk. However, plaintiff alleges that a negligent *omission* of defendant caused the ice to be on the sidewalk. More specifically, she alleges that CCU treated some of its sidewalks for ice after the winter storm but not the one on which she slipped and fell. *See*, Complaint paragraphs 6 and 18.

Professors Hubbard and Felix instruct that in 1866 the South Carolina Supreme Court defined negligence as:

The omission to do something that a reasonable and prudent man...would so...or doing something which a reasonable and prudent man would not do...

F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts* (4th Ed., 2011) at 65, citing *Bridger v Asheville & Spartanburg R.R.*, 25 S.C. 24, 28 (1886). “Negligence may consist of an act or an omission. Failure to act is not an act.” *Flynn v North Carolina State Highway and Public Works Commission*, 244 N.C. 617, 94 S.E.2d 571 (N.C. 1956) (attached as Exhibit A). The distinction is one of passive inaction versus positive conduct, or nonfeasance versus misfeasance. They are different things, and the SC. Tort Claims Act recognizes that. While the snow and ice immunity at 15-78-60(8) speaks only of “acts” other sections of the Tort Claims Act speak specifically in terms of “acts or omissions.” See, §15-78-60(20) (act or omission of a person other than an employee); §15-78-60(29) (acts or omissions of members of athletic commissions); §15-78-60(30) (acts or omissions of local foster care review boards); §15-78-60(31) (acts or omissions of employees and volunteers of the S.C. Protection and Advocacy System for the Handicapped); §15-78-60(36) (acts or omission of state constables). The snow and ice immunity in §15-78-60(8) would not apply if there had been a positive act of misfeasance by CCU that caused the ice to be on the sidewalk. However, at most there was an omission, so the snow and ice immunity does apply.

In *Flynn*, *supra*, the North Carolina Supreme Court recognized just this. The statute

in question allowed a claim for damages against the state if a negligent act of an employee of the state highway department proximately caused a defect in or on a highway that injured a member of the travelling public. The facts showed that the state highway department failed to repair a hole in the highway which had been caused by normal wear and tear, and the hole had caused an automobile accident. The court framed the issue as follows: "Is a failure to repair a hole in the highway caused by ordinary public travel a negligent act?" The court answered the question as follows:

We think it was the intent of the Legislature to permit recovery only for the negligent acts of its employees, for the things done by them, not for the things left undone. If the intent had been otherwise, it would have been easy to permit recovery for the negligent acts and omissions of State employees

The court went on to observe:

That the interpretation here given is correct, we think, is shown conclusively by subsequent legislative enactments. Chapter 400, Session Laws of 1955, ratified March 31, 1955, amended the Tort Claims Act by inserting after the words, 'negligent act,' the words, 'or omission.' By inserting the additional words the conclusion is inescapable the Legislature did not consider they were already included. However, on May 16, 1955, Chapter 1361, an amendment to Chapter 400, was passed, striking out the words, 'or omission.' By taking these words out, the conclusion is likewise inescapable that it was the legislative intent they should not be included.

Flynn, 94 S.E.2d at 573.

Words in statutes mean things, and the Tort Claims Act is to be construed liberally in favor of limiting the liability of the state. See, Tort Claims Act §15-78-20(f). *See also*, *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) (the cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent

whenever possible), *quoting Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015); *Nexsen v. Ward*, 96 S.C. 313, 80 S.E. 599, 601 (1914) (the rule sustained by all the courts requires that every word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction.); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute)(where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning). .

The court need not look to any other section of the Tort Claims Act, including §15-78-60(25) which provides immunity from liability for supervision, protection, control, confinement, or custody of any student except when the responsibility or duty is exercised in a grossly negligent manner. When the accident occurred, defendant was not supervising, protecting, or controlling the plaintiff/student who was merely walking to class on campus. See, *Gardner v. Biggart*, 308 S.C. 331, 333-34, 417 S.E.2d 858, 859-60 (1992) (inured plaintiff was merely a passenger on defendant's school bus, and the school bus driver was not exercising any duty involving supervision, custody, control or protection at the time of the accident).

Plaintiff s has failed to state facts sufficient to constitute a cause of action because there is no affirmative, positive act of defendant which caused the ice to be on the sidewalk. At most there was an omission or inaction, but this does not defeat defendant's snow and

ice immunity under §15-78-60(8) of the Tort Claims Act. The result may be different had the slip and fall occurred on private property, but it did not. Therefore, this action should be dismissed pursuant to Rule 12(b)(6)

CLARKE, JOHNSON, PETERSON & MCLEAN, PA

s/ Joseph P. McLean

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Attorney for Defendant

Florence, South Carolina

January 22, 2021

Page 571

94 S.E.2d 571

244 N.C. 617

Ethel Agnes FLYNN, Administratrix of the
Estate of Terry
Eugene Flynn, deceased,

v.

NORTH CAROLINA STATE HIGHWAY
AND PUBLIC WORKS COMMISSION.

No. 94

Supreme Court of North Carolina.

Oct. 17, 1956

William J. Cocke, Sam M. Cathey, Asheville,
for plaintiff, appellant.

Kenneth Wooten, Jr., Raleigh, Harkins, Van
Winkle, Walton & Buck, by O. E. Starnes, Jr.,
Asheville, for defendant, appellee.

HIGGINS, Justice.

The claim in this case is based on the alleged negligent failure of the named employees of the State Highway & Public Works Commission to repair a hole or break in the surface of the Cane Creek Road caused by public travel over it. In passing another vehicle, the father of plaintiff's intestate drove his pickup truck into the hole, lost control of it, wrecked it, with the result that Terry Flynn, age four years, was killed and the remaining seven occupants were injured. The claimant contends the break in the road surface was of such size and had existed for such length of time as to give the defendant's agents, naming them, constructive notice of its existence; and their failure to repair it was negligence. The claimant further contends she has the right to prosecute a claim for damages against the defendant under the Tort Claims Act, G.S. § 143-291. The pertinent part of the Act in effect at the time the claim arose is here quoted:

[244 N.C. 620] 'The Industrial Commission shall determine whether or not each individual claim arose as a result of a negligent act of a State employee while acting within the scope of his employment and without contributory negligence

on the part of the claimant or the person in whose behalf the claim is asserted. If the Commission finds there was such negligence on the part of a State employee while acting within the scope of his employment which was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages which the claimant is entitled to be paid, including medical and other

Page 573

expenses, and by appropriate order direct the payment of such damages by the department, institution or agency concerned, but in no event shall the amount of damages awarded exceed the sum of eight thousand dollars (\$8,000.00).'

In order to authorize the payment of compensation, the Industrial Commission's findings must include (1) a negligent act, (2) on the part of a State employee, (3) while acting in the scope of his employment, etc. The first requirement is that the claimant show a negligent act. Is a failure to repair a hole in the highway caused by ordinary public travel a negligent act? The requirement of the statute is not met by showing negligence, for negligence may consist of an act or an omission. Failure to act is not an act. We think it was the intent of the Legislature to permit recovery only for the negligent acts of its employees, for the things done by them, not for the things left undone. If the intent had been otherwise, it would have been easy to permit recovery for the negligent acts and omissions of State employees. The Industrial Commission then would be authorized to award damages resulting from a negligent act or from a negligent failure to act.

That the interpretation here given is correct, we think, is shown conclusively by subsequent legislative enactments. Chapter 400, Session Laws of 1955, ratified March 31, 1955, amended the Tort Claims Act by inserting after the words, 'negligent act,' the words, 'or omission.' By inserting the additional words the conclusion is inescapable the

ELECTRONICALLY FILED - 2020 Nov 13 10:01 AM - Horry - COMMON PLEAS - CASE#2019CP2607922
ELECTRONICALLY FILED - 2021 Jan 22 2:40 PM - Horry - COMMON PLEAS - CASE#2019CP2607922

Legislature did not consider they were already included. However, on May 16, 1955, Chapter 1361, an amendment to Chapter 400, was passed, striking out the words, 'or omission.' By taking these words out, the conclusion is likewise inescapable that it was the legislative intent they should not be included.

From the foregoing we conclude the claim of damages as the result of failure to repair Cane Creek Road is not compensable under G.S. § 143-291 and amendments thereto. Consequently, the judgment of the Superior Court of Buncombe County is

[244 N.C. 621] Affirmed.

JOHNSON, J., not sitting.

PARKER, J., concurs in result.

ELECTRONICALLY FILED - 2020 Nov 13 10:01 AM - Horry - COMMON PLEAS - CASE#2019CP2607922
ELECTRONICALLY FILED - 2021 Jan 22 2:40 PM - Horry - COMMON PLEAS - CASE#2019CP2607922

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO: 2019-CP-26-07922
	)	
Sierra Doherty,	)	
	)	
PLAINTIFF,	)	PLAINTIFF'S RESPONSE IN
	)	OPPOSITION TO DEFENDANT'S
vs.	)	12(b)(6) MOTION TO DISMISS
	)	
Coastal Carolina University	)	
	)	
DEFENDANT,	)	
_____	)	

TO: PRESIDING JUDGE AND JOSEPH P. MCLEAN, ATTORNEY FOR DEFENDANT
COASTAL CAROLINA UNIVERSITY

The Plaintiff, by and through her undersigned counsel, responds to the Defendant's motion to dismiss pursuant to Rule 12(b)(6), SCRCP, filed January 22, 2021.

SUMMARY OF OPPOSITION

Defendant's 12(b)(6) motions ignores that the Plaintiff's complaint has pled an affirmative act and that the gross negligence standard applies to the snow/ice exception in an attempt to have the Plaintiff's case dismissed. Additionally, discovery to date has produced evidence supporting Plaintiff's allegations that the Defendant engaged in affirmative action and a material question exists as to whether Defendant's conduct was negligent/grossly negligent.

HISTORY OF THE CONTROVERSY

Upon taking over the file, defense counsel notified Plaintiff's counsel on April 16, 2020 that he felt the South Carolina Tort Claims Act (SCTCA) contained an exception to the waiver of liability under the SCTCA that applied to the facts of this case:

The governmental entity is not liable for a loss resulting from:
(8) snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions unless the snow or ice thereon is

affirmatively caused by a negligent act of the employee.
S.C. Code §15-78-60(8).

Defense counsel explained that in light of this, he felt the need to amend the answer to assert a 12(b)(6) defense.

Plaintiff's counsel responded via email:

I think I would be doing my client a disservice and not doing my job if I outright consented to an affirmative defense that could prejudice her claims without some concession.

As such, I am fine consenting to allowing your client's to amend their answer to assert a 12(b)(6) answer to argue 15-78-60(8) requires dismissal, provided your clients will stipulate that that the gross negligence standard applies to the subsection 8 exception. As the South Carolina Supreme Court has held numerous times, "when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception. *Steinke v. SCDLLR*, 336 S.C. 373 (S.C. 1999); *Etheridge v. Richland School Dist. 1*, 330 S.C. 447, 463 (Ct. App. 1998) (when an action is brought alleging gross negligence by a governmental entity pursuant to an exception contained in Section 15-78-60, all other applicable exceptions must be read in light of the exception containing the gross negligence standard), *cert. granted on other grounds*, April 8, 1999.

S.C. Code 15-78-60(25) provides that the government is liable for a "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, . . . or client of any governmental entity" when "the responsibility or duty is exercised in a grossly negligent manner."¹ As a student-ice case, subsection 25, and its gross negligence standard would apply to the subsection 8 exception.

If you can stipulate to that, I can consent to an amended answer.
Email correspondence dated April 16, 2020.

Opposing counsel explained he understood Plaintiff's counsel's position, but felt the need

¹ S.C. Code §15-78-60(25) lays out an "exception to the exception." Meaning, if the governmental entity exercises a responsibility or duty in a grossly negligent manner, they are not excepted from the waiver of liability. The Defendant admits that the Plaintiff was a student (*Amended Answer*, ¶¶7 & 9), therefore S.C. Code §15-78-60(25) applies and that gross negligence "exception to the exception" has to be read in to any exception applicable to the case pursuant to *Etheridge*.

to file the motion to amend and a *Motion to Amend* and *Memorandum of Law* was filed April 22, 2020.

Plaintiff filed a *Response to Defendant's Motion to Amend* on October 7, 2020, arguing that allowing the Defendant to amend their answer and assert a 12(b)(6) defense was unnecessary and would be a waste of time. Plaintiff argued that Etheredge v. Richland School Dist. 1, 330 S.C. 447 (Ct. App. 1998) would require that the snow/ice exception be read in light of the gross negligence standard imposed by S.C. Code 15-78-60(25) since this case involved a student and that initial written discovery had already produced an email from Defendant CCU's Fire Inspector that documented the hazardous condition of the sidewalk, that it was "extremely slick" and had gotten that way overnight. Plaintiff argued that email was enough to create a question of material fact as to whether Defendant CCU had been grossly negligent and that for any 12(b)(6) motion in the future, the Plaintiff would be entitled to submit that email and have the motion converted to a motion for summary judgment and that there was nothing in their answer preventing the Defendant from making that S.C. Code §15-78-60(8) argument through a Rule 56 SCRCF motion for summary judgment. In essence, allowing the amendment would only serve to waste time having what would turn out to be a premature motion for summary judgment ruled on by the Court.

The Court allowed the Defendant to amend their answer via an Order filed November 5, 2020 and Defendant's 12(b)(6) motion followed.

On November 24, 2020, Plaintiff's counsel sent Defense counsel an email informing the defense of matters of designation for a 30(b)(6) deposition he would like to take and asking for dates for such deposition:

Joe:

I'd like to take a 30(b)(6) of CCU on the following matters of designation:

1. What maintenance, inspection and precautions were taken for the incimate weather in the lead up to Ms. Doherty's fall on Jan. 8, 2018;
2. What maintenance, inspection and precautions were taken for the incimate weather on Jan. 8, 2018;
3. What maintenance, inspection and precautions are usually taken by CCU for incimate weather;
4. The investigation and reporting of Ms. Doherty's fall;
5. Information related to student pedestrian traffic on campus. Specifically, where the area of the fall stands relative to other areas of campus as far as foot traffic;
6. Other falls/slips/trips of similar nature during periods of similar incimate weather (winter storms) for the 3 years preceding and 3 years since the fall.

If you can give me some dates that work for you and your folks, we can try to get that scheduled.

On December 1, 2020, having received no response, Plaintiff's counsel followed up about his 30(b)(6) request. Defense counsel responded via email that same day, stating that he had the 12(b)(6) motion pending and prefered to postpone depositions until after the motion is heard and ruled upon.

On December 16, 2020, Plaintiff's counsel electronically served Defense counsel with a *Notice of Video Deposition of Defendant Coastal Carolina University pursuant to Rule 30(B)(6) S.C.R.C.P.*, said deposition scheduled to be conducted remotely via Zoom on January 12, 2021. *See Exhibit 3 to this response, Notice of 30(B)(6) deposition.* That notice was accompanied by cover correspondence that noted:

...I am sorry we keep missing each other. As you are aware, I sent you an email on November 24th that outlined matters of examination for a 30(b)(6) deposition so that you could provide me with some dates that worked for you and your client. After I followed up to check on getting the dates on December 1st, you replied stating you wanted to wait until after your 12(b)(6) was heard...

As such, I have gone ahead and noticed the deposition for January 12, 2021. I do not like having to blind notice depositions. If this date does not work for you or your client, I would be more than willing to reschedule, provided there is an

agreement to have the deposition take place before any hearing on the motion. Otherwise, I would be doing my client a disservice not to pursue this deposition pursuant to the rules, which allow for the deposition to take place with just ten (10) days notice. I have done my best to select the closest date that would hopefully not conflict with any holiday plans.

Please feel free to contact me to discuss. I left my mobile number on my most recent voicemail since we have been playing phone tag, but will provide it again (843-XXX-XXXX).

Counsels spoke the next day about the matter with Defense counsel indicating his intent to file a motion for protective order. Plaintiff's counsel indicated he would file a joint opposition to both motions so that the matters could be submitted to the Court as expeditiously as possible.

The Defendant filed a *Motion for Protective Order* on December 17, 2020.

The Plaintiff filed a joint response in opposition to November 13th 12(b)(6) motion and December 17th motion for protective order. Those motions were placed on the January 27, 2021 roster with the Hon. Benjamin H. Culbertson.

At Defense counsel's request, a status conference was requested with Judge Culbertson and took place remotely via WebEx on January 6, 2021. The purpose of that status conference was that the Defendant wanted to delay the scheduled January 12th deposition of their 30(b)(6) witness until after the January 27, 2021 motions hearing. The Court denied that request.

Defense counsel subsequently requested that the deposition be rescheduled with the understanding that the Defendant would withdraw their 12(b)(6) motion to give the Plaintiff time to take the deposition and get the transcript before the motion was heard. The Plaintiff agreed, defense counsel informed the Clerk of Court's office of his withdrawal of the motions with leave to refile at a later date and the deposition of CCU's 30(b)(6) witness, Stephen K. Harrison, Vice President Auxiliary Enterprises was ultimately conducted on January 21, 2021.

The day after that deposition, January 21st, the Defendant refiled their 12(b)(6) motion.

This response in opposition follows.

LEGAL STANDARD

12(b)(6)

SCRCP 12(b)(6) provides for dismissal when there is a “failure to state facts sufficient to constitute a cause of action.” SCRCP 12(b)(6).

Generally, in considering a Rule 12(b)(6), SCRCP, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the Complaint. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 66, 651 S.E.2d 305, 307 (2007); Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

A Rule 12(b)(6) motion is addressed solely to the sufficiency of the allegations in the complaint. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

“A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 566, 127 S.Ct. 1955, 1965 (2007).

A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the Complaint and must presume all well-pled facts to be true. Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 379, 635 S.E.2d 538, 538-39 (2006); Overcash v. South Carolina Elec. and Gas Co., 364 S.C. 569, 614 S.E.2d 619 (2005). “[U]nder our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the evidence upon trial will prove, and not the evidence which will be required to prove those facts.” Brown v. Inv. Mgmt. & Research, Inc., 323 S.C. 395, 400 n. 3, 475 S.E.2d 754, 756 n. 3 (1996).

If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the

grant of a motion to dismiss for failure to state a claim is improper. Clearwater Tr. v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). "Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." Spence v. Spence, 368 S.C. 106, 116-17, 628 S.E.2d 869, 874 (2006). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

Rule 8(e)(1), SCRCP states that "each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required." Moreover, all pleadings shall be so construed as to do substantial justice to all parties. Unisun Ins. v. Hawkins, 342 S.C. 537, 541, 537 S.E.2d 559, 561 (Ct. App. 2000).

To ensure substantial justice to the parties, the pleadings must be liberally construed. Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991).

Further, "when a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The Plaintiff in most cases should be given opportunity to file and serve and amended complaint." Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

Conversion to Summary Judgment

The trial court may treat a motion under S.C. R. Civ. P. 12(b)(6) as a motion for summary judgment and consider matters presented outside of the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with S.C. R. Civ. P. 56(c), (e). The notice provisions in Rule 56 are incorporated into S.C. R. Civ. P. 12(b)(6). Brown v. Leverette, 291 S.C. 364, 365-367, 353 S.E.2d 697, 698-699 (1987).

Summary judgment is a drastic remedy which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Once a Rule 56 motion has been made, the evidence and its reasonable inferences must be viewed in the light most favorable to the non-moving party. *Id.* At 115, 545.

Summary judgment is appropriate when the pleadings, deposition, affidavits, and discovery on file show there is no genuine issue of material fact. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Flemming v. Rose, 350 S.C. 488 at 493-494 (2002).

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Conner v. City of Forest Acres, 348 S.C. 454, 462; 560 S.E.2d 606, 610 (2002), citing Koester v. Carolina Rental Center, Inc., 313 S.C. 490, 443 S.E.2d 392 (1994) and Rule 56(c), SCRPC. In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. Conner at 462, 610, citing Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112; 410 S.E.2d 537, 543 (1991).

In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330 (2009).

For the purposes of summary judgment, the moving party has the burden of proving no material fact exists. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54 (1998).

"Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Askew at 49, quoting Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusions to be drawn from those facts. Gilliland v. Elmwood Properties, 301 S.C. 295, 299; 391 S.E.2d 577, 579 (1990), citing Piedmont Engineers, Architects and Planners, Inc. v. First Hartford Realty Corp., 278 S.C. 195, 196; 293 S.E.2d 706, 707 (1982).

Summary judgment is inappropriate when more than one inference can be drawn from the evidence when it is viewed in the light most favorable to the non-moving party. Fickling v. City of Charleston, 372 S.C. 597; 643 S.E.2d 110 (2007).

When the evidence is susceptible to more than one reasonable inference, it should be submitted to the jury. Quesinberry v. Rouppasong, 331 S.C. 589; 503 S.E.2d 717 (1998).

If any triable factual issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402 (1991).

ARGUMENT

I. The Plaintiff has alleged an affirmative act by Defendant CCU.

Section 15-78-60(8) of the Tort Claims Act provides "a governmental entity is not liable for a loss resulting from: ...(8) snow or ice conditions...on any public way or other place due to weather conditions unless the snow or ice thereon is affirmatively caused by a negligent act of the employee..." S.C. Code §15-78-60(8).

The burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense. Strange v. S.C.

Dept. of Highways and Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994).

Defendant attempts to meet their burden by focusing entirely on the fact that the snow/ice exception to the waiver of immunity found in S.C. Code §15-78-60(8) uses the word “act” and then claiming that the Plaintiff has pled only omissions, so the Defendant is entitled to dismissal pursuant to Rule 12(b)(6).

This argument ignores that the actual allegations pled by the Plaintiff in her complaint include affirmative acts. The Plaintiff specifically pled that:

- 1) the Defendant took the affirmative act of closing its campus due to the hazardous conditions (*Complaint*, ¶5);
- 2) the Defendant subsequently took the affirmative act of re-opening its campus despite the hazardous conditions (*Complaint*, ¶5);

The Plaintiff has specifically pled that she was injured after both of those affirmative acts took place. It is a reasonable inference and question for a jury to consider, that having taken the affirmative act of closing the campus because of the dangerous conditions they were aware of, if the Defendant subsequently took the affirmative act of reopening the campus and did so in a negligent manner, then they are not entitled to the ice/snow exception under their own argument. At a minimum, whether closing and reopening the campus was an affirmative act presents a material question of fact for the jury to consider.

Plaintiff further pled that Defendant CCU’s actions were negligent/grossly negligent in failing to “properly treat the ice covered walkways before reopening campus” and “properly remedy the unsafe condition that the Defendant knew or should have known existed.” (*Complaint*, ¶12). Merriam-Webster’s defines “properly” as “in a way that is acceptable or

suitable” or “in a way that is accurate or correct.”² Someone treating or remedying ice covered walkways in an unacceptable/unsuitable or inaccurate/incorrect way would be affirmative action.³

Put simply, with the liberal construction that must be applied to the Plaintiff’s pleadings and with the standard requiring that all reasonable inferences are made in her favor, her complaint sufficiently states a cause of action and the motion to dismiss should be denied.

II. The gross negligence standard of S.C. Code 15-78-60(25) applies and that would defeat Defendants’ argument that an affirmative act is required.

The Defendant’s motion and accompanying memorandum of law ignores the fact that Plaintiff has alleged gross negligence. *See* ¶¶10-11 of the Complaint.

Under the “Exceptions to waiver of immunity” section of the S.C. Tort Claims act, it states that “the governmental entity is not liable for a loss resulting from...(25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student...except when the responsibility or duty is exercised in a grossly negligent manner.” S.C. Code 15-78-60(25), emphasis added.

“When an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception.” *Steike v. SCDLLR*, 336 S.C. 373 (S.C. 1999); *Etheredge v. Richland School Dist. 1*, 330 S.C. 447, 463 (Ct. App. 1998). In *Etheredge*, the trial court had originally granted summary judgment to the School District on-

² Merriam-Webster online definition search conducted on 12/17/2020 from <https://www.merriam-webster.com/dictionary/properly>

³ As discussed later in this response, given the knowledge we now have through what limited discovery has taken place about what CCU knew about the specific hazards this storm presented, about what needed to be done to address those hazards, and the failure by CCU to so address those hazards on the day the Plaintiff was injured, there is a material question of fact for a jury to decide as to whether CCU’s affirmative actions in trying to address known hazards from this severe winter storm were negligent/grossly negligent.

several of the exceptions to the waiver of immunity under S.C. Code §15-78-60. In reversing the trial court, the *Etheredge* court specifically found:

Where an action is brought against a governmental entity for injuries or death allegedly caused to a student by the entity's gross negligence in the exercise of its duty of supervision, protection and control of the students in its custody in accordance with subsection (25) of 15-78-60, all other subsections of 15-78-60 providing exceptions to the waiver of governmental immunity, must be read in light of subsection (25), which provides an exception to immunity where the governmental entity exercises its responsibilities or duties in a grossly negligent manner.

Etheredge at 463, 246, emphasis added. See *Jackson v. S.C. Dept. of Corr.*, 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989).

As the Plaintiff previously argued when opposing the Defendant's motion to amend, *Etheredge* creates an "exception to the exception" via the gross negligence standard for which the discovery to date created enough of a factual question to require submission of the case to a jury.

Notably, S.C. Code §15-78-60(25) does not contain the limiting "act" language the Defendants rely on so heavily in their motion to dismiss. It simply states that if the duty owed to any student is "exercised in a grossly negligent manner," then there is, as the Plaintiff previously argued, an "exception to the exception."

"Gross negligence is the intentional, conscious failure to do something which one ought to do or the doing of something which one ought not to do." *Etheredge* at 454-455.

Since *Etheredge* states that the gross negligence "exception to the exception" applies, then the Plaintiff has a valid claim even if the only conduct she alleged is the "conscious failure to do something which one ought to do."

Defendant attempts to avoid this by arguing that the Court does not need to look at S.C. Code §15-78-60(25) because "when the accident occurred, defendant was not supervising,

protecting, or controlling the plaintiff/student who was merely walking to class on campus.”
 11/13/2020 Memo, p.4.

This argument ignores the specific allegations of the complaint that Defendant CCU was supervising, protecting and controlling the Plaintiff when they supervised/controlled her access to campus to protect her from the hazardous conditions. Defendant CCU had specifically closed campus, restricting the ability of non-resident, commuting students like the Plaintiff to move about campus, in an effort to protect them from the hazardous conditions they knew would be present on campus. Then when they reopened campus, the Defendant supervised students like the Plaintiff's return to campus and their use of the campus grounds. Whether that be the action of reopening on a delayed schedule, clearly meant for student's like the Plaintiff's protection given the severe weather conditions, or on regular schedule, those are all actions taken by CCU under a duty they had (or a minimum had certainly assumed with the initial action of closing campus) to protect students like the Plaintiff.⁴

“Gross negligence is a mixed question of law and fact and should be presented to a jury unless the evidence supports only one reasonable inference.” Etheredge at 462 (citing to Clyburn v. Sumter County Sch. Dist. #17, 317 S.C. 50, 451 S.E.2d 855 (1994) and Doe v. Orangeburg County Sch. Dist. No. 2, 329 S.C. 221, 495 S.E.2d 230 (Ct. App. 1997).

In short, the specific allegations that Defendant CCU closed and reopened its campus due to the dangerous conditions creates a question of fact for a jury to consider as to whether or not Defendant CCU acted in a grossly negligent manner in supervising/protecting/controlling the Plaintiff.

⁴ Also, as noted in section III below, evidence discovered to date supports CCU took action for the safety of students like the Plaintiff.

Taking the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, granting the Defendant's motion to dismiss for failure to state a claim would be improper. Clearwater Tr. v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). As such, based solely on the pleadings, the Defendant's motion should be denied.

In the alternative, and at a minimum, the Plaintiff would argue that based on the discovery to date (*see below*), she should be given opportunity to file and serve and amended complaint. Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

III. If the Court does not believe the allegations of the Complaint and the reasonable inferences that can be drawn from those factual allegations are sufficient to deny the Defendant's motion, the Plaintiff requests that the Court consider matters outside the pleadings and convert the motion to one for Summary Judgment.

As addressed above, the Plaintiff believes the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, support denying the Defendant's motion. If, based on the above, the Court agrees, there is no reason to go any further in this *Response*.

However, if the Court is not convinced that the Defendant's motion should be denied, the Plaintiff would respectfully request that the Court consider the remainder of this *Response* and the matters presented outside of the pleadings contained within. The Plaintiff is specifically filing this *Response* well before the scheduled motion hearing date of March 1, 2021 to afford the Defendant a reasonable opportunity to respond to such matters in accordance with S.C. R. Civ. P. 56(c), (e). Brown v. Leverette, 291 S.C. 364, 365-367, 353 S.E.2d 697, 698-699 (1987).

- a. Discovery to date presents a material question of fact that CCU took "actions" which led to the Plaintiff's injury.

As noted above, the Plaintiff deposed CCU's 30(b)(6) witness. The matters of examination noticed for that deposition were:

- 1) What maintenance, inspection and precautions were taken for the inclement weather in the lead up to Ms. Doherty's fall prior to January 8, 2018;
- 2) What maintenance, inspection and precautions were taken for the inclement weather on January 8, 2018;
- 3) What maintenance, inspection and precautions are usually taken by CCU for inclement weather;
- 4) The investigation and reporting of Ms. Doherty's fall;
- 5) Information related to student pedestrian traffic on campus. Specifically, where the area of the fall stands relative to other areas of campus as far as foot traffic;
- 6) Other falls/slips/trips of similar nature during periods of similar inclement weather (winter storms) for the 3 years preceding and 3 years since the fall.

Designated matters #1 and #2 specifically are asking what affirmative acts were taken by Defendant CCU.

CCU produced Stephen K. Harrison as their witness. Mr. Harrison is the Vice President of Auxiliary Enterprises. Mr. Harrison explained his job "entails all things on campus which are self-supporting" (housing, dining, bookstore, etc.) "as well as other entities on campus which are large operational staff responsible for the operations of the institution; for instance, the Grounds Department, the Custodial Department, etcetera." *Harrison Depo*, p.13, l.18 -- p.14, l.1. Mr. Harrison has worked in that capacity since July of 2017, but has been with CCU in various titles since September 2010. *Harrison Depo*, p.14, l.2-9.

Mr. Harrison also explained that he is a member of CCU's "Executive Emergency Management Team" through which he "would be a part of discussing forecasts that we have or whatever the emergency is generally on campus..." *Harrison Depo*, p.28, l.17-22.

During his deposition, Mr. Harrison explained many "actions" CCU took due to this storm, not the least of which were the actions taken restricting access to campus. Those actions began with the closing of the campus on Wednesday January 3, 2018.

The closing of campus on Wednesday, January 3, 2018 is documented by an email sent out Tuesday evening titled "Campus closed Wednesday."

From: no-reply@e2campus.com
 To: No-Reply CCUAlert
 Subject: Campus closed Wednesday
 Date: Tuesday, January 2, 2018 6:57:35 PM

Due to winter weather conditions, the CCU campus will be closed on Wednesday. Monitor email and coastal.edu for updates.

See Exhibit 1.

After explaining how that was a communication that would have gone out to faculty, staff and students, Harrison testified as follows:

Q: And so the University closed the campus because of the winter weather conditions?

MR. MCLEAN: Object to the form of the question. Go ahead and answer it.

A: Yes, sir.

Q: And those conditions were that there was going to be extreme winter weather conditions?

A: Yeah, severe winter weather event, yeah, a storm.

Q: Ice and snow, right?

A: That was what I understood; yes, sir.

Q: And the University made the decision to close the campus because it would be unsafe to invite students, faculty, and the public on the campus in those extreme winter weather conditions?

MR. MCLEAN: Object to the form of the question. Go ahead and answer it.

A: Yeah. Based on all the information we were discussing a moment ago that we were monitoring as well as state and county decisions, we, we decided to cancel classes and close administrative offices.

Q: And the reason why that decision was made because it would be unsafe not to do it, right?

A: We're, we're - yes, sir. We're always interested in making sure any member of our community is safe as they are on our campus.

Harrison Depo, p.31, l.23 - p.32, l.25.

Harrison confirmed that CCU took the action of keeping campus closed on Thursday, January 4, 2018, as documented in this Wednesday afternoon email:

From: no-reply@e2campus.com
To: No-Reply CCUAlert
Subject: CCU closed Thursday
Date: Wednesday, January 3, 2018 5:27:58 PM

Due to winter weather conditions, CCU will remain closed on Thursday. Monitor email and coastal.edu for updates.

See Exhibit 1.

Q: And so the University made the decision to keep the campus closed going into Thursday due to the extreme weather conditions?

MR. MCLEAN: Object to the form of the question. Go ahead and answer it.

A: Yes, sir.

Q: And, again, the University made that decision to keep the campus closed because it would be unsafe to invite students, faculty, and the public onto campus given the extreme weather conditions?

MR. MCLEAN: Object to the form of the question. Go ahead and answer it.

A: Yes, sir.

Harrison Depo, p.34, l.8 – 20.

Harrison testified as to CCU's action in reopening campus on a delayed schedule. That action was documented via an email that was sent out Thursday afternoon:

From: no-reply@e2campus.com
 To: No-Reply CCUAlert
 Subject: CCU delayed schedule on Friday
 Date: Thursday, January 4, 2018 2:39:48 PM

CCU will operate on a delayed schedule beginning 11 a.m. on Friday, Jan. 5. Monitor email and coastal.edu.

See Exhibit 1.

Q: And the University made that decision to open campus on that delayed opening schedule because it would be unsafe to invite students, faculty, and the public on campus earlier than 11 a.m. given the extreme weather conditions?

MR. MCLEAN: Object to the form of the question. Go ahead and answer it.

A: Yeah. As I said before, we want to take all those factors and so whether it be campus or getting to and from campus until 11 a.m., we didn't want them here.

Harrison Depo, p.40, l.3-13, emphasis added.

These actions of closing, reopening on delay and reopening at a normal operating level are actually part of CCU's "comprehensive Emergency Management Program."

EMERGENCY MANAGEMENT

The mission of the **Office of Emergency Management** is to prepare the CCU community for all hazards and threats by facilitating the coordination and integration of a comprehensive emergency management program.

ADVISORIES

The overall program is coordinated among all University departments as well as local, state and federal agencies.

See Exhibit 2.

CCU's own communications document that closing campus was done by University

Administration “officially” issuing a “Suspension of Operations” and activating “Emergency Operating Level 2.”

From: Office of University Communication <noreply@coastal.edu>
 Sent: Tuesday, January 2, 2018 6:53 PM
 To: currentfs@coastal.edu
 Subject: Campus closed Wednesday
 Importance: High

The National Weather Service predicts weather in our area will deteriorate Wednesday (tomorrow) morning with potential for freezing rain and snow.
 Therefore, campus will be closed tomorrow.
 Essential employees will be contacted by their supervisors about reporting to duty.
 Non-essential personnel should NOT report to work unless directed.
 University administration will issue updates via CCU Alert text messages, CCU email and coastal.edu as information becomes available.
 University administration has officially issued a “Suspension of Operations” and will activate Emergency Operating Level 2 for Wednesday (see web link below).
 To view the “CCU Essential Personnel” policy, go to <https://www.coastal.edu/policies/pdf/fast-track%20482%20essential%20personnel-%20march%202017.pdf>.
 To review CCU’s Emergency Operating Levels, go to https://www.coastal.edu/services/safety_and_security/emergencymanagement/emergencyoperatinglevels/.

Office of University Communication
 Coastal Carolina University
 450-A Century Circle
 Conway, SC 29526

See Exhibit 2.

As referenced in the email above, CCU’s “Emergency Operating Levels” are accessible through the University’s website. The “Emergency Operating Levels” page documents that “when...there are emergency conditions on campus, CCU will take precautionary measures to prepare and safeguard the University community.” See Exhibit 2, emphasis added.

Level	Situation	University Operations
4	Emergency situation/severe weather is forecast for our area.	Classes, administration and staff offices will operate on an abbreviated schedule. Essential Personnel report.
3	Emergency situation/severe weather is imminent or has occurred.	Classes are canceled. Administration and staff offices remain open.
2	Emergency situation/severe weather or disaster is imminent or is occurring.	Classes are canceled and administration and staff offices are closed. Essential Personnel report.
1	A disaster is imminent or is occurring.	Campus is closed. Classes are canceled, administration and staff offices, and residential facilities are cleared and closed. Select Essential Personnel report.

See Exhibit 2.

Harrison confirmed that campus being closed Wednesday and Thursday (January 3-4, 2018) was CCU operating at Emergency Operating Level 2, before confirming that the action of reopening the campus on a delayed schedule for Friday (January 4, 2018) was moving the Emergency Operating Level to Level 4.

Q: So would it be fair to say that while, while maybe this January 4th email didn't say that specifically we're operating on Level 4 Friday, that is, in essence, what it's saying when it's describing how we're going to operate?

A: Yes, sir.

Q: Okay. And so we had a situation where the University made the decision to operate at Level 2 for at least two days, Wednesday and Thursday?

A: Yes, sir.

Q: And then we have a situation where the decision has been made to change the Operating Level from Level 2 to Level 4 going into Friday, right?

A: Or at least the fact consistent with a Level 4 without announcing it; yes, sir.

Harrison Depo, p.58, l.17 – p.59, l.6.

Harrison testified further about those actions:

Q: And so that – when she talks about the Executive – the Emergency Management Executive Group, that's the group that you've talked about that you were a part of, right?

A: Yes, sir.

Q: So that decision to open delayed, that was an action that you took part in coming to along with the President and the Provost?

A: Yes, sir.

Q: And would it be fair to say that y'all decided to open at that delayed time of 11 a.m. in part for concerns over safety?

A: I think so; yes, sir.

Harrison Depo, p.112, l.14 – p.113, l.1.

All of the above shows that moving CCU operating levels is an action. Actions that must

be "activated" as documented in their own communications. Reopening campus and returning to normal operating levels, at a minimum, presents a material question of fact as to whether such conduct were affirmative actions taken by CCU.

b. Discovery to date presents a material question of fact that CCU was negligent/grossly negligent.

CCU was aware well before the winter storm of January 3-8, 2018 that severe winter storms were natural hazards the University had to prepare for and deal with. As part of the process to qualify for potential Federal mitigation grant funds, CCU hired an outside consultant to help them prepare the *Coastal Carolina University All-Hazards Mitigation Plan* (AHMP).⁵ The plan itself documents that the process to prepare the plan "included 14 major steps that were completed over the course of approximately 21 months starting in June 2015." AHMP, p.9.

"At its core, the Plan identifies significant hazard threats and recommends specific actions to combat hazard vulnerability." AHMP, p.4.

The plan was adopted by CCU on February 24, 2017. AHMP, p.284.

CCU's plan recognizes that they are "vulnerable to a wide range of natural and man-made hazards that threaten life and property." AHMP, p.26. The plan specifically identifies that severe winter storms are hazards for CCU, noting that "winter storms and ice storms can down trees, cause widespread power outages, damage property, and cause fatalities and injuries to human life." AHMP, p.29. The plan documents that the "NCDC reported 6 winter events in Horry and Georgetown counties between 1996 and 2015," and that "of the disaster declarations affecting Horry and Georgetown counties, three were directly to winter storm events." AHMP, p.39.

The plan specifically notes two severe winter storms in the first two months of 2014 that

⁵ CCU's AHMP is a public document available through the University's website at https://www.coastal.edu/emergency/pdfs/FINAL_CCU_AHMP_07-1-19.pdf

affected CCU, which led to State of Emergencies being issued by South Carolina. AHMP, p.99.

In its Priority Risk Index, the plan finds that the impact of severe weather storms to CCU to be "critical." AHMP, p.133. The plan groups severe winter storm hazards with such other hazards as: fires, heat waves, hazardous materials incidents, utility failures, and bomb threats/explosions. AHMP, p.136.

In short, severe winter storms are a known and identified hazard for which CCU has created a plan to "combat" the hazard.

Mr. Harrison explained that part of what CCU does during a severe weather storm is monitor weather systems and that their Office of Emergency Management has access to National Weather Service (NWS) briefings out of Wilmington, North Carolina.

Within the email communications produced in discovery, are emails sent out by the Director of CCU's Emergency Management Department, Carissa Medeiros, wherein she references and/or shares with members of the Emergency Management team the NWS briefings for the storm in early January 2018. *Harrison Depo*, p.29, l.6 – p.30, l.7.

In an email sent Thursday, January 4, 2018 at 11:41 a.m., Medeiros specifically noted the concern about melt/refreeze hazards, noting that "the sun is beginning to melt some of the snow and ice" but that "temperatures will spend most of their time below freezing through Saturday night...Black ice will plague the area for several days. Highs through Saturday will only be in the 30s with near record cold expected tonight through Saturday night with lows of 10 to 15 degrees and as cold as the single numbers." Medeiros went on to note that "Public Safety, Facilities Planning and Facilities Operations have been on campus assessing the facilities and...the walkways have icy patches...Staff is treating those areas today and has set aside enough ice-melt and sand to treat icy areas in the morning." That email specifically noted that

SCDOT was "expecting everything to refreeze tonight and days ahead." See Exhibit 3, emphasis added.

Medeiros sent a subsequent email just a few hours later (2:38 p.m.), informing the group of the action to delay opening campus the next day (Friday, January 5th) until 11 a.m. (i.e., moving the Emergency Operating Level from 2 to 4). In that email, Medeiros specifically noted that action was taken to "give Facilities Planning and Facility Operations time to treat the refrozen areas on campus..." See Exhibit 3, emphasis added. However, Medeiros also noted "unfortunately, I don't believe there will be any additional melting after today due to below freezing temperatures tomorrow day and night." She included an extended forecast through Monday night in that email.

Attached to that email was the updated NWS briefing from January 4th at 1:30 p.m., which specifically noted on its cover page under "What has changed?": "Re-freeze/black ice conditions expected" and "Very cold temperatures..." See Exhibit 3.

Via an email dated Friday (Jan. 5th) at 10:38 a.m., Medeiros included yet another forecast. That forecast predicted for Saturday day (Jan 6th) "sunny, with a high near 34" and for Saturday night "low around 14." For Sunday, it forecast "Sunny with a high near 38" and Sunday night "low around 28." See Exhibit 3.

Via email dated Sunday, January 7, 2018 at 7:02 p.m., CCU acknowledged that the severe winter weather conditions were ideal for melt/refreeze hazards:

From: Office of University Communication <noreply@coastal.edu>
 Sent: Sunday, January 7, 2018 7:02 PM
 To: currentfs@coastal.edu; currentstudents@coastal.edu
 Subject: Be cautious on campus
 Importance: High

Temperatures have continued to remain at or below freezing for our area.

While the bright sunshine has helped melt some ice, the remaining water refreezes when temperatures drop at night, leaving some patches of ice throughout campus.

Please be cautious of icy areas when in parking lots or walking around campus.

Office of University Communication
 Coastal Carolina University
 450-A Century Circle
 Conway, SC 29526

See Exhibit 3.

Despite that knowledge, CCU took the action of reopening at normal operating level on Monday, January 8, 2018. CCU took that action despite having just acknowledged in emails on Thursday that the melting/refreezing conditions had caused there to be “icy patches” on walkways and that delaying until 11 a.m. would “give Facilities Planning and Facility Operations time to treat the refrozen areas on campus.”

The property where Sierra encountered the melt/refreeze is within the municipal limits of the City of Conway. *Harrison Depo*, p.25, l.3-5. As real property within the municipal city limits of the City of Conway, South Carolina, the Code of City Ordinances for the City of Conway, applies to your campus and area where Sierra was injured.

Title 5, Chapter 1, Art. B, Sec. 5-1-38 of the City Ordinances for the City of Conway adopted and incorporated the International Property Management Code and all subsequent amendments and revisions.⁶ See Exhibit 5.

Chapter 3, §302.3 IPMC states that “Sidewalks, walkways, stairs, driveways, parking

⁶ As the last update to that section of the City of Conway ordinances was in 2009, this ordinance was in effect well before 2018.

spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions." See Exhibit 5.

We know precisely what the proper state of repair/maintenance was supposed to be for the sidewalk where Sierra fell: it was the standard of care described by Ms. Medeiros in the email explaining why CCU was delaying the opening on Friday: the proper standard of care for maintaining that sidewalk free from hazardous conditions was to allow time for it to be inspected and treated. Sadly, that was a standard that CCU failed to meet the following Monday, despite knowing they needed to do so.

Failure to maintain the sidewalks on campus by CCU free from hazardous conditions is violation of the City of Conway City Ordinance 5-1-38. South Carolina appellate court decisions support that violation of a local ordinance is negligence per se. See Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). The causative violation of an applicable statute is negligence per se and is evidence of reckless or willful conduct. Carraway v. Pee Dee Block, 275 S.C. 511, 273 S.E.2d 340 (1980).

CCU's own communications and actions identify the appropriate level of care that was required to protect the safety of students like the Plaintiff before inviting them back on campus given the known and identified severe winter hazards. CCU failed to meet that standard on January 8, 2018 and as such was negligent/grossly negligent.

First and foremost, CCU failed to meet that standard of care by operating at normal operations level. CCU had already acknowledged the need to delay opening to allow the icy patches caused by melting/refreezing to be identified and treated. Instead CCU opened at normal time, as if the severe winter hazard conditions did not exist. This is despite CCU acknowledging that taking the action to open on a delay to allow the grounds and facilities crews to inspect and

treat icy areas was done to protect students like the Plaintiff.

Q: When the University made the decision to reopen on a delay on Friday, the University took that action to protect the safety and welfare of its students and faculty?

A: Yes.

Harrison Depo, p.121, l.16-20, emphasis added.

The action of operating at normal level that Monday was significant, as Harrison admitted the following:

Q: [So if] Ms. Doherty is a commuter student and classes aren't going on, there is no reason for her to be on campus if you guys have said campus is closed, is there?

A: No. If, she's an off-campus resident, a commuter student so to speak and she doesn't have a class period because we've delayed classes, I'm not aware of any reason why she might need to be on the campus; no, sir.

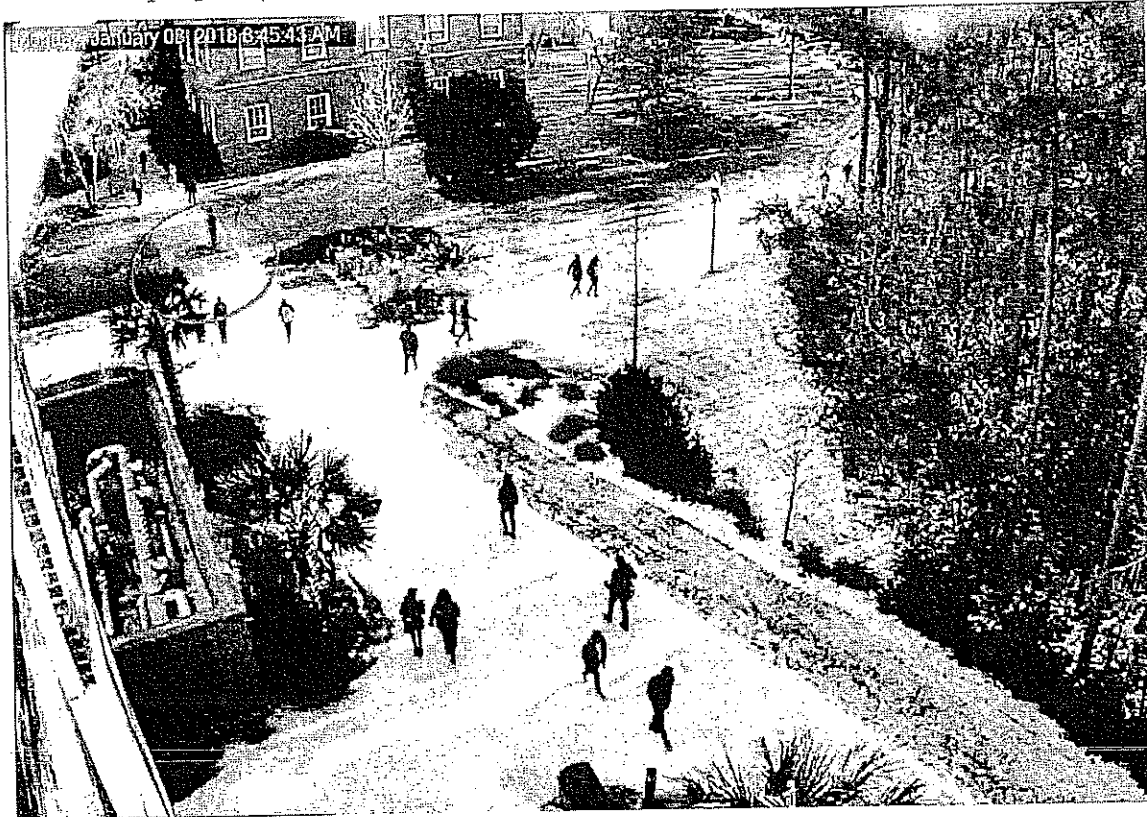
Harrison Depo, p.130, l.15 – p.131, l.3.

CCU's failures to meet that same standard of care on Monday is significant as CCU's own communications document the Plaintiff was injured because of one of these melt/refreeze hazards. In an email sent after the Plaintiff's fall, CCU's Fire Inspector Keith Williams sent pictures of the sidewalk noting "As you can see in the photos attached the sidewalk was ice covered, the portion she fell on appears to have melted and frozen back over last night. The area was extremely slick, as we even had trouble standing on it." See Exhibit 4, emphasis added.

When explaining why CCU sent that email out Sunday night, Harrison admitted it was because of concerns that there were icy spots like the one the Plaintiff encountered:

Q: So would it be fair to say that the concerns documented in those previous emails by Ms. Medeiros about the melting-refreezing issue along with the weather that occurred between those emails and Sunday night, led the University to be concerned that we've had that happen and we've got some potential hazard spots around campus because of the melting-refreezing issue?

A: I think it led us to be concerned that that has happened, yes.
Harrison Depo, p.120, 1.9-18.



See Exhibit 5.

The screengrab from video produced by CCU above shows a few things. First, the campus is not operating on a delay (it is 8:45 a.m.). Second, this intersection is quite heavily trafficked (as there are approximately 20 pedestrians all in this frame who would pass through that intersection on their travel). Finally, the potential for melting/refreezing is obvious, as you can see the section of sidewalk where the Plaintiff slipped and fell (marked by the circle) literally has a line of demarcation between snow-covered sidewalk and non-snow-covered sidewalk.⁷

⁷ Plaintiff would note that during his deposition, Harrison admitted that not only did the video show the Plaintiff slip in the melt/refreeze ice and “her feet fly up and she comes right down on her backside,” but Harrison also admitted in the footage just prior to the Plaintiff’s slip and fall,

One would assume, okay, maybe CCU did not delay opening campus that morning, but knowing the potential for melt-refreeze hazards and this being a heavily trafficked intersection, surely it was inspected and treated if needed. That assumption would be wrong.

Q: Can you tell me that that area was inspected that morning?

A: I cannot.
Harrison Depo, p.87, l.3-5.

Q: That section of sidewalk where Sierra slipped and broke her arm that day, was it treated by the University that morning?

A: I can't be certain if it was treated or not.
Harrison Depo, p.83, l.24 – p.84, l.2.

In fact, what we learned during Harrison's deposition, is that despite having previously instructed students to "stay on salted sidewalks" (*See Exhibit 2, Jan. 2, 2018 email*), the reality is that absent just happening by an icy spot and noticing it, CCU's plan to deal with severe winter melt/refreeze conditions is simply to spread ice-melt/sand/salt at building entrances/exits and on bridges.

Q: But what I'm trying to figure out is when you got a situation where you've got severe winter weather conditions and you know, in fact, you've warned folks that, listen, one of the hazards that is brought about by these conditions is icy patches on walkways, are these grounds crews supposed to specifically go out and inspect the walkways by walking them to see whether or not there are any icy patches or doing something along those lines?

A: Yeah. The areas where we would direct them to specifically walk and spread, you know, ice-melt or sand or salt or what we have are going to be our entries in and out of buildings and our bridges.

Q: All right. And so if that's the case, then it would be fair to say that no one with the University would have been directed to go inspect like that intersection to make sure that intersection was okay and when I say that intersection, I'm referring to, you know, that whole little area basically we can kind of see right there at the center of that video we just watched, you know, the pathways leading into that interception and then exiting it. Nobody would have been directed, hey, go check that and make sure it's

you can see the icy patch affect numerous other pedestrians as they encounter it. *Harrison Depo*, p.71 – 72.

okay?

MR. MCLEAN: Object to the form of the question. Go ahead and answer it.

A: It is unlikely that anybody would have been directed to look at any particular intersection that doesn't have a building entry or exit or a bridge.

Harrison Depo, p.88, l.12 – p.89, l.15.

The discovered evidence to date discussed above creates a material question of fact as to whether or not the Defendant negligent/grossly negligent in their conduct that resulted in the Plaintiff's injuries. As such, the Defendant's motion should be denied.

CONCLUSION

Based on the above, the Plaintiff respectfully requests that the Court deny the Defendant's motion to dismiss and motion for protective order.

Respectfully submitted,

February 5, 2021
Florence, South Carolina

WUKELA LAW FIRM

s/ Patrick J. McLaughlin
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Attorney for Plaintiff
PO Box 13057
Florence, SC 29504
patrick@wukelaalaw.com
T: 843-669-5634, F: 843-669-5150

Exhibit 1

CCU 30b6

From: no-reply@e2campus.com
To: No-Reply CCUAlert
Subject: Campus closed Wednesday
Date: Tuesday, January 2, 2018 6:57:35 PM

Due to winter weather conditions, the CCU campus will be closed on Wednesday. Monitor email and coastal.edu for updates.

ELECTRONICALLY FILED - 2021 Feb 05 10:38 AM - Horry - COMMON PLEAS - CASE#2019CP2607922

CCU 3066

From: no-reply@e2campus.com
To: No-Reply CCUAlert
Subject: CCU closed Thursday
Date: Wednesday, January 3, 2018 5:27:58 PM

Due to winter weather conditions, CCU will remain closed on Thursday. Monitor email and coastal.edu for updates.

ELECTRONICALLY FILED - 2021 Feb 05 10:38 AM - Horry - COMMON PLEAS - CASE#2019CP2607922

CCU 30b6

From: no-reply@e2campus.com
To: No-Reply CCUAlert
Subject: CCU delayed schedule on Friday
Date: Thursday, January 4, 2018 2:39:48 PM

CCU will operate on a delayed schedule beginning 11 a.m. on Friday, Jan. 5. Monitor email and coastal.edu.

ELECTRONICALLY FILED - 2021 Feb 05 10:38 AM - Horry - COMMON PLEAS - CASE#2019CP2607922

Exhibit 2

EMERGENCY MANAGEMENT

The mission of the **Office of Emergency Management** is to prepare the **CCU** community for all hazards and threats by facilitating the coordination and integration of a comprehensive emergency management program.

ADVISORIES

The overall program is coordinated among all University departments as well as local, state and federal agencies.

Emergency Management monitors the weather for impending hazardous conditions that may affect the campus and activates the Emergency Operations Center to coordinate response and recovery efforts for large-scale emergencies/disasters. Additionally, the Emergency Management director provides the president, the **Emergency Management Executive Group**, and the **Emergency Management Team** with situation briefings and facilitates discussions to determine the emergency operations direction, priorities and strategies.

Emergency Management leads the University's emergency planning initiatives and maintains the CCU Emergency Operations Framework. The University's mitigation program is administered through the Office of Emergency Management to include obtaining federal approval for the CCU All-Hazards Mitigation Plan and coordinating mitigation projects for the campus.

Emergency Management also plays an integral role in providing preparedness information for the University community; organizing all-hazards training and exercises for students, faculty and staff; and planning/hosting hazard awareness educational events on campus that emphasize the importance of personal preparedness.

CONTACT INFORMATION

Carissa A. Medeiros

Director of Emergency Management

843-349-5088

843-349-5041 (fax)

Patrick McLaughlin

From: Office of University Communication <noreply@coastal.edu>
Sent: Tuesday, January 2, 2018 6:53 PM
To: currentfs@coastal.edu
Subject: Campus closed Wednesday
Importance: High

The National Weather Service predicts weather in our area will deteriorate Wednesday (tomorrow) morning with potential for freezing rain and snow.

Therefore, campus will be closed tomorrow.

Essential employees will be contacted by their supervisors about reporting to duty.

Non-essential personnel should NOT report to work unless directed.

University administration will issue updates via CCU Alert text messages, CCU email and coastal.edu as information becomes available.

University administration has officially issued a "Suspension of Operations" and will activate Emergency Operating Level 2 for Wednesday (see web link below).

To view the "CCU Essential Personnel" policy, go to <https://www.coastal.edu/policies/pdf/fast-hreo%20482%20essential%20personnel-%20march%202017.pdf>.

To review CCU's Emergency Operating Levels, go to https://www.coastal.edu/services/safety_and_security/emergencymanagement/emergencyoperatinglevels/.

Office of University Communication
Coastal Carolina University
450-A Century Circle
Conway, SC 29526

Coastal Carolina University (CCU) does not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, gender expression, national origin, age, genetic information, mental or physical disability, or status as a disabled or Vietnam-era veteran in its admissions policies, programs, activities or employment practices. For more information relating to discrimination, please contact the CCU Title IX Coordinator/EEO Investigator, Coastal Carolina University, Kearns Hall 104B, Conway, SC; Title IX email titleix@coastal.edu; office phone 843-349-2382; EEO email eeo@coastal.edu; or the U.S. Dept. of Education Office for Civil Rights at www2.ed.gov/ocr.

EMERGENCY OPERATING LEVELS

There are incidents that occur on campus that are managed by CCU and local emergency response agencies. When a large-scale emergency or disaster adversely affects our area or there are emergency conditions on campus, CCU will take precautionary measures to prepare and safeguard the University community. These precautionary measures may include campus services being modified; classes, administration and staff offices operating on an abbreviated schedule, or the cancellation of classes and closure of campus. The University has established four **Emergency Operating Levels** and will announce the appropriate level during emergency operations based on the situation. Familiarize yourself with the levels below so you understand University operations during an emergency or disaster.

Level	Situation	University Operations
4	Emergency situation/severe weather is forecast for our area.	Classes, administration and staff offices will operate on an abbreviated schedule. Essential Personnel report.
3	Emergency situation/severe weather is imminent or has occurred.	Classes are canceled. Administration and staff offices remain open.
2	Emergency situation/severe weather or disaster is imminent or is occurring.	Classes are canceled and administration and staff offices are closed. Essential Personnel report.
1	A disaster is imminent or is occurring.	Campus is closed. Classes are canceled, administration and staff offices, and residential facilities are cleared and closed. Select Essential Personnel report.

**These levels are to be used as a general guideline. Please understand the circumstances of each large-scale emergency or disaster will vary, calling for various operational responses. Coastal Carolina University's operational responses to incidents are situationally dependent.*

Patrick McLaughlin

From: University Housing at Coastal Carolina University <housing@coastal.edu>
Sent: Tuesday, January 2, 2018 8:22 PM
To: Brandon Gray
Subject: Correction: Winter Weather and Early Arrivals

Dear Approved Extended Stay Resident,

CCU administration is monitoring the winter weather that is forecast to impact our area over the coming days. In anticipation of inclement weather, if you have not already returned to campus, University Housing encourages you to remain at your current location and instead move in on Sunday, January 7.

If you must return to campus and move-in prior to Sunday, please call your community RA On-Call and provide the date and time you anticipate arriving. Phone numbers are listed at the end of this email. For new students to CCU, visit your 24-hour Community desk to check in and receive your room key.

Please be aware that campus services will be limited during this weather event. In addition, please be prepared to remain indoors due to potentially hazardous roadways and sidewalk conditions. If you do leave your room, exercise caution and stay on salted sidewalks.

The 24-Hour Community Desks in Ingle Hall, Tradition Hall, and University Place will open at 12 p.m. on Wednesday, January 3 and Resident Advisers will be serving in their on-call capacity. Additionally on Wednesday, January 3, Hicks Dining Hall will be open for breakfast (8 a.m. to 10 a.m.), lunch (12 p.m. to 2 p.m.) and dinner (5 p.m. to 7 p.m.), and UP Dining Hall will be open 10 a.m. to 3 p.m. Both locations will accept cash and credit cards. Meal times and locations are subject to change due to weather conditions. Meal plans will begin on Sunday, January 7, when full dining operations are expected to resume.

Please travel safely and we look forward to welcoming you back to campus.

Community RA On-Call Phone Numbers

- Blue Ridge: 843-798-0724
- Chanticleer: 843-333-7707
- CINO: 843-516-4970
- Eaglin: 843-855-1552
- Gardens: 843-855-1553
- Georgetown: 843-855-1553
- Grand Strand: 843-516-0929
- Ingle: 843-855-0307
- Low Country: 843-742-6932
- Piedmont: 843-855-4282
- Sandhills: 843-742-1750
- Teal: 843-798-8043
- Tradition: 843-333-9945
- Woods: 843-855-1554

CCU 30b6

University Housing
Coastal Carolina University
P.O. Box 261954
Conway, SC 29528-6054
843-349-6400 - main
843-349-6425 - fax
housing@coastal.edu
www.coastal.edu/housing
[@CCUHousing](https://www.facebook.com/CCUHousing)
www.facebook.com/CCUHousing

University Housing creates a foundation of care for resident safety and success

ELECTRONICALLY FILED - 2021 Feb 05 10:38 AM - Horry - COMMON PLEAS - CASE#2019CP2607922

Exhibit 3

Patrick McLaughlin

From: Timothy Meacham
Sent: Thursday, January 4, 2018 11:48 AM
To: Katherine Brooks; Kathy T. Watts; Melissa Jarrard
Subject: Fwd: Winter Weather Update - Campus Assessment
Attachments: FEMA+Daily+Ops+Briefing+01-04-2018.pdf

Fyi..will be back in touch after a decision is made this afternoon. Thanks, all.

Sent via the Samsung Galaxy S8, an AT&T 4G LTE smartphone

----- Original message -----

From: Carissa Medeiros <cmedeiros@coastal.edu>
Date: 1/4/18 11:41 AM (GMT-05:00)
To: "Abdallah S. Haddad" <abdallah@coastal.edu>, Abigail Marrero <amarrero@coastal.edu>, Allie Tanner <altanner@coastal.edu>, BJ Landrum <blandrum@coastal.edu>, David DeCenzo <ddecenzo@coastal.edu>, David Roper <dproper@coastal.edu>, Debbie Conner <dconner@coastal.edu>, "J. Ralph Byington" <byington@coastal.edu>, Jennifer Packard <jpackard@coastal.edu>, Jennifer Wilbanks <Jennifer.Wilbanks@hgts.edu>, JoAnna Dalton <jdalton@coastal.edu>, "Kathy T. Watts" <watts@coastal.edu>, Kimberly Harper <kharper@coastal.edu>, "Marilyn Fore (Marilyn.Fore@hgts.edu)" <Marilyn.Fore@hgts.edu>, Martha Humm <mhumh@coastal.edu>, "Matthew L. Hogue" <dhogue@coastal.edu>, Melissa Todd <mtodd@coastal.edu>, Milton Seekins <mseekins@coastal.edu>, Poppy Hepp <poppy@coastal.edu>, Rachel Abarbanell <rhabarba@coastal.edu>, Randy Wuest <rwuest@coastal.edu>, Sheila Crawford <scrawfor@coastal.edu>, Stephen Harrison <harrison@coastal.edu>, Susan Butcher <sbutcher@coastal.edu>, Susan Talbot <stalbot@coastal.edu>, Timothy Meacham <tmeacham@coastal.edu>, "Travis E. Overton" <toverton@coastal.edu>, William Plate <billplate@coastal.edu>, Anthony Carter <acarter@coastal.edu>, April Betsch <april@coastal.edu>, Boyd Holt <bholt@coastal.edu>, Brandy Graham <graham-brandy@aramark.com>, Brent Reser <breser@coastal.edu>, Bryan Stiles <bastiles@coastal.edu>, "Caesar C. Ross, III" <cross@coastal.edu>, "Charles H. Johns, IV" <cjohns1@coastal.edu>, Chris Adrian <cmadrian@coastal.edu>, "Daniel M. Lawless" <Dan@coastal.edu>, Darla Domke-Damonte <ddamonte@coastal.edu>, David Beaty <DBeaty001@horrycountyschools.net>, David Betsch <dbetsch@coastal.edu>, "Dean P. Hudson" <dHUDSON@coastal.edu>, "Dwayne M. Beam" <dbeam@coastal.edu>, "Fadi N. Baroody" <Fadi@coastal.edu>, Herbert Hoots <hhoots@coastal.edu>, "James A. Hendrick, Jr." <jhendric@coastal.edu>, Jennie Cassidy <jcassidy@coastal.edu>, Jennifer Hughes <jhughes@coastal.edu>, Jody Davis <jody@coastal.edu>, Justin Poindexter <jpoindext@coastal.edu>, "Kathy A. Daley" <kdaley@coastal.edu>, "Kimberly B. Sherfess" <ksherf@coastal.edu>, Melvin Davis <mdavis10@coastal.edu>, Michael Murphy <mmurphy2@coastal.edu>, "Phillip T. Moore" <pmoore@coastal.edu>, Porter Medley <pmedley@coastal.edu>, "Rose Marie H. Johnson" <rmj@coastal.edu>, Ryan Rose <rrose@coastal.edu>, Sandee Oliver <snoliver@coastal.edu>, Sandra Baldridge-Adrian <sabaldri@coastal.edu>, Scott Karchner <sakarchn@coastal.edu>, Scott Willis <willis-scott@Aramark.com>, Shaun Bannon <sbannon@coastal.edu>, Shawn Sease <sease@coastal.edu>, "T. Rein Mungo" <Tmungo@coastal.edu>, "Tammy M. Blouse" <tblouse@coastal.edu>, Whitney Comer <wcomer@coastal.edu>, "William G. Weisner" <wweisner@coastal.edu>
Subject: Winter Weather Update - Campus Assessment

Good morning,

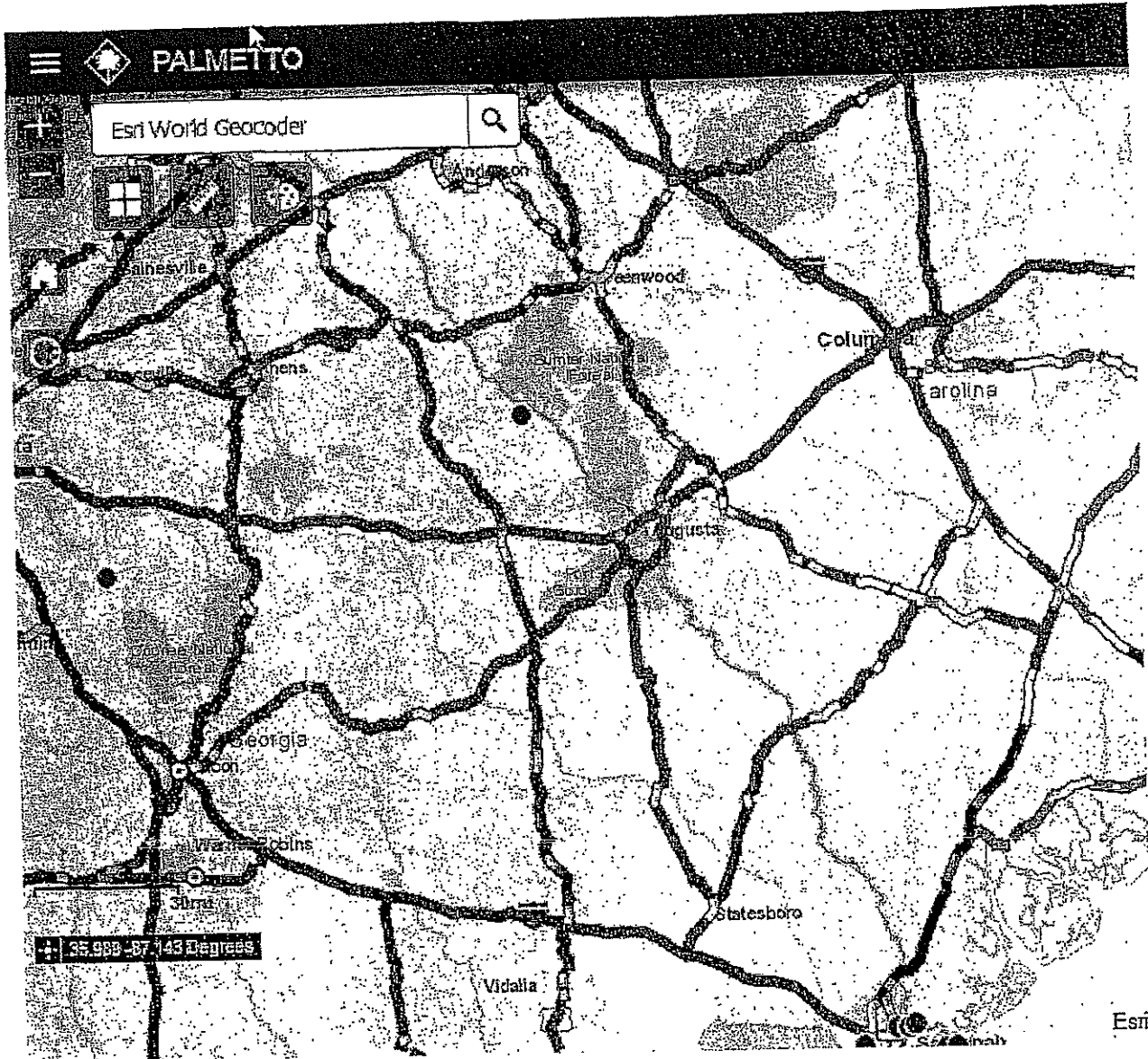
The winter storm has left the ground snow covered and most of the area received 2 to 4 inches of a wintry mix although it is likely that some areas received less than 2 inches and others received more than 4 inches. The sun is beginning to melt some of the snow and ice and with a high of 38 today there should be many areas cleared. However, temperatures will spend most of their time below freezing through Saturday night and this will largely prevent significant snow and ice melt. The exception will be on treated roadways, bridges and walkways where bright sunshine and brisk winds will help to erode the snow and ice. Black ice will plague the area for several days. Highs through Saturday will only be in the 30s with near record cold expected tonight through Saturday night with lows of 10 to 15 degrees and as cold as the single numbers.

Horry County Government offices were going to open at noon today but then announced that they would remain closed. Myrtle Beach International Airport inspected the runway late this morning and is now back in business. The first arrival will be around 12:30 pm. Horry County Public Works and SCDOT crews were out overnight applying salt and sand to primary routes and bridges/overpasses. They will continue to work on the roads today and again tonight to get ahead of the refreeze tonight. Horry County Government and Horry County Schools will meet today to discuss tomorrow's operational schedule. The Executive Group will have a conference call this afternoon to discuss the University's operational schedule for Friday.

Public Safety, Facilities Planning and Facilities Operations have been on campus assessing the facilities and have reported that everything looks good. University Blvd and the walkways have icy patches but overall are in good shape. Staff is treating those areas today and has set aside enough ice-melt and sand to treat icy areas in the morning. Hwy 501 has patches thawing, bridges seem to be okay but the roadways that are shaded continue to have icy patches. 544 is also icy but had a lot of cars traveling on it which is breaking up the icy areas.

Statewide Situation: As shown in the graphic below the coastal highways and interstates have traffic issues and some significant events in the Low Country. Highest ice accumulation is in Charleston County and there is 7+ inches of snow in Dorchester, Charleston, Berkeley and Sumter Counties. SCDOT has 1400 employees working the event. They continue to move resources into the impacted areas. The interstates are in fair conditions and passable but, I-20 in Lee County, I-26 in Charleston, and I-95 around Walterboro is icy. They will be branching out on primary routes today and continue to salt and sand, and push material off the road. They are expecting everything to refreeze tonight and days ahead and staff have plenty of materials (salt and sand) on hand. 18 miles of tractor trailers are waiting on the GA side of 95 on the side of the road for things to get moving. 20 miles backed up on the SC side of 95 going into GA. SCDPS has 183 officers assigned to the event. Currently their main concern is in Jasper County with collisions – jackknifed tractor trailers (3) different locations. They are working with the National Guard trying to get additional wrecker units out.

I have attached FEMA's Daily Operations Briefing for your situational awareness. Pages 3-5 provide an overview on the storm's impact to our north and our northern students traveling back to campus. I will send out another update this afternoon once the Executive Group has made their decision. Please feel free to contact me for any questions or concerns. Thank you.



Carissa A. Medeiros | Emergency Management Director
COASTAL CAROLINA UNIVERSITY
 Department of Public Safety
 P.O. Box 261954, Conway, South Carolina 29528-6052
 Tel 843.349.5088 | Fax 843.349-5041 | Cell 843-457-7871 | cmedeiros@coastal.edu



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Patrick McLaughlin

From: Carissa Medeiros <cmedeiros@coastal.edu>
Sent: Thursday, January 4, 2018 2:38 PM
To: Abdallah S. Haddad; Abigail Marrero; Allie Tanner; BJ Landrum; David DeCenzo; David Roper; Debbie Conner; J. Ralph Byington; Jennifer Packard; Jennifer Wilbanks; JoAnna Dalton; Kathy T. Watts; Kimberly Harper; Marilyn Fore (Marilyn.Fore@hgts.edu); Martha Hunn; Matthew L. Hogue; Melissa P. Todd; Milton Seekins; Poppy Hepp; Rachel Abarbanell; Randy Wuest; Sheila Crawford; Steve Harrison; Susan Butcher; Susan Talbot; Timothy Meacham; Travis E. Overton; William Plate; Anthony Carter; April Betsch; Boyd Holt; Brandy Graham; Brent Reser; Bryan Stiles; Caesar C. Ross, III; Charles H. Johns, IV; Chris Adrian; Daniel M. Lawless; Darla Dornke-Damonte; David Beaty; David Betsch; Dean P. Hudson; Dwayne M. Beam; Fadi N. Baroody; Herbert Hoots; Hendrick, James; Jennie Cassidy; Jennifer Hughes; Jody Davis; Justin Poindexter; Kathy A. Daley; Kimberly B. Sherfese; Melvin Davis; Michael Murphy; Phillip T. Moore; Porter Medley; Rose Marie Johnson; Ryan Rose; Sandee Oliver; Sandra Baldrige-Adrian; Scott Karchner; Scott Willis; Shaun Bannon; Shawn Sease; T. Rein Mungo; Tammy M. Blouse; Whitney R. Comer; William G. Weisner
Subject: Winter Weather Briefing - Delayed Opening Tomorrow
Attachments: Winter_Storm_1318F (2).pdf

Good afternoon,

The President, Provost and the Emergency Management Executive Group have decided to have a delayed opening tomorrow at 11 am. This will give Facilities Planning and Facility Operations time to treat the refrozen areas on campus and allow time for the roads to clear more due to earlier traffic. Unfortunately I don't believe there will be any additional melting after today due to below freezing temperatures tomorrow day and night. We should see much improvement Sunday and Monday with temperatures in the 40's and 50's. The NWS has also issued a Wind Chill Advisory for our area beginning tonight at 3 am thru 10 am tomorrow morning with wind chills in the single digits.

Horry County Schools are closed tomorrow and Horry County Government offices will open at 10 am. I have attached the latest NWS briefing which provides more details regarding the melt-refreeze issues ahead and the wind chill advisory. This will be my last briefing for the Winter Storm unless the impacts change and put lives or campus property at risk. Please feel free to reach out for any questions or concerns. Thank you

This Afternoon

Sunny, with a high near 38. Northwest wind around 14 mph, with gusts as high as 20 mph.

Tonight

Clear, with a low around 15. Northwest wind 6 to 9 mph.

Friday

Sunny, with a high near 32. Wind chill values as low as 5. West wind 5 to 8 mph.

Friday Night

Clear, with a low around 14. Wind chill values as low as 5. Calm wind becoming north 5 to 7 mph after midnight.

Saturday

Sunny, with a high near 34. North wind 8 to 10 mph, with gusts as high as 15 mph.

Saturday Night

Clear, with a low around 14.

Sunday

Sunny, with a high near 43.

Sunday Night

Mostly cloudy, with a low around 31.

Monday

A chance of rain. Mostly cloudy, with a high near 59. Chance of precipitation is 30%.

Monday Night

A chance of rain. Mostly cloudy, with a low around 42. Chance of precipitation is 40%.

Carissa A. Medeiros | Emergency Management Director

COASTAL CAROLINA UNIVERSITY

Department of Public Safety

P.O. Box 261954, Conway, South Carolina 29528-6052

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NATIONAL WEATHER SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION



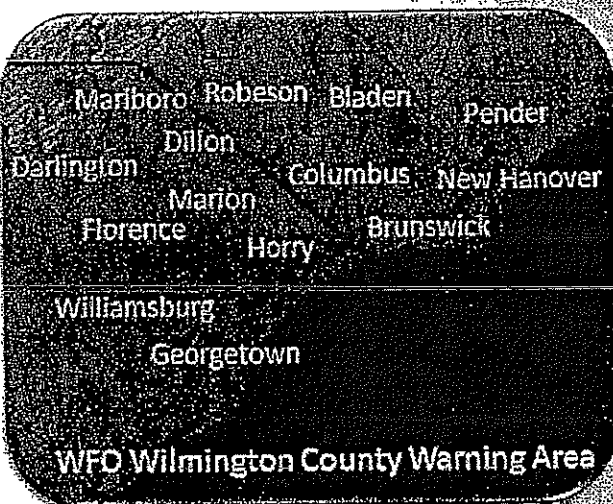
Winter Storm Recovery Outlook

Decision Support Briefing
As of: January 4, 2018, 130 PM EST



What has Changed?

- ✓ Re-freeze/black ice conditions expected
- ✓ Very cold temperatures/Wind Chill Advisory
- ✓ Low water hazards for navigation



Created by:
Steven Pfaff, Warning Coordination Meteorologist
National Weather Service Wilmington, NC

Weather Forecast Office
Wilmington, NC



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Presentation Created
1/4/2018 1:53 PM

Patrick McLaughlin

From: Carissa Medeiros
Sent: Friday, January 5, 2018 10:38 AM
To: David DeCenzo; J. Ralph Byington; Travis E. Overton; Debbie Conner; Steve Harrison; BJ Landrum; Martha Hunn; William Plate; David Roper
Subject: Winter Storm Recovery Update

Good morning,

I had a SEOC conference call this morning and the SCDOT has reported that all interstates are in good condition and flowing freely. Primary routes are also clear except for the Summerville area. They will be 100% complete with their snow removal on the impacted state roads by Saturday. The SCDPS is reporting no weather related traffic issues on any major roads as of 9 am this morning. I believe our students in SC won't have a problem getting back to campus this weekend. However, I am sure our students in the New England states will have travel issues. Flights coming into MYR from Boston and Atlantic City have been cancelled this morning. I-95 looks pretty good through NC, VA and PA. Hopefully DOT crews in the north will be able to get out today and tomorrow and treat the icy areas. The graphic below shows the traffic flow and the red dots are critical incidents – but most are road closures due to construction. Please let me know if you have any questions or concerns. Thank you.

Campus (Conway) Forecast**Today**

Sunny, with a high near 34. West wind around 8 mph.

Tonight

Clear, with a low around 16. Wind chill values as low as 5. Calm wind becoming north 5 to 7 mph after midnight.

Saturday

Sunny, with a high near 34. Wind chill values as low as 5. North wind 7 to 10 mph, with gusts as high as 15 mph.

Saturday Night

Clear, with a low around 14. Wind chill values as low as 5. Northeast wind around 6 mph.

Sunday

Sunny, with a high near 38. Northeast wind 3 to 6 mph.

Sunday Night

Mostly cloudy, with a low around 28.

Monday

A chance of rain after 1pm. Mostly cloudy, with a high near 57. Chance of precipitation is 50%.

Monday Night

Rain likely. Mostly cloudy, with a low around 41. Chance of precipitation is 60%.

Carissa A. Medeiros | Emergency Management Director

COASTAL CAROLINA UNIVERSITY

Department of Public Safety

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Patrick McLaughlin

From: Office of University Communication <noreply@coastal.edu>
Sent: Sunday, January 7, 2018 7:02 PM
To: currentfs@coastal.edu; currentstudents@coastal.edu
Subject: Be cautious on campus

Importance: High

Temperatures have continued to remain at or below freezing for our area.

While the bright sunshine has helped melt some ice, the remaining water refreezes when temperatures drop at night, leaving some patches of ice throughout campus.

Please be cautious of icy areas when in parking lots or walking around campus.

Office of University Communication
Coastal Carolina University
450-A Century Circle
Conway, SC 29526

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Exhibit 4

From: Melissa Jarrard
To: Phillip T. Moore
Subject: RE: Accident 1-8/2018 Between Brittan & Wall Building
Date: Monday, January 8, 2018 12:23:00 PM

Good Morning Phillip,

Could I please get a copy of this incident report once it is finalized and any pictures etc.

Thanks you,

Melissa Jarrard
 Paralegal
 Office of University Counsel
 Coastal Carolina University
 Singleton 108
 P. O. Box 261954
 Conway, SC 29528-6054
 Office: 843-234-3449
 mpjarrar@coastal.edu

From: Rose Marie H. Johnson
Sent: Monday, January 8, 2018 11:01 AM
To: Keith Williams <kwilliams@coastal.edu>
Cc: Anthony Carter <acarter@coastal.edu>; Melissa Jarrard <mpjarrar@coastal.edu>
Subject: RE: Accident 1-8/2018 Between Brittan & Wall Building

Thank you Keith. This information is most helpful. I will forward it to the office of university counsel for further involvement.

Thank you,
 Rose Marie

From: Keith Williams
Sent: Monday, January 8, 2018 10:30 AM
To: Rose Marie H. Johnson <rmj@coastal.edu>
Cc: Anthony Carter <acarter@coastal.edu>
Subject: Accident 1-8/2018 Between Brittan & Wall Building

Good morning,

Just want to forward the information Fire Safety had on the accident this morning between Brittan and Wall Building.

Name of Student: Sierra Doherty
 Police Department was going to fill out the incident report.

The incident number will be 2018 0004

The patient informed me she was walking from Brittan to the Wall Building. She fell on the ice covered sidewalk. She stated she slipped and fell backwards on her left arm. Her pain was coming from her elbow on her left arm.

Horry County EMS arrived on scene and transported patient to Conway Medical for evaluation and treatment. The patient was experiencing severe pain in her left arm and elbow.

As you can see in the photos attached the sidewalk was ice covered, the portion she fell on appears to have melted and frozen back over last night. The area was extremely slick, as we even had trouble standing on it.

If you need additional information please contact our office.

Best regards,
Kelth Williams
Fire Inspector
Coastal Carolina University
PO Box 261954
Conway, SC 29528
Work (843) 349-5005
Cell (336) 432-7742
E-mail: kwilliams@coastal.edu

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Exhibit 5

ELECTRONICALLY FILED - 2021 Feb 05 10:38 AM - Horry - COMMON PLEAS - CASE#2019CP2607922

Sec. 5-1-38 - Property maintenance code.

- (a) Adoption of Property Maintenance Code. This section is to be known and referred to as the Property Maintenance Code of the City of Conway. There is hereby adopted in its entirety by the City of Conway the International Property Maintenance Code, current edition, as amended, a copy of which is to be kept permanently on file in the office of the building official as part of the general ordinances of the City of Conway, with same being incorporated herein by reference, and without the necessity of setting out and copying in its entirety the Property Maintenance Code, current edition, as amended.
- (b) Amendments and revisions. As the various parts of the Property Maintenance Code, current edition may be amended or revised from time to time in the future by the State of South Carolina, such amendments or revisions are adopted by the City of Conway without the necessity of re-enacting and republishing the foregoing provisions of this section in its entirety.

(Ord. No. 2001-06-25(D), 6/25/01; Ord. No. 2004-11-22(D), 12/13/04; Ord. No. 2008-06-23(C), 6/23/08; Ord. No. 2009-05-11(A), 5/11/09)

ELECTRONICALLY FILED - 2021 Feb 05 10:38 AM - HORRY - COMMON PLEAS - CASE#2019CP2607922

GENERAL REQUIREMENTS

ments of this chapter. *Occupants of a dwelling unit, rooming unit or housekeeping unit* are responsible for keeping in a clean, sanitary and safe condition that part of the *dwelling unit, rooming unit, housekeeping unit or premises* which they occupy and control.

- ❖ The owner is responsible for complying with the requirements of Chapter 3, except when the code places the responsibility on the occupants to keep their portion of the premises in a safe and sanitary condition.

Simply stated, owners must provide a safe and sanitary property and premises when they let it for occupancy. Occupants must continue to keep it safe and sanitary while they occupy, control or use the property and premises.

301.3 Vacant structures and land. Vacant structures and premises thereof or vacant land shall be maintained in a clean, safe, secure and sanitary condition as provided herein so as not to cause a blighting problem or adversely affect the public health or safety.

- ❖ Both vacant structures and vacant land present special concerns to communities. Because no one is living on these premises, they are often ignored by the owners. Consequently, this section establishes the code official's authority to order the cleanup of vacant lands and the securing of vacant structures that might present an attractive nuisance.

When the owner fails to secure a vacant structure, Section 108.2 provides the code official with the authority to arrange for securing such buildings. Additionally, Section 110 authorizes the code official to pursue demolition of any structure that is deemed unreasonable to repair. When a structure is reasonable to repair, the code official is authorized to require the necessary repairs.

SECTION 302 EXTERIOR PROPERTY AREAS

302.1 Sanitation. *Exterior property and premises* shall be maintained in a clean, safe and sanitary condition. The *occupant* shall keep that part of the *exterior property* that such *occupant* occupies or controls in a clean and sanitary condition.

- ❖ This section establishes a simple, straightforward requirement that exterior areas shall be clean and free from rubbish and garbage (see the definitions in Chapter 2). The code official may find that enforcement of this section is frequently neither straightforward nor simple.

Each jurisdiction has neighborhoods within the overall community that have distinct characteristics. Deteriorated, low-cost housing may dominate in one area, while another has expensive, well-maintained housing units. Sanitation standards should be enforced uniformly and consistently.

302.2 Grading and drainage. *Premises* shall be graded and maintained to prevent the erosion of soil and to prevent the

accumulation of stagnant water thereon, or within any structure located thereon.

Exception: *Approved* retention areas and reservoirs.

- ❖ Improperly graded property areas create health and safety hazards. Stagnant water provides a home for many nuisance insects, especially the mosquito. Stagnant water next to a structure can cause mold growth, which can lead to the decay of wooden members. Pooled water is an attractive nuisance for children and has contributed to numerous drowning deaths.

Stagnant water is foul or stale water. Regrading the premises may be necessary to prevent stagnant water. If regrading is not practical, some type of water-diversion system must be installed. Other solutions include replacing nonabsorbent soil with absorbent soil, installing underground drain tile or building an underground leaching pit.

Soil erosion can be a nuisance if material is being deposited in drainage systems or on adjacent properties, and is an indication of improper grading. Planting and maintaining an acceptable ground cover generally prevents erosion.

As indicated by the exception, water retention areas or reservoirs are permitted by the code even though they may contain stagnant water; however, the code official must approve their use.

302.3 Sidewalks and driveways. Sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions.

- ❖ The code official is authorized to require that all sidewalks, walkways, stairs, driveways, parking spaces, etc., are usable and kept in proper repair. Walking surfaces that have deteriorated to a condition that presents a hazard to pedestrians must be repaired or replaced to eliminate the hazard and thus reduce the potential for accidents or injuries.

302.4 Weeds. *Premises and exterior property* shall be maintained free from weeds or plant growth in excess of [JURISDICTION TO INSERT HEIGHT IN INCHES]. Noxious weeds shall be prohibited. Weeds shall be defined as all grasses, annual plants and vegetation, other than trees or shrubs provided; however, this term shall not include cultivated flowers and gardens.

Upon failure of the *owner* or agent having charge of a property to cut and destroy weeds after service of a notice of violation, they shall be subject to prosecution in accordance with Section 106.3 and as prescribed by the authority having jurisdiction. Upon failure to comply with the notice of violation, any duly authorized employee of the jurisdiction or contractor hired by the jurisdiction shall be authorized to enter upon the property in violation and cut and destroy the weeds growing thereon, and the costs of such removal shall be paid by the *owner* or agent responsible for the property.

- ❖ Criteria establishing maximum heights for grass and weeds are necessary to reduce rodent shelters and pollen dust problems.

Exhibit 6



Exhibit 7

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2019-CP-26-07922

Sierra Doherty,
Plaintiff,
vs.
Coastal Carolina University,
Defendant.

DEPOSITION OF:
STEPHEN K. HARRISON

Deposition of STEPHEN K. HARRISON taken
remotely via Zoom before Laura W. Little, Verbatim
Reporter and Notary Public in and for the State of
South Carolina, at Wukela Law Firm, 403 Second Loop
Road, Florence, South Carolina, commencing at
10:00 a.m. on the 21st day of January 2021.

Laura W. Little
Laura Little Reporting Service
345 Potato House Road
Darlington, South Carolina 29532
843-393-6466
act4court@bellsouth.net

1 from University Counsel's office.

2 Q. Okay. What is Mr. Johnson's - what, what is
3 his title there at the university?

4 A. Carlos Johnson is Senior Vice President and
5 University Counsel.

6 Q. Okay. Other than the documents that we
7 provided as part of this exhibit packet for this
8 deposition, were there any other documents or things
9 that you reviewed in preparation---

10 A. I was able to---

11 Q. ---for this deposition?

12 A. Yes, sir. I was able to watch the
13 University's archived video of Ms. Doherty's slip and
14 fall. I believe that's the only thing that was not
15 included in your packet that I was able to see.

16 Q. All right. What exactly is your position
17 with the University, Mr. Harrison?

18 A. Yes, sir. My title Vice President of
19 Auxiliary Enterprises entails all those things on
20 campus which are self-supporting such as housing,
21 dining, the bookstore, etcetera, based on student
22 charged student fees as well as other entities on
23 campus which are large operational staff responsible
24 for the operations of the institution; for instance,
25 the Grounds Department, the Custodial Department,

1 etcetera.

2 Q. Okay. And how long have you been there at
3 the University in that capacity?

4 A. I began in this capacity in July of 2017.

5 Q. And were you with the University prior to
6 assuming that role?

7 A. Yes, sir. I worked as -- with various titles
8 as the Senior Housing Officer at the University since
9 September of 2010.

10 Q. So you've been -- you've been there with the
11 University since 2010 in some capacity?

12 A. Yes, sir.

13 Q. Okay. Where are you originally from?

14 A. Originally from Virginia Beach, Virginia.

15 Q. Okay. How did you wind up down here?

16 A. The, the briefest version of that story is
17 after graduate school being a housing professional, I
18 decided to go Out West because I get to live on campus
19 for free.

20 Q. Yeah.

21 A. So I worked at a couple of institutions in
22 the desert and mountain west and then needed to return
23 to the land of humidity and sweat tea for, for family
24 and familiarity kind of reasons.

25 Q. All right. Very good. All right. Of

1 A. So current faculty staff, as I understand it,
2 would go to any member of the faculty or the staff
3 currently employed by the University.

4 Q. Okay. And so this, this email that went out
5 that Tuesday afternoon to the faculty and staff let
6 them know that, "CCU Administration is monitoring the
7 winter weather system that is forecast to impact our
8 area in the next few days. Please monitor your email
9 and the coastal.edu for the latest information about
10 university operations." Is that right?

11 A. Yes, sir.

12 Q. Okay. Who would be involved in -- well,
13 generally, who would be involved in creating, in
14 creating this email and making the decision to, okay,
15 now it's time to send it out?

16 A. Generally, I hope I'm referring to it by the
17 correct name, the Executive Emergency Management
18 Team, --

19 Q. Okay.

20 A. ---of which I am a member, would be part of
21 discussing forecasts that we have or whatever the
22 emergency is generally on campus and discussing as part
23 of that conversation when and what communications would
24 go -- and again as I was previously suggesting,
25 authorship is fairly atypically a group exercise versus

1 the office of -- here titled Office of the University
2 Communication, now Office of Marketing and
3 Communication. University of Marketing and
4 Communication would take the discussion from that
5 conversation and author a message like this.

6 Q. Okay. What -- how exactly was, was CCU
7 monitoring the winter weather system at the time?

8 A. We have an Office of Emergency Management and
9 the staff in that office are partnered very closely
10 with county and state offices and privy to the
11 briefings that are done out of, I believe, Wilmington,
12 North Carolina.

13 Q. The National Weather Service briefings?

14 A. The National Weather Service; yes, sir. And
15 so all of that information as well as what we, we would
16 gather from local media and others would be part of the
17 information that the University is gathering and making
18 it part of this discussion.

19 Q. And there is, there is some stuff we'll get
20 into that there's another packet of emails that are
21 like Emergency Management type emails where -- is it
22 Ms. -- I don't want to butcher her last name.

23 A. Medeiros.

24 Q. Medeiros, okay. And so there's a lot of
25 emails kind of either -- either she's sending them or

1 they're getting forward that are in one of these
2 exhibits where she's kind of constantly saying, hey,
3 this is what we're hearing now about this weather storm
4 and here's a, here's a new update from the National
5 Weather Service. Is that generally speaking the type
6 of monitoring that was going on by the University?

7 A. It is.

8 Q. Okay. The second email we've got in this
9 packet which is page 10 is dated January 2, 2018, at
10 6:57:35 PM and it is entitled -- and it is titled,
11 "Campus closed Wednesday." Is that correct?

12 A. Yes, sir.

13 Q. And this email states, "Due to winter weather
14 conditions, the CCU campus will be closed on Wednesday.
15 Monitor email and coasta.edu for updates," Is that
16 accurate?

17 A. Yes, sir.

18 Q. All right. So the University closed its
19 campus on Wednesday -- for Wednesday, January 3rd,
20 2018?

21 MR. MCLEAN: Object to the form of the
22 question. Go ahead and answer it.

23 A. Yeah. And this is a, shall I say, pithy
24 communication which we're reading it as an email, but
25 it also goes out as a text alert. The CCU alert system

1 has a text message, so brevity is, is critical to make
2 that effective.

3 Q. Sure.

4 A. And so we -- for this moment, we're
5 communicating to faculty and staff that we're
6 cancelling classes. Offices will be -- will not be
7 staffed on this Wednesday.

8 Q. Does that also go out to -- so on this one,
9 it's -- the "To" is "No Reply CCU Alert," and so using
10 the same phrase we used previously, the list serve
11 designation---

12 A. Yes, sir.

13 Q. ---would this be a list that includes
14 students as well?

15 A. It would. My understanding of CCU alert
16 certainly at that time, I couldn't speak to the current
17 technology, but my understanding is that that system is
18 one that members of the University community must
19 subscribe to and so, yes, this would -- any faculty
20 staff member, indeed, family members who students or
21 faculty and staff subscribe to it would have gotten
22 this message.

23 Q. Okay. And so the University closed the
24 campus because of the winter weather conditions?

25 MR. MCLEAN: Object to the form of the

1 Thursday."

2 A. Uh-huh. Excuse me. Yes, sir.

3 Q. And it states that, "Due to winter weather
4 conditions, CCU will remain closed on Thursday.
5 Monitor email and coastal.edu for updates." Is that
6 right?

7 A. Yes, sir.

8 Q. And so the University made the decision to
9 keep the campus closed going into Thursday due to the
10 extreme weather conditions?

11 MR. MCLEAN: Object to the form of the
12 question. Go ahead and answer it.

13 A. Yes, sir.

14 Q. And, again, the University made that decision
15 to keep the campus closed because it would be unsafe to
16 invite students, faculty, and the public onto campus
17 given the extreme winter weather conditions?

18 MR. MCLEAN: Object to the form of the
19 question. Go ahead and answer it.

20 A. Yes, sir.

21 Q. And that -- would it -- would that be a
22 decision that's made -- and I guess this goes back to
23 the original one that we just talked about, too. Is
24 that something that's made by that Emergency Management
25 Group?

1 that timeline, and so we would stick to the county
2 timeline of a delayed open.

3 Q. Okay. And the University made the decision
4 to open campus on that delayed opening schedule because
5 it would be unsafe to invite students, faculty, and the
6 public on a campus earlier than 11 a.m. given the
7 extreme winter weather conditions?

8 MR. MCLEAN: Object to the form of the
9 question. Go ahead and answer it.

10 A. Yeah. As I said before, we want to take all
11 those factors and so whether it be campus or getting to
12 and from campus until 11 a.m., we didn't want them
13 here.

14 Q. Do you know how the 11 a.m. time was decided?

15 A. I don't specifically recall how 11 a.m., but,
16 again, I would assume, I would kind of venture a guess
17 that 11 a.m. is what Horry County offices were doing,
18 administrative offices and the like, and so we were
19 matching that as per the Governor's directive.

20 Q. Do you know whether or not -- I guess, the
21 folks responsible for the grounds, how -- what's the
22 best way to refer to them, grounds crew, facilities
23 crew, maintenance crew? I don't know.

24 A. Yeah. Ground -- grounds crew is perfectly
25 sufficient; yes, sir.

1 levels were being referring to in that email that we
2 just looked at?

3 A. Yes, sir.

4 Q. The next page is another email. This one is
5 dated Wednesday, January 3, 2018, and it looks like
6 this one is similar to the one that we just reviewed
7 from January 2nd, right?

8 A. It does look similar; yes, sir.

9 Q. But this one is just saying that -- you know,
10 the first one was saying the campus was going to be
11 closed, let's see, Wednesday. This one is saying we're
12 going to be closed Thursday, right?

13 A. Yes, sir.

14 Q. Okay. And it's still saying Emergency
15 Operating Level 2, right?

16 A. It is.

17 Q. And that, that would be -- that's going to be
18 the operating level we're going to have going into
19 Thursday, January 4th?

20 A. Yes, sir.

21 Q. Okay. The next email is from January 4,
22 2018, at 2:33 PM; is that right?

23 A. Uh-huh. It is.

24 Q. And then this one is, is somewhat similar,
25 although this one now is saying that we're going to be

1 operating on a delayed scheduled on Friday, January 5,
2 2018; is that right?

3 A. It is.

4 Q. Now, this one does not reference the
5 Emergency Operating Levels at all, does it?

6 A. I don't see a reference in the email to the
7 Operating Levels.

8 Q. If you turn back, Mr. Harrison, to that page
9 17 that, that was the printout of the levels.

10 A. Uh-huh.

11 Q. We've got -- if you look at it, we have a
12 Level 4, which if you look at what that level
13 describes, that would seem to be a level -- an
14 Operating Level that would, that would jibe with what
15 we're going to do going into Friday, right?

16 A. I think those are consistent; yes, sir.

17 Q. Okay. So would it be fair to say that while,
18 while maybe this January 4th email didn't say that
19 specifically we're operating on Level 4 Friday, that
20 is, in essence, what it's saying when it's describing
21 how we're going to operate?

22 A. Yes, sir.

23 Q. Okay. And so we had a situation where the
24 University made the decision to operate at Level 2 for
25 at least two days, Wednesday and Thursday?

1 A. Yes, sir.

2 Q. And then we have a situation where the
3 decision has been made to change the Operating Level
4 from Level 2 to Level 4 going into Friday, right?

5 A. Or at least the fact consistent with a Level
6 4 without announcing it; yes, sir.

7 Q. Sure. Okay. Were there classes going on at
8 that time?

9 A. At which time?

10 Q. Like Friday January 5th. And let me give you
11 some information that, that may help you answer that or
12 not. There's some emails in here that we'll look at in
13 a second where it looks like maybe students weren't
14 moving back to campus until like, you know, I think
15 some were scheduled to come in like on Thursday but the
16 majority of students I think were going to be coming
17 back to campus on Sunday. So this is all, obviously,
18 around the time of holiday break. Would it be likely
19 that we weren't actually having classes the week that
20 this is going on and this is more -- all of this
21 closing of campuses and stuff so far has been really
22 about staff and faculty and what few students may be on
23 campus or coming on campus prior to classes starting?

24 A. Yeah, that sounds consistent. Without having
25 reviewed the academic calendar for the year in

1 (Whereupon, the video was played.)

2 Q. Now, obviously, this video was shot from
3 pretty far away, right?

4 A. Yes.

5 Q. And it's a little, as a lot of times will
6 happen with digital surveillance, it's a little jerky,
7 jumpy where it's not real smooth, but even in watching
8 this video, you're able to see it and see this spot of
9 the sidewalk affect people as they walk across it,
10 right?

11 A. Yeah, those -- these folks you've shown me
12 are changing the nature of their walk as they cross it.

13 Q. Is this video -- are these video feeds
14 monitored in real-time?

15 A. I do not believe that they are.

16 Q. Okay. All right. So Ms. Doherty, I believe,
17 now, I believe she's right there in the middle of the
18 intersection, and so I'm going to start it back up.

19 (Whereupon, the video was played.)

20 Q. All right. I just paused it at one minute on
21 the player and 8:46:08 on the timestamp. And so
22 watching that video, you're able to see Sierra slip and
23 lose her footing on the ice?

24 A. I am.

25 Q. And she pretty much goes -- her feet fly up

1 and she comes right down on her backside it looks like,
2 right?

3 A. I think that's what I'm seeing; yes, sir.

4 Q. Okay. And there's no question -- or let me
5 ask you this: Is there any question you watching that
6 video that she hit ice, she slipped and she fell
7 because of the ice?

8 MR. MCLEAN: Object to the form of the
9 question. Go ahead.

10 A. I would say it's consistent with hitting ice
11 and slipping and falling because of ice.

12 Q. Okay. Did it look like a legitimate slip-
13 and-fall to you?

14 MR. MCLEAN: Object to the form of the
15 question. Go ahead and answer it.

16 A. As regarding, I would say I definitely see
17 her fall, but as to legitimacy, I'm not certain.

18 Q. All right. Let's see. I don't want to -- I
19 want to -- I'm just going to kind of fast-forward
20 through some of this, okay?

21 (Whereupon, the video was played.)

22 Q. Okay. I've got it like at 6:38 on the player
23 and 8:51:46 and so I, I think if you look kind of see
24 where the cursor is like right around there, I think
25 you'll see---

1 keep moving with the objective of trying to finish up
2 by 1 o'clock.

3 MR. MCLAUGHLIN: All right. That'll be
4 fine with me. All right. Hold on. I'm going to---

5 MR. MCLEAN: Does that suit everyone?

6 MR. MCLAUGHLIN: Yeah.

7 MR. HARRISON: That's fine. Thank you.

8 MR. MCLAUGHLIN: I've stopped -- I've
9 stopped the share and I'm going to pause the video
10 recording right now and, Ms. Little, if you would take
11 us off the record.

12 (OFF-THE-RECORD BREAK)

13 MR. MCLAUGHLIN CONTINUES EXAMINATION

14 Q. Very briefly, Mr. Harrison, you didn't -- we
15 just took a very brief break. Did you talk with anyone
16 about your deposition on the break?

17 A. Only to mention to my administrative staff we
18 weren't done.

19 Q. Okay. Very good. All right.

20 A. They were looking at me expectantly like
21 there were, there were other things to deal with.

22 Q. Well, you can blame me for that.

23 A. That's fine.

24 Q. The section of sidewalk where Sierra slipped
25 and broke her arm that day, was it treated by the

1 University on that morning?

2 A. I can't be certain if it was treated or not.

3 Q. Who would have been responsible for treating
4 it?

5 A. Our grounds staff on campus would have been
6 responsible for assessing the campus and treating any
7 ingress or egress sections of the building and
8 walkways.

9 Q. And back for this storm in January of 2018,
10 who with the grounds staff was responsible for making
11 sure that the walkways got treated?

12 A. It's a collective effort. The way our
13 Grounds Department is structured is by crews assigned a
14 geographical area, for lack of a better term. A crew
15 leader for each of those areas reporting to our
16 assistant superintendent or superintendent, and so not
17 a single individual but the crews in those areas would
18 be responsible for treating the areas of the campus.

19 Q. So there would have been a specific crew that
20 would have been responsible for treating the walkways
21 in that specific area of campus?

22 A. Yeah, for treating exits and entries to
23 buildings and any areas that they, they determined to
24 be hazard.

25 Q. Okay. Do they keep any records of where they

1 treat sidewalks or entrances?

2 A. No, sir. No, sir. It's not, it's not kept
3 as a record.

4 Q. Okay. If that section of sidewalk had been
5 treated that morning, it would have been memorialized
6 via the video recording angle we just saw, right?

7 MR. MCLEAN: Object to the form of the
8 question. Go ahead and answer it.

9 A. Yeah. I don't know that from that angle or
10 that video that we would have been able to see the
11 treatment, see what was -- what may have been spread on
12 campus. I don't know that we would have been able to
13 see it.

14 Q. Well, I mean, if they treated that part of
15 the sidewalk where she slipped and fell, we can see
16 that whole part of the sidewalk, right?

17 A. We can see the sidewalk; yes, sir.

18 Q. Yeah. So if they came through and they
19 treated that sidewalk that morning, it would have been
20 video recorded by the same video system that recorded
21 her slipping and falling, right?

22 A. Oh, excuse me, your question was would the,
23 the video camera have recorded their, their treatment
24 of the sidewalk?

25 Q. Yeah. Yeah.

1 A. Do I agree? Yes, certainly.

2 Q. Okay. And do you know -- did the University
3 preserve any video documenting the fact that that
4 sidewalk had been treated?

5 A. Yeah. As I said before, I'm, I'm not aware
6 of any other video being preserved related to this
7 situation.

8 Q. And as it stands right now, you don't know
9 the answer to whether or not that section of sidewalk
10 -- and I don't just mean that particular section where
11 she fell, I'm referring to that little intersection
12 section, I guess, that whole little area. You don't
13 know whether or not that was treated at all on the
14 morning of January 8, 2018?

15 A. I don't.

16 Q. Okay. Was that area inspected by the
17 University on the morning of January 8, 2018, prior to
18 Sierra falling and breaking her arm?

19 A. All of the areas of campus would have been
20 traversed by grounds staff to make an assessment of
21 campus.

22 Q. All right. Well, that -- I can appreciate
23 that answer, but that's kind of like a general answer
24 about, well, all of the areas would have been done. So
25 I want to drill down on that and you're here to

1 testify---

2 A. Sure.

3 Q. ---on behalf of the University. Can you tell
4 me that that area was inspected that morning?

5 A. I cannot.

6 Q. If that area had been inspected -- well,
7 like, first let me ask you this: You said -- when you
8 gave that general answer you talked about, you know, it
9 would have been traversed by crews or whatever. What
10 goes into inspecting the walkways in a situation like
11 this where we've got severe winter weather stuff, how
12 are they supposed to go inspect walkways?

13 A. Certainly. So the grounds crew and those
14 geographical crews of the geographical area that I
15 described, they'd be responsible for the ingress and
16 egress, so their, their entries and exits out of
17 buildings. Certainly, our bridges on campus. We have
18 four that I can think of off the top of my head,
19 perhaps five, that, obviously, we're going to expect to
20 see some ice and slippery spaces on those bridges
21 sooner than other places and then any other walkways
22 that they notice. So they are, as we think we saw in
23 that video, on golf carts and then, otherwise, walking
24 to and fro on campus and the expectation would be that
25 as they move about campus, if they see something that

1 is clearly a hazard be that ice or, or uneven payment
2 or a tree branch that has fallen in the way, that they
3 use the tools available to them to mitigate that hazard
4 or to communicate back to their, their supervisor that
5 they might not be able to do for whatever, but I don't
6 have a tool big enough for this branch or whatever it
7 might be to, to remedy the problem.

8 Q. Okay. And I get that like, you know, listen,
9 throughout your daily rounds you see something, say
10 something type of situation.

11 A. Sure.

12 Q. But what I'm trying to figure out is when you
13 got a situation where you've got severe winter weather
14 conditions and you know, in fact, you've warned folks
15 that, listen, one of the hazards that is brought about
16 by these conditions is icy patches on walkways, are
17 these grounds crews supposed to specifically go out and
18 inspect the walkways by walking them to see whether or
19 not there are any icy patches or doing something along
20 those lines?

21 A. Yeah. The areas where we would direct them
22 to specifically walk and spread, you know, ice-melt or
23 sand or salt or what we have are going to be our
24 entries in and out of buildings and our bridges.

25 Q. All right. And so if that's the case, then

1 it would be fair to say that no one with the University
2 would have been directed to go inspect like that
3 intersection to make sure that intersection was okay
4 and when I say that intersection, I'm referring to, you
5 know, that whole little area basically we can kind of
6 see right there at the center of that video we just
7 watched, you know, the pathways leading into that
8 intersection and then exiting it. Nobody would have
9 been directed, hey, go check that and make sure it's
10 okay?

11 MR. MCLEAN: Object to the form of the
12 question. Go ahead and answer it.

13 A. It is unlikely that anybody would have been
14 directed to look at any particular intersection that
15 doesn't have a building entry or exit or a bridge.

16 Q. Okay. If that area had been inspected at all
17 or if University staff grounds crew had gone across
18 that area at all, it would have been memorialized in
19 the video, right?

20 MR. MCLEAN: Object to the form of the
21 question. Go ahead and answer it.

22 A. It would, it would have been memorialized by
23 video, not necessarily in the one that we, we watched.

24 Q. Sure. But, in other words, if we wanted to
25 know after Sierra had fallen, if somebody with the

1 ahead and answer it.

2 A. I think that is the danger understood.

3 Q. Okay. If you turn to page 36, this is
4 another Medeiros' email. This is from Thursday,
5 January 4, 2018, at 2:38. The subject is, "Winter
6 Weather Briefing Delayed Opening Tomorrow;" is that
7 right?

8 A. Yes, sir.

9 Q. All right. Ms. Medeiros begins by informing
10 everyone that "The President, Provost, and the
11 Emergency Meeting Executive Group have decided to have
12 a delayed opening tomorrow at 11 a.m.;" is that right?

13 A. Yes.

14 Q. Okay. And so that -- when she talks about
15 the Executive -- the Emergency Management Executive
16 Group, that's the group that you've talked about that
17 you were a part of, right?

18 A. Yes, sir.

19 Q. So that decision to open delayed, that was an
20 action that you took part in coming to along with the
21 President and the Provost?

22 A. Yes, sir.

23 Q. And would it be fair to say that y'all
24 decided to open at that delayed time of 11 a.m. in part
25 for concerns over safety?

1 A. I think so; yes, sir.

2 Q. In fact, if you look at that email, Ms.
3 Medeiros goes on to kind of explain -- I assume explain
4 the thinking behind the delayed opening was that it
5 would in part give Facilities Planning and Facilities
6 Operations time to treat the refrozen areas on campus;
7 is that right?

8 A. It does.

9 Q. So at the time that you guys decided to take
10 the action of opening on the delayed schedule for
11 Friday of 11:00 a.m., part of the concern you had that
12 led to that action was these refrozen areas on campus
13 would have to be treated?

14 A. Yes.

15 Q. Okay. Ms. Medeiros goes on to note in this
16 email that, "Unfortunately, I don't believe there will
17 be any additional melting after today due to below
18 freezing temperatures tomorrow day and night;" is that
19 right?

20 A. It is.

21 Q. She noted that, "We should see much
22 improvement Sunday and Monday with temperatures in the
23 40s and 50s."

24 A. Correct.

25 Q. Ms. Medeiros attached to this email the

1 Q. "While the bright sunshine has helped melt
2 some ice, the remaining water refreezes when
3 temperatures drop at night leaving some patches of ice
4 throughout campus."

5 A. Yes.

6 Q. "Please be cautious of icy areas when in
7 parking lots or walking around campus;" is that right?

8 A. Yes.

9 Q. Okay. So would it be fair to say that the
10 concerns documented in those previous emails by Ms.
11 Medeiros about the melting-refreezing issue along with
12 the weather that occurred between those emails and
13 Sunday night, led the University to be concerned that
14 we've had that happen and we've got some potential
15 hazard spots around campus because of the melting-
16 refreezing issue?

17 A. I think it led us to be concerned that that
18 has happened, yes.

19 NWS 1/4/2018 1:30 UPDATE MARKED AND
20 ENTERED FOR IDENTIFICATION AS PLAINTIFF'S EXHIBIT
21 NUMBER SEVEN(7).

22 Q. Okay. All right. Back to that Exhibit 7 we
23 looked at for a brief minute. That was that---

24 A. Uh-huh.

25 Q. ---that updated National Weather Service

1 Update that Ms. Medeiros included on that email about
2 an hour later after this updated briefing is timed. If
3 you look at the bottom left of that first page, which
4 is page 45, there is a section labeled, "What has
5 Changed?" Do you see that section?

6 A. I do.

7 Q. What are the first two things listed there,
8 sir?

9 A. Beside the first two checkmarks?

10 Q. Yeah. The first two -- the first two items
11 they have listed beside the checkmarks.

12 A. So the first checkmark I read to be "Re-
13 freeze/black ice conditions expected" and the second
14 checkmark is "Very cold temperatures/Wind Chill
15 Advisory."

16 Q. Okay. When the University made the decision
17 to reopen on a delay on Friday, the University took
18 that action to protect the safety and welfare of its
19 students and faculty?

20 A. Yes.

21 Q. The purpose of not opening until 11 a.m. was
22 to give University grounds and facilities crews enough
23 time to inspect the grounds and treat the icy areas
24 that needed treating?

25 MR. MCLEAN: Object to the form of the

1 A. Yes, sir.

2 Q. Correct?

3 A. Yes, sir.

4 Q. And if they did, in fact, most likely do
5 that, didn't they?

6 A. I'm, I'm sure they most likely did.

7 Q. Okay. Do you know if Ms. Doherty was a
8 resident student or a commuter student in January of
9 2018?

10 A. It's my understanding she was a commuter
11 student or an off-campus student.

12 Q. That's all I have. Thank you.

13 A. Thank you.

14 REDIRECT EXAMINATION BY MR. MCCLAUGHLIN:

15 Q. A very brief follow-up, Mr. Harrison. So
16 if---

17 A. Yes, sir.

18 Q. ---Ms. Doherty is a commuter student and
19 classes aren't going on, there is no reason for her to
20 be on campus if you guys have said campus is closed, is
21 there?

22 MR. MCLEAN: Object to the form of the
23 question.

24 A. No. If, if she's an off-campus resident, a
25 commuter student so to speak and she doesn't have a

1 class period because we've delayed classes, I'm not
2 aware of a reason why she might need to be on the
3 campus; no, sir.

4 Q. And, again, we talked about the -- when we
5 talk about closing campus, it ain't like a prison. You
6 don't put it on lockdown where people can't get in or
7 out. But the purpose of saying campus is closed is to
8 try to keep people from coming on campus because the
9 situation is such that more people coming, there being
10 more traffic, given the circumstances could create
11 potential hazards and risks, right?

12 A. Yes.

13 Q. Okay. All right. Thank you. That's all I
14 have. Thank you, sir.

15 A. Thank you.

16 MR. MCLEAN: I have nothing further.
17 Thank you.

18 MR. HARRISON: Thank you.

19 MR. MCLAUGHLIN: All right. I'm going
20 to, I'm going to pause the recording or go ahead and
21 stop it right now.

22 (THERE BEING NO FURTHER QUESTIONS,
23 DEPOSITION CONCLUDED AT 12:51 P.M.)
24
25

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July 2, 2021

The Honorable Judge Benjamin Culbertson
PO Box 479
Georgetown, South Carolina 29442

Re: Sierra Doherty vs. Coastal Carolina University

Dear Judge Culbertson:

This Notice of Motion and Motion to Amend Complaint Pursuant to Rule 15 was supposed to have been filed March 8, 2021, contemporaneously with the filing of a Notice of Motion and Motion to Alter or Amend Judgment/Motion to Reconsider Dismissal Pursuant to Rule 12(B)(6).

Unfortunately, the motion to alter/amend/reconsider was mistakenly filed twice instead of the motion to amend complaint being filed (see EF entries for 3/8/2021 at 09:15 and 3/8/2021 at 11:07). Both motions were transmitted to Your Honor and opposing counsel via email the morning of March 8, 2021. Your Honor denied the motion to alter/amend/reconsider via a Form 4 order on March 16, 2021 and that order has been appealed.

The error of the motion to amend complaint not being filed was just discovered and it is being filed to correct the electronic record. Opposing counsel is aware of this issue and this corrective filing. This correspondence has been done at the instruction of the Clerk of Court's Office.

Yours truly,

WUKELA LAW FIRM

PATRICK J. MCLAUGHLIN

PJM/ter

CC: Joseph McLean
Clarke, Johnson, Peterson, and McLean, P.A.
PO Box 1865
Florence, South Carolina 29503

ELECTRONICALLY FILED - 2021 Jul 02 1:20 PM - Horry - COMMON PLEAS - CASE#2019CP2607922

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2019-CP-26-07922
	)	
Sierra Doherty,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S NOTICE OF MOTION AND
	)	MOTION TO AMEND COMPLAINT
Coastal Carolina University,	)	PURSUANT TO RULE 15 SCRPC
	)	
Defendant.	)	
	)	

TO: THE HONORABLE BENJAMIN H. CULBERTSON, DEFENDANT COASTAL CAROLINA UNIVERSITY AND ATTORNEY JOSEPH MCLEAN

NOW COMES the Plaintiff, pursuant to Rule 15 SCRPC and moves to Amend her complaint due to the Court's Order e-filed March 4, 2021 dismissing the Plaintiff's complaint under Rule 12(b)(6).¹

LEGAL STANDARD

SCRPC 15 states that leave to amend "shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a) SCRPC. Amendments to conform to the evidence "may be made upon motion of any party at any time, even after judgment..." Rule 15(b) SCRPC.

"When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The Plaintiff in most cases should be given opportunity to file and serve and amended complaint." Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

¹ This motion is being filed contemporaneously with *Plaintiff's Notice of Motion and Motion to Alter or Amend Judgment/Motion to Reconsider Dismissal Pursuant to Rule 12(B)(6)*.

Grounds for Allowing the Plaintiff to Amend her Complaint:

In opposing the motion to dismiss, the Plaintiff specifically requested:

In the alternative, and at a minimum, the Plaintiff would argue that based on the discovery to date (*see below*), she should be given opportunity to file and serve and amended complaint. Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

Response in Opposition, p.14.

The procedural timeline of this case, provided by the Plaintiff in her *Response*, is specifically relevant to Plaintiff's request to consider matters outside the pleadings. It shows:

- Amended Summons & Complaint*,² December 12, 2019;
- Answer*, December 18, 2019;
- Motion to Alter/Amend Answer and Memo in Support*, April 22, 2020;
- Response in Opposition to Motion to Alter/Amend Answer*, October 7, 2020;
- Order Granting Leave to File Amended Answer*, November 5, 2020;
- Amended Answer*, November 5, 2020;
- Motion to Dismiss I and Memo in Support*, November 13, 2020;
- Motion for Protective Order and Memo in Support*, December 17, 2020;
- *Joint Response in Opposition to Motion For Protective Order and Motion to Dismiss*, December 17, 2020;

The Court allowed the Defendant to amend their answer via an Order filed November 5, 2020 and Defendant's initial 12b(b)(6) motion followed.

Subsequent to Defendant CCU amending their Answer, the Plaintiff attempted to obtain additional discovery in this matter by noticing a 30(b)(6) deposition of CCU for January 12, 2021, said notice being served on December 16, 2020. That matters of examination for that

² The initial *Summons & Complaint* was filed December 11, 2019 and amended the next day solely due to numbering errors within the paragraphs.

30(b)(6) witness were specifically matters which would provide the Plaintiff information to counter the new affirmative defense Defendant CCU had been allowed to assert:

1. What maintenance, inspection and precautions were taken for the incimate weather in the lead up to Ms. Doherty's fall on Jan. 8, 2018;
2. What maintenance, inspection and precautions were taken for the incimate weather on Jan. 8, 2018;
3. What maintenance, inspection and precautions are usually taken by CCU for incimate weather;
4. The investigation and reporting of Ms. Doherty's fall;
5. Information related to student pedestrian traffic on campus. Specifically, where the area of the fall stands relative to other areas of campus as far as foot traffic;
6. Other falls/slips/trips of similar nature during periods of similar incimate weather (winter storms) for the 3 years preceding and 3 years since the fall.

Exhibit 3 to December 17 Joint Response.

Defendant CCU attempted to block that 30(b)(6) deposition by filing for the protective order. In opposing that motion for protective order, the Plaintiff quoted the designated matters and argued:

It is telling that Defendant CCU wants to deny the Plaintiff the opportunity to discover such evidence, especially in light of their argument to dismiss. If the Court were to accept Defendant's argument that the Plaintiff can only have a claim based on the affirmative acts of the Defendant, denying the Plaintiff the right to discover additional affirmative acts by the Defendant prior to deciding the motion to dismiss would be unfair and unjust.

December 17 Joint Response, p.11-12.

At Defense counsel's request, a status conference was requested with Judge Culbertson and took place remotely via WebEx on January 6, 2021. The purpose of that status conference was that the Defendant wanted to delay the scheduled January 12th deposition of their 30(b)(6) witness until after the January 27, 2021 motions hearing. The Court denied that request.

Defense counsel subsequently requested that the deposition be rescheduled with the agreement that the Defendant would withdraw their 12(b)(6) motion to give the Plaintiff time to take the deposition and get the transcript before the motion was heard. The Plaintiff agreed,

defense counsel informed the Clerk of Court's office of his withdrawal of the motions with leave to refile at a later date and the deposition of CCU's 30(b)(6) witness, Stephen K. Harrison, Vice President Auxiliary Enterprises was ultimately conducted on January 21, 2021.

In short, the Plaintiff has been arguing that materials outside the pleadings should be considered since before the Court allowed Defendant CCU to amend their Answer to assert the affirmative defense the March 4, 2021 order is based on. The Plaintiff specifically opposed attempts to deny her discovery of evidence which she could use to counter that affirmative defense and the Court agreed to allow her to obtain that discovery. Defendant CCU proposed moving the date of the deposition after the Court refused to stop the deposition before the 12(b)(6) hearing, specifically proposing allowing the Plaintiff time "to allow you to get the transcript back." *See* Exhibit 1, January 6-7, 2021 email thread.

Despite the Plaintiff having noticed both the Court and Defendant CCU as far back as October 22, 2020 that matters outside the pleadings would be submitted, and despite Defendant CCU specifically confirming their understanding that the Plaintiff would require the transcript of the 30(B)(6) deposition before any hearing by proposing postponement of the hearing until after such could occur, when asked to consider that additional material, the Court's March 4, 2021 order did not even address the additional material the Plaintiff had provided in support of arguing against dismissal and for her right to amend her complaint.

In *Spence*, the South Carolina Supreme Court specifically cited to cases which discussed the importance of plaintiff's being able to show how they would cure defects and court's consideration of such when dismissing cases.

When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff presents

additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted. Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell, 1998 ME 70, 708 A.2d 283, 286-87 (Me. 1998) (trial court acted within its discretion in dismissing case with prejudice pursuant to Rule 12(b)(6) where plaintiff was unable to show how he would cure defects in his complaint if granted leave to amend it); Barkley v. Good Will Home Asso., 495 A.2d 1238 (Me. 1985) (in absence of bad or dilatory motives on the part of plaintiff or undue prejudice to defendant, the trial court abused its discretion by denying the plaintiff and opportunity to amend her complaint after it was dismissed pursuant to Rule 12(b)(6); Baker v. Town of Middlebury, 753 N.E.2d 67, 74 (Ind. App. 2001) (dismissal of complaint pursuant to Rule 12(b)(6) with prejudice was harmless error because plaintiff failed to show how he would have amended his complaint to avoid dismissal).

Spence at 130, 881-882, emphasis added.

The Plaintiff specifically submitted the discovery materials within Section III of her *Response* arguing that they supported not only denying the motion, but also that she be given opportunity to file and serve an amended complaint. *Response*, p.14. Over the course of 15-pages, the Plaintiff presented 30(b)(6) testimony and supporting evidentiary documents used in obtaining that testimony arguing those matters supported that Defendant CCU had "acted" affirmatively in causing her loss and been grossly negligent in their duties to her.

Plaintiff notes the additional materials are especially relevant given the Court's March 4 order citation to Gardner v. Biggart, 308 S.C. 331, 333-34, 417 S.E.2d 858, 859-60 (1992) in finding that the gross negligence standard of S.C. Code §15-78-60(25) did not apply. As Plaintiff argued at the hearing (and in her proposed order), in finding that the gross negligence standard of §15-78-60(25) did not apply to the defendant Department of Education in a bus accident, the *Gardner* court specifically noted that the State had been liable for bus accidents upon a showing of simple negligence since 1977, when the General Assembly had expressly waived sovereign immunity of the State for bus transportation students by statute. Gardner at 334, 860 (citing S.C. Code §59-67-765 (1990)).

The *Gardner* court finding about the bus driver having exercised no duty involving supervision, custody, control or protection came after discussion of the above and in comparison to Richardson v. Hambright, 296 S.C. 504, 374 S.E.2d 296 (1988), which the DOE had relied on in arguing the gross negligence standard should apply. In finding DOE's reliance on *Richardson* was misplaced, the *Gardner* court noted:

Richardson involved the school district's exercise of its supervision, control and protection of students. There, the conduct complained of was school district's failure to conduct random ID checks to enforce its policy requiring parental permission for students to be transported in private vehicles. Clearly, this was a supervisory responsibility to which the gross negligence applied. Gardner at. 334, 860.

The *Richardson* court had found that there was no gross negligence in the district's failure to conduct ID checks pursuant to its policy, because it was the first week of school and the policy only required the "all school" checks to be made once or twice a month, finding that "the District's failure to conduct an ID check during the one week of school when this accident occurred simply does not constitute an intentional and conscious failure." Richardson at 505-506, 297-298.

The Plaintiff's submitted additional materials support a much stronger argument of intentional and conscious failure than in *Richardson*, involving actions and omissions which go beyond the Plaintiff "merely being a student walking across campus" (as argued by Defendant CCU). Specifically, the materials support an intentional and conscious failure to protect, after CCU voluntarily undertook the duty to protect, by deactivating the emergency operating level and specific precautions CCU knew addressed the very hazard that wound up injuring the Plaintiff. *See* Exhibit 2, Amended Complaint.

In *Spence*, the South Carolina Supreme Court noted that “when a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal is generally without prejudice. The Plaintiff in most cases should be given an opportunity to file and serve and amended complaint. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery); *Small v. Mungo*, 254 S.C. 438, 442-44, 175 S.E.2d 802, 804 (1970) (affirming dismissal of complaint for failure to proceed, but finding it should have been dismissed without prejudice); *Dockside Ass’n Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (citing Rule 15(a) SCRPC, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)); *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice); accord *Arkansas Dept. of Environ. Quality v. Brighton*, 352 Ark. 396, 102 S.W.3d 458, 468 (Ark. 2003) (complaint dismissed for failure to state facts upon which relief can be granted should be dismissed without prejudice in order for plaintiff to decide whether to serve amended complaint or appeal); *Thacker v. Bartlett*, 785 N.E.2d 621, 624 (Ind. App. 2003) (dismissal for failure to state claim is without prejudice because the complaining party may either file an amended complaint or stand upon complaint and appeal); *Giuliani v. Chuck*, 1 Haw. App. 379, 620 P.2d 733, 737 (Haw. App. 1980) (complaint is not subject to dismissal prejudice unless it appears to a certainty that no relief can

be granted under any set of facts that can be proved in support of its allegations); James F. Flanagan, South Carolina Civil Procedure 95 (2d ed. 1996) (party who loses motion to dismiss normally is given the right to amend the complaint to cure the defect).” Spence at 130, 881, emphasis added.

“The Tort Claims Act provides potential claimants with two years in which to file suits. This two year period begins on the date of loss...” Bayle v. S.C. DOT, 344 S.C. 115, 127, 542 S.E.2d 736, (Ct. App. 2001). As pled in the complaint and noted in her *Response*, the Plaintiff’s date of loss was January 8, 2018. While the Court’s March 4, 2021 order does not state that the dismissal is with prejudice, since the statute of limitation has run, the practical effect of issuing an order that does not specifically provide the Plaintiff with leave to amend, is that the dismissal is with prejudice.

In *Spence*, the South Carolina Supreme Court specifically noted that “when the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint.” Spence at 130, 881, emphasis added.

Plaintiff would note the failure to allow her leave to amend on granting a dismissal pursuant to Rule 12(b)(6) is particularly unfair and unjust considering the Court only recently allowed Defendant CCU to amend its Answer to assert the very grounds upon which the 12(b)(6) motion was granted.

The procedural timeline of this case (*see above*), shows that the Court allowed Defendant CCU to amend their answer via an Order filed November 5, 2020 and Defendant’s initial 12(b)(6) motion followed. After the back-and-forth over the 30(b)(6) depo, the Court’s refusal to postpone that deposition, Defendant CCU’s proposal to reschedule the depo to give Plaintiff time to obtain the transcript (*see above*), the day after that deposition, January 21st, Defendant

CCU refiled their 12(b)(6) motion. As soon as the Plaintiff obtained the transcript, she diligently worked to prepare her response and get it e-filed in time for both the Court and Defendant CCU to be on notice of the additional materials she was submitting for review, e-filing her response with its seven (7) exhibits on February 5, 2021, almost a month before the hearing on Defendant CCU's refiled 12(b)(6) motion.

In short, the Court allowed Defendant CCU to amend their Answer to assert the affirmative defense upon which the motion to dismiss has been granted, is aware that the Plaintiff was obtaining additional evidence to allow her to address that affirmative defense, was aware that the Plaintiff had submitted additional materials outside the pleadings based on the 30(b)(6) deposition she had fought to pursue before the Court had a hearing on the matter and has now issued an order denying the Plaintiff the opportunity to amend her complaint to address that affirmative defense, while not considering the additional materials submitted by the Plaintiff.

Contemporaneously with the filing of this motion, the Plaintiff is also filing a *Motion to Alter or Amend Judgment/Motion to Reconsider* pursuant to Rule 59(c) SCRPC. For the reasons discussed above, if the Court does not reconsider its order granting Defendant CCU's motion to dismiss, the Plaintiff respectfully requests that the Court grant her motion to amend her complaint.

CONCLUSION

In light of the above, as justice requires the Plaintiff be afforded a right to amend her complaint to conform with the evidence now known which addresses the amended affirmative defense raised by Defendant CCU and pursuant to Rule 15(a) & (b) SCRPC and Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006), the Plaintiff respectfully requests that the Court GRANT her motion to amend.

Respectfully submitted,

s/Patrick J. McLaughlin
Patrick J. McLaughlin
SC Bar No. 73675
Wukela Law Firm
PO Box 13057
Florence, SC 29504-3057
Telephone: 843-669-5634
Facsimile: 843-669-5150
Email: patrick@wukelalaw.com

March 8, 2020

Exhibit 1

Patrick McLaughlin

From: Patrick McLaughlin <Patrick@wukelalaw.com>
Sent: Thursday, January 7, 2021 1:13 PM
To: 'Joe McLean'
Subject: RE: Doherty v CCU

That's fine with me.

From: Joe McLean [mailto:JMcLean@cjpmlaw.com]
Sent: Thursday, January 7, 2021 12:00 PM
To: Patrick McLaughlin
Subject: RE: Doherty v CCU

How about I just withdraw both the motion for protective order and motion to dismiss without prejudice and re-file the motion to dismiss/ motion for summary judgment after the 30(b)(6)?
Joe

From: Joe McLean
Sent: Wednesday, January 6, 2021 3:48 PM
To: Patrick McLaughlin <Patrick@wukelalaw.com>
Subject: Re: Doherty v CCU

Jan. 21. Thanks much. I will file consent motion and order for continuance of hearing on Motion to Dismiss.
Joe

Sent from my iPhone

On Jan 6, 2021, at 2:01 PM, Patrick McLaughlin <Patrick@wukelalaw.com> wrote:

The 19th is my birthday and we may be out of town. 20th or 21st work for you and your folks?

From: Joe McLean [mailto:JMcLean@cjpmlaw.com]
Sent: Wednesday, January 6, 2021 10:31 AM
To: Patrick McLaughlin
Subject: Doherty v CCU

Patrick

Will you agree to postpone the depo until Jan. 19? In exchange, I will ask that the hearing on Jan 27 be postponed to allow you to get the transcript back.

CCU is still in the process of returning employees to campus from the University's winter break closure. Moreover, the particular employees who can address the noted topics are swamped with preparing the campus for students to begin returning on the 11th.

Joe

Joseph P. McLean

Clarke, Johnson, Peterson & McLean, P.A.

P.O. Box 1865

Florence, S.C. 29503-1865

Phone (843) 669-2401

Direct (843) 519-1670

jmclean@cjpmlaw.com

ELECTRONICALLY FILED - 2021 Jul 02 1:20 PM - Horry - COMMON PLEAS - CASE#2019CP2607922

Exhibit 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO: 2018-CP-26-07922
Sierra Doherty	)	
	)	
Plaintiff,	)	
	)	AMENDED COMPLAINT
vs.	)	
	)	(JURY TRIAL DEMANDED)
Coastal Carolina University,	)	
	)	
Defendant.	)	
	)	

The Plaintiff, Sierra Doherty, by and through her undersigned counsel, hereby makes the following claims and allegations:

JURISDICTION

1. That the Plaintiff is a citizen and a resident of the County of Frederick, State of Virginia.
2. That Plaintiff, Sierra Doherty, at the time of this incident, January 8, 2018, was a full-time student registered and attending classes at Coastal Carolina University in the County of Horry, State of South Carolina.
3. That the Plaintiff is informed and believes that the Defendant, Coastal Carolina University (hereinafter "CCU"), at all times relevant to this action, was a public university supported by State funds located in, transacting business in and owning property in Horry County, South Carolina. Additionally, the complained of acts and omissions in this matter took place within Horry County, South Carolina.
4. That the Defendant is subject to personal jurisdiction in South Carolina in that they transact business, operate and own property in Horry County, South Carolina, and in that they caused tortious injury within Horry County, South Carolina.

FACTUAL ALLEGATIONS

5. That on or about January 3, 2018, Winter Storm Grayson brought freezing rain, ice and snow to Horry County, South Carolina causing power outages, business and school closings and dangerous travel conditions.
6. That prior to January 3, 2018, CCU had created an "All Hazards Mitigation Plan" (AHMP) which:
 - a. "at its core...identifies significant hazard threats and recommends specific actions to combat hazard vulnerability." AHMP, p.4;
 - b. Recognized that CCU was "vulnerable to a wide range of natural and man-made hazards that threaten life and property." AHMP, p.26;
 - c. Specifically identified severe winter storms like Winter Storm Grayson as hazards which can "down trees, cause widespread power outages, damages property and cause fatalities and injuries to human life." AHMP, p.29;
 - d. Documented a history of winter events that had impacted CCU and led to disaster declarations and State of Emergencies. AHMP, p.39 & 99;
 - e. Prioritized the risk of severe winter storms as "critical." AHMP, p.133;
 - f. Grouped severe winter storm hazards with such other hazards as: fire, heat waves, hazardous materials incidents, utility failures, and bomb threats/explosions. AHMP, p.136.
7. That as a result of the AHMP identifying severe weather storms as a critical hazard for CCU, CCU was supposed to have a plan to combat the specific hazards associated with severe winter storms.

8. Due to hazardous and dangerous conditions imposed by Winter Storm Grayson, CCU closed its campus. This was accomplished by CCU affirmatively:

- a. Issuing a "Suspension of Operations" on Tuesday, January 2, 2018; and,
- b. Activating "Emergency Operating Level 2" for Wednesday, January 3, 2018.

From: Office of University Communication <noreply@coastal.edu>
 Sent: Tuesday, January 2, 2018 6:53 PM
 To: currentfs@coastal.edu
 Subject: Campus closed Wednesday
 Importance: High

The National Weather Service predicts weather in our area will deteriorate Wednesday (tomorrow) morning with potential for freezing rain and snow.
 Therefore, campus will be closed tomorrow.
 Essential employees will be contacted by their supervisors about reporting to duty.
 Non-essential personnel should NOT report to work unless directed.
 University administration will issue updates via CCU Alert text messages, CCU email and coastal.edu as information becomes available.
 University administration has officially issued a "Suspension of Operations" and will activate Emergency Operating Level 2 for Wednesday (see web link below).
 To view the "CCU Essential Personnel" policy, go to <https://www.coastal.edu/policies/pdf/fast-hreo%20482%20essential%20personnel-%20march%202017.pdf>.
 To review CCU's Emergency Operating Levels, go to https://www.coastal.edu/services/safety_and_security/emergencymanagement/emergencyoperatinglevels/.

Office of University Communication
 Coastal Carolina University
 450-A Century Circle
 Conway, SC 29525

9. In taking the affirmative actions described in the January 2, 2018 email above, CCU directed and linked to their "Emergency Operating Levels."

10. CCU's "Emergency Operating Levels" page documents that "when...there are emergency conditions on campus, CCU will take precautionary measures to prepare and safeguard the University community."

11. That CCU has marked concrete walkways throughout their campus to direct and control the pedestrian traffic of students, faculty and guests.

12. That despite their AHMP specifically categorizing severe winter storm hazards as "critical" and knowing that the ice and snow they generate can "cause fatalities and injuries to

human life,” CCU’s AHMP does not in any way address standards for inspecting and treating the walkways that direct and control pedestrian traffic around campus, nor impose guidelines on what Emergency Operating level should be activated when specific severe winter hazards like melt/refreeze conditions exist.

13. That in emails to “Approved Extended Stay Residents” who were on campus on January 2, 2018, CCU specifically warned students: “If you do leave your room, exercise caution and stay on salted sidewalks.”

14. CCU continued with their activation of Emergency Operating Level 2 for Thursday, January 4, 2018 to “safeguard the University community.”

15. That as early as January 4, 2018, at 11:41 a.m., CCU’s Director of Emergency Management Department, Carissa Medeiros, specifically noticed CCU’s Emergency Management Team about the specific hazard that harmed the Plaintiff, melt/refreeze hazards, by noting in an email that:

- a. “the sun is beginning to melt some of the snow and ice” but that “temperatures will spend most of their time below freezing through Saturday night...Black ice will plague the area for several days. Highs through Saturday will only be in the 30s with near record cold expected tonight through Saturday night with lows of 10 to 15 degrees and as cold as the single numbers;”
- b. “Public Safety, Facilities Planning and Facilities Operations have been on campus assessing the facilities and...the walkways have icy patches...Staff is treating those areas today and has set aside enough ice-melt and sand to treat icy areas in the morning;”

- c. That email SCDOT was “expecting everything to refreeze tonight and days ahead.”

16. That because of the potential for the specific hazard of melt/refreezes, Mederios subsequently sent an email notifying that “the President, Provost and the Emergency Management Executive Group” were activating Emergency Operating Level 4, which is:

Level	Situation	University Operations
4	Emergency situation/severe weather is forecast for our area.	Classes, administration and staff offices will operate on an abbreviated schedule. Essential Personnel report.

17. That in the email explaining why CCU had activated Emergency Operating Level 4, Mederios explained this “will “give Facilities Planning and Facility Operations time to treat the refrozen areas on campus...””

18. In noting the need to operate at Emergency Operating Level 4 to treat the refrozen areas on campus, Mederios noted, “unfortunately, I don’t believe there will be any additional melting after today due to below freezing temperatures tomorrow day and night” including an extended forecast through Monday night in that email which showed very cold temperatures.

19. Attached to that email explaining the activation of Emergency Level 4 to address the specific hazard of melt/refreezes, was the updated NWS briefing from January 4th at 1:30 p.m., which specifically noted on its cover page under “What has changed?”: “Re-freeze/black ice conditions expected” and “Very cold temperatures...”

20. Via an email dated Friday (Jan. 5th) at 10:38 a.m., Medeiros included yet another forecast. That forecast predicted the conditions ripe for melt/refreeze hazards would continue through Saturday day (Jan 6th) “sunny, with a high near 34,” Saturday night “low around 14,” Sunday “Sunny with a high near 38” and Sunday night “low around 28.”

21. Via email dated Sunday, January 7, 2018 at 7:02 p.m., CCU acknowledged that the severe winter weather conditions continued to be ideal for melt/refreeze hazards:

From: Office of University Communication <noreply@coastal.edu>
Sent: Sunday, January 7, 2018 7:02 PM
To: currentfs@coastal.edu; currentstudents@coastal.edu
Subject: Be cautious on campus
Importance: High

Temperatures have continued to remain at or below freezing for our area.

While the bright sunshine has helped melt some ice, the remaining water refreezes when temperatures drop at night, leaving some patches of ice throughout campus.

Please be cautious of icy areas when in parking lots or walking around campus.

Office of University Communication
 Coastal Carolina University
 450-A Century Circle
 Conway, SC 29526

22. That the actions to activate Emergency Operating Levels were made to protect the safety of CCU's students and that when CCU closed campus or delayed opening campus the reason was because CCU did not want students on campus because it was unsafe.

23. That despite the exact same potential melt/refreeze conditions existing for Monday January 8, 2018 that had existed on Friday, January 5, 2018, and despite Monday holding the likelihood of much greater campus traffic, as it was the first day of classes coming back from the winter/holiday break, CCU deactivated their Emergency Operating Levels and went back to normal operations.

24. That as student registered for classes at CCU, when CCU returned to operating on a normal schedule, the Plaintiff had to attend class or face a potential unexcused absence.

25. That on the morning of January 8, 2018, before 9:00 a.m., Plaintiff was on the campus of CCU walking to class between the Wall Building and Brittain Hall.

26. That as the Plaintiff passed through the sidewalk intersection between the Wall Building and Brittain Hall, she encountered one of the melt/refreeze hazards CCU had documented their awareness of and known reasonable care to counter in the emails above.

27. That upon encountering the melt/refreeze hazard, the Plaintiff went airborne and attempted to break her fall by extending her arm, suffering a catastrophic injury to her arm resulting in surgery, therapy, scarring, and continued treatment.

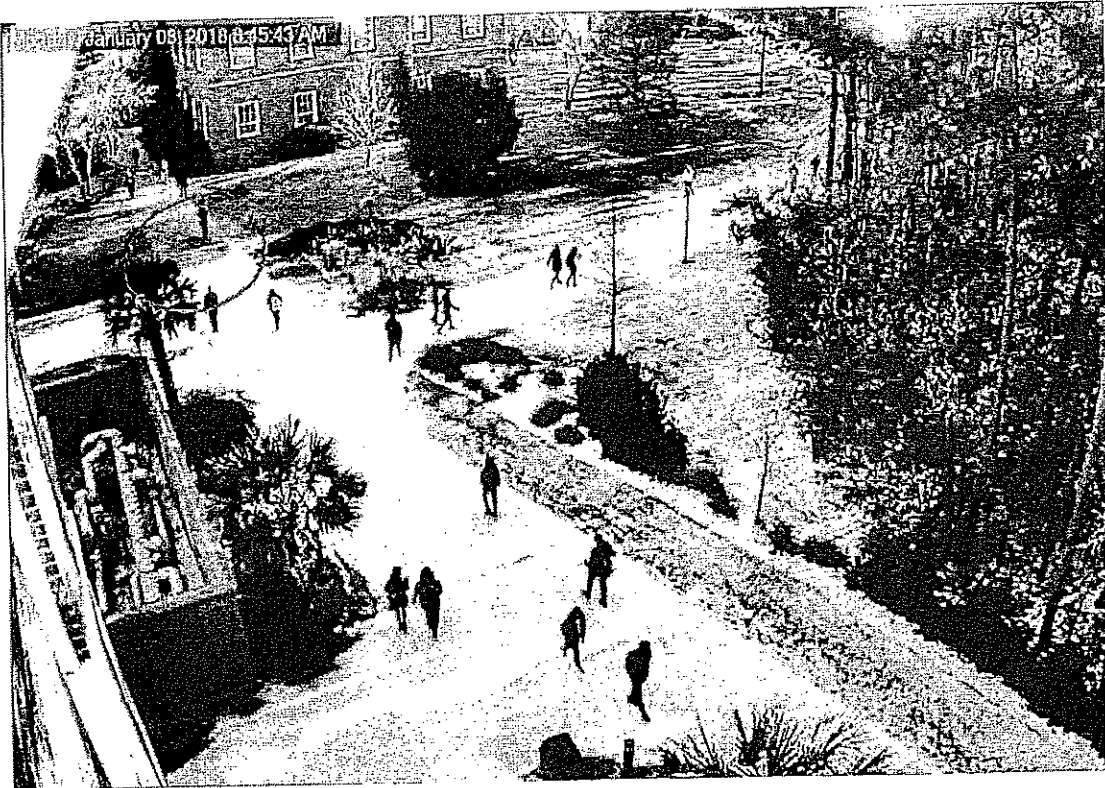
28. That CCU agents/employees responded to the Plaintiff at the location of her fall.

29. That one of the agents/employees responding for CCU was CCU Fire Inspector Keith Williams, who specifically noted in an email dated January 8, 2018 at 10:30 a.m.:

As you can see in the photos attached the sidewalk was ice covered, the portion she fell on appears to have melted and frozen back over last night. The area was extremely slick, as we even had trouble standing on it.

30. That as an off-campus, commuting student, if CCU had been operating at Emergency Operating Level 4 on January 8, 2018, under the same precautions CCU had taken for the same conditions on Friday, January 5, 2018, there would have been no reason for the Plaintiff to have been on campus that early.

31. That if CCU not deactivated Emergency Operating Level 4 and instead delayed opening to allow Public Safety, Facilities Planning and Facilities Operations on campus time to assess the facilities and the walkways to identify icy patches for treatment, as they had for similar weather conditions on Thursday January 5 and (allegedly) Friday, January 6, they could have discovered the melt/refreeze hazard that caused the Plaintiff's loss. As persons who had been briefed about the high potential for melt/refreeze hazards like CCU Public Safety, Facilities Planning and Facilities Operations agents/employees, the clear line of demarcation present where the Plaintiff fell (that is indicative of potential melting/refreezing) was visible to the naked eye, should have been sufficient to warn informed inspectors that the area needed to be checked.



32. On January 8, 2018, five days after the storm began and three days after the school reopened on Emergency Operating Level 4, 24-year old Sierra Doherty was walking to class on the sidewalk between the Wall Building and Brittain Hall, on a sidewalk that unbeknownst to her was one of the walkways that had not been treated or inspected for ice by CCU because they had deactivated their Emergency Operating Levels and safety precautions. Ms. Doherty slipped on ice on the untreated sidewalk, went air born and attempted to break her fall by extending her arm, suffering a catastrophic injury to her arm resulting in surgery, therapy, scarring, and continued treatment.

33. That any inspection of the area by CCU would have revealed the melt/refreeze hazard, as video shows numerous other students slipping on the melt/refreeze hazard that injured the Plaintiff.

34. At the time of this injury, Plaintiff Sierra Doherty was a full-time student registered and attending classes at Coastal Carolina University in the County of Horry, State of South Carolina.

35. At the time of this injury, CCU's Horry campus was within the municipal limits of Conway, South Carolina.

FOR A FIRST CAUSE OF ACTION
(Negligence: Premises Liability against Defendant CCU)

36. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

37. That as the Plaintiff was a full-time student registered and attending classes at Coastal Carolina University, she was an invitee on Defendant CCU's premises.

38. That Defendant CCU owed the Plaintiff, as an invitee, a duty to maintain the premises in a reasonably safe condition.

39. That the Defendant CCU owed the Plaintiff a duty to use reasonable care to discover any risks on the premises and then either put the premises in a reasonably safe condition or warn the Plaintiff of the risk.

40. That Defendant CCU's actions and failures to act amount to a breach of said duties as well as negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct in the following particulars, to wit:

- a. Failing to adequately and properly treat the ice covered walkways before re-opening campus to the students, creating an unsafe condition for students at Coastal Carolina University, South Carolina in a reasonably safe condition. Specifically, but not limited to the fact that despite knowing of the potential for invitees to encounter melt/refreeze hazards

“in parking lots or walking around campus,” CCU’s standard operating procedure is to only treat the entrances/exits to building and bridges;

- b. Failing to adequately and properly remedy the unsafe condition that the Defendant knew or should have known existed. Specifically, but not limited to the fact that despite knowing of the potential for invitees to encounter melt/refreeze hazards “in parking lots or walking around campus,” CCU’s standard operating procedure is to only treat the entrances/exits to buildings and bridges;
- c. Failing to adequately and properly warn of the unsafe condition of the walkway. Specifically, but not limited to the fact that despite knowing of the potential for invitees to encounter melt/refreeze hazards “in parking lots or walking around campus” and instructing students to “exercise caution by staying on salted sidewalks,” CCU’s standard operating procedure is to only treat the entrances/exits to buildings and bridges.
- d. Failing to adequately and properly inspect campus before allowing students back on for normal operations. Specifically, but not limited to the fact that despite knowing of the potential for invitees to encounter melt/refreeze hazards “in parking lots or walking around campus,” CCU’s standard operating procedure made it “unlikely that anybody would have been directed to look at any” walkway area “that doesn’t have a building entry or exit or a bridge.”

41. That as a direct and proximate result of Defendant CCU’s negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

FOR A SECOND CAUSE OF ACTION
(Negligence per se Against Defendant)

42. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.
43. That the property where the Plaintiff encountered the melt/refreeze on CCU's campus is within the municipal limits of the City of Conway, South Carolina.
44. That as real property within the municipal limits of the City of Conway, the Code of City Ordinances for the City of Conway applies to campus where the Plaintiff was injured.
45. That Title 5, Chapter 1, Art. B, Sec. 5-1-38 of the City Ordinances for the City of Conway adopted and incorporated the International Property Management Code and all subsequent amendments and revisions and that this adoption had occurred well before the Plaintiff's injury.
46. That Chapter 3, §302.3 IPMC states "Sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions."
47. That Defendant CCU failed to comply with IPMC Chapter 3, §302.3 and as such, violated Title 5, Chapter 1, Art. B, Sec. 5-1-38 of the City Ordinances for the City of Conway.
48. That the violation of a local ordinance is negligence per se. *See Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).
49. That the causative violation of an applicable statute/ ordinance is evidence of reckless or willful conduct. *Carraway v. Pee Dee Block*, 278 S.C. 511, 273 S.E.2d 340 (1980).
50. That as a direct and proximate result of Defendant CCU's negligence per se, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

FOR A THIRD CAUSE OF ACTION
(Negligence Against Defendant for Voluntary Undertaking)

51. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

52. That Defendant CCU voluntarily undertook duties to the Plaintiff. Specifically, Defendant CCU voluntarily undertook a duty to:

- a. Restrict the Plaintiff's access to campus if it was unsafe;
- b. Not open campus and/or areas of campus unless and until it was inspected and any melt/refreeze hazards were identified and treated;
- c. Treat the walkways to protect against known hazards.

53. That the Defendant CCU breached its duty to the Plaintiff and was negligent, careless, and reckless in the following particulars:

- a. Failing to use due care in returning to normal operating level and opening access to campus when it was unsafe;
- b. Failing to use due care by not inspecting areas of campus other than entrances/exits and bridges;
- c. Failing to use due care by failing to treat walkways other entrances/exits and bridges.

54. That the Defendant CCU's actions and failures to act amount to negligence, gross negligence, carelessness, recklessness, willful and wanton conduct, and violations of state and federal safety rules, regulations, and laws.

55. That as a direct and proximate result of Defendant CCU's negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

FOR A FOURTH CAUSE OF ACTION
(Gross Negligence Against Defendant for Failing Duties to a Student)

56. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

57. That as student, Defendant CCU owed responsibilities and duties of supervision, protection, control, confinement and/or custody to the Plaintiff. *See* S.C. Code §15-78-60(25).

58. That Defendant CCU exercised those responsibilities and duties to the Plaintiff in a grossly negligent manner. Specifically, but not limited to:

- a. Gross negligence in deactivating Emergency Operating Level 4 and returning to normal operations despite knowing the proper precautionary actions for operations should have, at a minimum, remained the same for Monday January 8, 2018 as they had been for Friday January 4, 2018;
- b. Gross negligence in only treating entrances/exits to buildings and bridges despite knowing that the melt/refreeze conditions existed throughout campus;
- c. Gross negligence in only inspecting entrances/exits to buildings and bridges despite knowing that the melt/refreeze conditions existed throughout campus;
- d. Gross Negligence in operating a normal operating level during known hazardous conditions, yet not having real-time monitoring of campus surveillance footage, which showed numerous students slip on the melt/refreeze hazard that injured the Plaintiff prior to her fall.

59. That as a direct and proximate result of Defendant CCU's gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

DAMAGES

60. That as a direct and proximate result of the above set out acts and omissions of Defendant CCU; the Plaintiff was damaged in the following particulars:

- a. Actual and Consequential damages resulting from Personal Injury, to wit:
 - i. disability, past and future;
 - ii. pain and suffering, past and future;
 - iii. stress, anguish and anxiety, past and future;
 - iv. medical costs, past and future;
 - v. lost wages, past and future.

WHEREFORE, the Plaintiff prays judgment for actual and consequential damages against Defendant CCU in an amount to be determined by a jury.

WUKELA LAW FIRM

s/Patrick J. McLaughlin
Patrick J. McLaughlin
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Florence, SC
March 8, 2020

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
Sierra Doherty,)
Plaintiff,)
vs.)
Coastal Carolina University,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-26-07922

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION TO ALTER OR AMEND
JUDGMENT/MOTION TO RECONSIDER
DISMISSAL PURSUANT TO RULE 12(B)(6)**

**TO: THE HONORABLE BENJAMIN H. CULBERTSON, DEFENDANT COASTAL
CAROLINA UNIVERSITY AND ATTORNEY JOSEPH MCLEAN**

NOW COMES the Plaintiff, pursuant to Rule 59(e), SCRCP and moves to Alter or Amend this Court's Order e-filed March 4, 2021 dismissing the Plaintiff's complaint. Specifically, Plaintiff asks the Court to reconsider its ruling and a) to reconsider its ruling and address the material outside the pleadings as requested by the Plaintiff; and/or b) to alter or amend the order to allow the Plaintiff thirty (30) days to file an amended complaint.¹

LEGAL STANDARD

SCRCP 12(b)(6) provides for dismissal when there is a "failure to state facts sufficient to constitute a cause of action." SCRCP 12(b)(6).

Generally, in considering a Rule 12(b)(6), SCRCP, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the Complaint. Doe v. Greenville

¹ This motion is being filed contemporaneously with Plaintiff's Notice of Motion and Motion to Amend Complaint Pursuant to Rule 15 SCRCP.

County Sch. Dist., 375 S.C. 63, 66, 651 S.E.2d 305, 307 (2007); Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

A Rule 12(b)(6) motion is addressed solely to the sufficiency of the allegations in the complaint. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

“A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 566, 127 S.Ct. 1955, 1965 (2007).

A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the Complaint and must presume all well-pled facts to be true. Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 379, 635 S.E.2d 538, 538-39 (2006); Overcash v. South Carolina Elec. and Gas Co., 364 S.C. 569, 614 S.E.2d 619 (2005). “[U]nder our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the evidence upon trial will prove, and not the evidence which will be required to prove those facts.” Brown v. Inv. Mgmt. & Research, Inc., 323 S.C. 395, 400 n. 3, 475 S.E.2d 754, 756 n. 3 (1996).

If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Clearwater Tr. v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). “Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.” Spence v. Spence, 368 S.C. 106, 116–17, 628 S.E.2d 869, 874 (2006). “The question is whether, in the light most favorable to the plaintiff, and

with every doubt resolved in his behalf, the complaint states any valid claim for relief." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

Rule 8(e)(1), SCRCP states that "each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required." Moreover, all pleadings shall be so construed as to do substantial justice to all parties. Unisun Ins. v. Hawkins, 342 S.C. 537, 541, 537 S.E.2d 559, 561 (Ct. App. 2000).

To ensure substantial justice to the parties, the pleadings must be liberally construed. Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991).

The trial court may treat a motion under S.C. R. Civ. P. 12(b)(6) as a motion for summary judgment and consider matters presented outside of the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with S.C. R. Civ. P. 56(c), (e). The notice provisions in Rule 56 are incorporated into S.C. R. Civ. P. 12(b)(6). Brown v. Leverette, 291 S.C. 364, 365-367, 353 S.E.2d 697, 698-699 (1987).

In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330 (2009).

Further, "when a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The Plaintiff in most cases should be given opportunity to file and serve and amended complaint." Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

Grounds for Reconsidering, Altering or Amending the March 4, 2021 Order

I. THE COURT SHOULD ADDRESS THE MATERIAL OUTSIDE THE PLEADINGS SUBMITTED BY THE PLAINTIFF AND RECONSIDER ITS RULING GRANTING THE MOTION TO DISMISS.

In opposing the motion to dismiss, the Plaintiff specifically requested that:

If the Court does not believe the allegations of the Complaint and the reasonable inferences that can be drawn from those factual allegations are sufficient to deny the Defendant's motion, the Plaintiff requests that the Court consider matters outside the pleadings and convert the motion to one for summary judgment.

Response in Opposition, p.14, Sec. III.

The Plaintiff's response provided the legal authority for "conversion to summary judgment":

The trial court may treat a motion under S.C. R. Civ. P. 12(b)(6) as a motion for summary judgment and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with S.C. R. Civ. P. 56(c), (e). The notice provisions in Rule 56 are incorporated into S.C. R. Civ. P. 12(b)(6). Brown v. Leverette, 291 S.C. 364, 365-367, 353 S.E.2d 697, 698-699 (1987).

Response in Opposition, p.7.

The Plaintiff specifically filed her *Response* "well before the scheduled motion hearing date²...to afford the Defendant a reasonable opportunity to respond to such matters in accordance with S.C. R. Civ. P. 56(c), (e). Brown v. Leverette, 291 S.C. 364, 365-367, 353 S.E.2d 697, 698-699 (1987)." *Response*, p.14.

Defendant CCU did not submit any reply to Plaintiff's *Response* or provide any authority on why the Court should not consider the submitted matters outside the pleadings other than arguing at the hearing that they had filed a 12(b)(6) motion, not a motion for summary judgment. The Defendant does not have to consent to a 12(b)(6) being converted to a motion for summary

² Plaintiff's *Response* was filed February 5, 2021, the hearing was March 2, 2021. Rule 56(c) SCRCR requires ten (10) days notice.

judgment. As long as a reasonable opportunity has been afforded to respond, the trial court may consider matters outside the pleadings, pursuant to *Brown*.

The procedural timeline of this case, provided by the Plaintiff in her *Response*, is specifically relevant to Plaintiff's request to consider matters outside the pleadings. It shows:

- Amended Summons & Complaint*,³ December 12, 2019;
- Answer*, December 18, 2019;
- Motion to Alter/Amend Answer and Memo in Support*, April 22, 2020;
- Response in Opposition to Motion to Alter/Amend Answer*, October 7, 2020;
- Order Granting Leave to File Amended Answer*, November 5, 2020;
- Amended Answer*, November 5, 2020;
- Motion to Dismiss I and Memo in Support*, November 13, 2020;
- Motion for Protective Order and Memo in Support*, December 17, 2020;
- *Joint Response in Opposition to Motion For Protective Order and Motion to Dismiss*, December 17, 2020;

As the Plaintiff noted in opposing Defendant's motion to amend their answer:

...allowing the Defendant to amend their answer and assert a 12(b)(6) defense was unnecessary and would be a waste of time. Plaintiff argued that *Etheredge v. Richland School Dist. 1*, 330 S.C. 447 (Ct. App. 1998) would require that the snow/ice exception be read in light of the gross negligence standard imposed by S.C. Code 15-78-60(25) since this case involved a student and that initial written discovery had already produced an email from Defendant CCU's Fire Inspector that documented the hazardous condition of the sidewalk, that it was "extremely slick" and had gotten that way overnight. See Exhibit 1 to 10/7/2020 *Response*. **Plaintiff argued that email was enough to create a question of material fact as to whether Defendant CCU had been grossly negligent and that for any 12(b)(6) motion in the future, the Plaintiff would be entitled to submit that email and have the motion converted to a motion for summary judgment and that there was nothing in their answer preventing the Defendant from making that**

³ The initial *Summons & Complaint* was filed December 11, 2019 and amended the next day solely due to numbering errors within the paragraphs.

S.C. Code §15-78-60(8) argument through a Rule 56 SCRCF motion for summary judgment. In essence, allowing the amendment would only serve to waste time having what would turn out to be a premature motion for summary judgment ruled on by the Court.

Response, p. 3, quoting from Oct. 7, 2020 *Response in Opposition to Motion to Amend*, emphasis added.

The Court allowed the Defendant to amend their answer via an Order filed November 5, 2020 and Defendant's initial 12b(b)(6) motion followed.

Subsequent to Defendant CCU amending their Answer, the Plaintiff attempted to obtain additional discovery in this matter by noticing a 30(b)(6) deposition of CCU for January 12, 2021, said notice being served on December 16, 2020. That matters of examination for that 30(b)(6) witness were specifically matters which would provide the Plaintiff information to counter the new affirmative defense Defendant CCU had been allowed to assert:

1. What maintenance, inspection and precautions were taken for the inclement weather in the lead up to Ms. Doherty's fall on Jan. 8, 2018;
2. What maintenance, inspection and precautions were taken for the inclement weather on Jan. 8, 2018;
3. What maintenance, inspection and precautions are usually taken by CCU for inclement weather;
4. The investigation and reporting of Ms. Doherty's fall;
5. Information related to student pedestrian traffic on campus. Specifically, where the area of the fall stands relative to other areas of campus as far as foot traffic;
6. Other falls/slips/trips of similar nature during periods of similar inclement weather (winter storms) for the 3 years preceding and 3 years since the fall.

Exhibit 3 to December 17 Joint Response.

Defendant CCU attempted to block that 30(b)(6) deposition by filing for the protective order. In opposing that motion for protective order, the Plaintiff quoted the designated matters and argued:

It is telling that Defendant CCU wants to deny the Plaintiff the opportunity to discover such evidence, especially in light of their argument to dismiss. If the Court were to accept Defendant's argument that the Plaintiff can only have a claim based on the affirmative acts of the Defendant, denying the Plaintiff the

right to discover additional affirmative acts by the Defendant prior to deciding the motion to dismiss would be unfair and unjust.
December 17 Joint Response, p.11-12.

At Defense counsel's request, a status conference was requested with Judge Culbertson and took place remotely via WebEx on January 6, 2021. The purpose of that status conference was that the Defendant wanted to delay the scheduled January 12th deposition of their 30(b)(6) witness until after the January 27, 2021 motions hearing. The Court denied that request.

Defense counsel subsequently requested that the deposition be rescheduled with the agreement that the Defendant would withdraw their 12(b)(6) motion to give the Plaintiff time to take the deposition and get the transcript before the motion was heard. The Plaintiff agreed, defense counsel informed the Clerk of Court's office of his withdrawal of the motions with leave to refile at a later date and the deposition of CCU's 30(b)(6) witness, Stephen K. Harrison, Vice President Auxiliary Enterprises was ultimately conducted on January 21, 2021.

In short, the Plaintiff has been arguing that materials outside the pleadings should be considered since before the Court allowed Defendant CCU to amend their Answer to assert the affirmative defense the March 4, 2021 order is based on. The Plaintiff specifically opposed attempts to deny her discovery of evidence which she could use to counter that affirmative defense and the Court agreed to allow her to obtain that discovery. Defendant CCU proposed moving the date of the deposition after the Court refused to stop the deposition before the 12(b)(6) hearing, specifically proposing allowing the Plaintiff time "to allow you to get the transcript back." *See Exhibit 1, January 6-7, 2021 email thread.*

Despite the Plaintiff having noticed both the Court and Defendant CCU as far back as October 22, 2020 that matters outside the pleadings would be submitted, and despite Defendant CCU specifically confirming their understanding that the Plaintiff would require the transcript of

the 30(B)(6) deposition before any hearing by proposing postponement of the hearing until after such could occur, when asked to consider that additional material, the Court's March 4, 2021 order did not even address the additional material the Plaintiff had provided in support of arguing against dismissal and for her right to amend her complaint.

In *Spence*, the South Carolina Supreme Court specifically cited to cases which discussed the importance of plaintiff's being able to show how they would cure defects and court's consideration of such when dismissing cases.

When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted. *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 1998 ME 70, 708 A.2d 283, 286-87 (Me. 1998) (trial court acted within its discretion in dismissing case with prejudice pursuant to Rule 12(b)(6) where plaintiff was unable to show how he would cure defects in his complaint if granted leave to amend it); *Barkley v. Good Will Home Asso.*, 495 A.2d 1238 (Me. 1985) (in absence of bad or dilatory motives on the part of plaintiff or undue prejudice to defendant, the trial court abused its discretion by denying the plaintiff and opportunity to amend her complaint after it was dismissed pursuant to Rule 12(b)(6); *Baker v. Town of Middlebury*, 753 N.E.2d 67, 74 (Ind. App. 2001) (dismissal of complaint pursuant to Rule 12(b)(6) with prejudice was harmless error because plaintiff failed to show how he would have amended his complaint to avoid dismissal).

Spence at 130, 881-882, emphasis added.

The Plaintiff specifically submitted the discovery materials within Section III of her *Response* arguing that they supported not only denying the motion, but also that she be given opportunity to file and serve an amended complaint. *Response*, p.14. Over the course of 15-pages, the Plaintiff presented 30(b)(6) testimony and supporting evidentiary documents used in obtaining that testimony arguing those matters supported that Defendant CCU had "acted" affirmatively in causing her loss and been grossly negligent in their duties to her.

Plaintiff notes the additional materials are especially relevant given the Court's March 4 order citation to Gardner v. Biggart, 308 S.C. 331, 333-34, 417 S.E.2d 858, 859-60 (1992) in finding that the gross negligence standard of S.C. Code §15-78-60(25) did not apply. As Plaintiff argued at the hearing (and in her proposed order), in finding that the gross negligence standard of §15-78-60(25) did not apply to the defendant Department of Education in a bus accident, the *Gardner* court specifically noted that the State had been liable for bus accidents upon a showing of simple negligence since 1977, when the General Assembly had expressly waived sovereign immunity of the State for bus transportation students by statute. Gardner at 334, 860 (citing S.C. Code §59-67-765 (1990)).

The *Gardner* court finding about the bus driver having exercised no duty involving supervision, custody, control or protection came after discussion of the above and in comparison to Richardson v. Hambright, 296 S.C. 504, 374 S.E.2d 296 (1988), which the DOE had relied on in arguing the gross negligence standard should apply. In finding DOE's reliance on *Richardson* was misplaced, the *Gardner* court noted:

Richardson involved the school district's exercise of its supervision, control and protection of students. There, the conduct complained of was school district's failure to conduct random ID checks to enforce its policy requiring parental permission for students to be transported in private vehicles. Clearly, this was a supervisory responsibility to which the gross negligence applied. Gardner at. 334, 860.

The *Richardson* court had found that there was no gross negligence in the district's failure to conduct ID checks pursuant to its policy, because it was the first week of school and the policy only required the "all school" checks to be made once or twice a month, finding that "the District's failure to conduct an ID check during the one week of school when this accident

occurred simply does not constitute an intentional and conscious failure.” Richardson at 505-506, 297-298.

The Plaintiff’s submitted additional materials support a much stronger argument of intentional and conscious failure than in *Richardson*, involving actions and omissions which go beyond the Plaintiff “merely being a student walking across campus” (as argued by Defendant CCU). Specifically, the materials support an intentional and conscious failure to protect, after CCU voluntarily undertook the duty to protect, by deactivating the emergency operating level and specific precautions CCU knew addressed the very hazard that wound up injuring the Plaintiff. *See* Exhibit 2, Amended Complaint, discussed below.

In short, unlike the plaintiff in *Richardson*, here the Plaintiff can create a material question of fact of whether Defendant CCU, at a minimum, voluntarily undertook duty and was grossly negligent in performing it. But she can also go further, showing that Defendant CCU took precautionary safety measures pursuant to their own emergency management policy (or plan), that were targeted at the very hazard that wound up injuring the Plaintiff. She can show those measures and that emergency policy/plan exists specifically to protect students like her, that Defendant CCU was taking those precautions and following that plan, when they took the intentional and conscious action of deactivating the precautions, when they had notice that the specific conditions justifying those precautions and that plan being activated continued to exist. That is enough to create a material question of fact as to whether Defendant CCU was grossly negligent in how they activated and deactivated those precautionary safety measures and it goes well beyond what the plaintiff in *Richardson* was able to plead or prove.

By not considering and addressing this material after affording the Plaintiff the opportunity to obtain it through the 30(b)(6) deposition, after both the Court and Defendant CCU

were on notice that the Plaintiff would be submitting additional material, the Court's March 4 order is unfair and unjust.

To refuse to consider the submitted additional materials and grant a motion to dismiss, on a ground that the Court just recently allowed Defendant CCU to assert, over Plaintiff's objection to the amendment because the Plaintiff specifically argued she would be entitled to have the Court consider additional material outside the pleadings, is unfair and unjust. To deny this while also denying her the right to amend (*see below*) is irreparably prejudicial.

As such, the Plaintiff respectfully asks that the Court reconsider its March 4, 2021 order and deny Defendant CCU's motion to dismiss.

II. PLAINTIFF REQUESTED AND SHOULD BE AFFORDED THE OPPORTUNITY TO AMEND HER COMPLAINT.

In opposing the motion to dismiss, the Plaintiff specifically requested:

In the alternative, and at a minimum, the Plaintiff would argue that based on the discovery to date (*see below*), she should be given opportunity to file and serve and amended complaint. Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

Response in Opposition, p.14.

In *Spence*, the South Carolina Supreme Court noted that "when a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal is generally without prejudice. The Plaintiff in most cases should be given an opportunity to file and serve and amended complaint. See Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery); Small v. Mungo, 254 S.C. 438, 442-44, 175 S.E.2d 802, 804 (1970) (affirming dismissal of complaint for failure to proceed, but

finding it should have been dismissed without prejudice); Dockside Ass'n Inc. v. Detyens, Simmons & Carlisle, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (citing Rule 15(a) SCRC, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)); Davis v. Lunceford, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice); accord Arkansas Dept. of Environ. Quality v. Brighton, 352 Ark. 396, 102 S.W.3d 458, 468 (Ark. 2003) (complaint dismissed for failure to state facts upon which relief can be granted should be dismissed without prejudice in order for plaintiff to decide whether to serve amended complaint or appeal); Thacker v. Bartlett, 785 N.E.2d 621, 624 (Ind. App. 2003) (dismissal for failure to state claim is without prejudice because the complaining party may either file an amended complaint or stand upon complaint and appeal); Giuliani v. Chuck, 1 Haw. App. 379, 620 P.2d 733, 737 (Haw. App. 1980) (complaint is not subject to dismissal prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations); James F. Flanagan, South Carolina Civil Procedure 95 (2d ed. 1996) (party who loses motion to dismiss normally is given the right to amend the complaint to cure the defect).” Spence at 130, 881, emphasis added.

“The Tort Claims Act provides potential claimants with two years in which to file suits. This two year period begins on the date of loss...” Bayle v. S.C. DOT, 344 S.C. 115, 127, 542 S.E.2d 736, (Ct. App. 2001). As pled in the complaint and noted in her *Response*, the Plaintiff’s date of loss was January 8, 2018. While the Court’s March 4, 2021 order does not state that the

dismissal is with prejudice, since the statute of limitation has run, the practical effect of issuing an order that does not specifically provide the Plaintiff with leave to amend, is that the dismissal is with prejudice.

In *Spence*, the South Carolina Supreme Court specifically noted that “when the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint.” *Spence* at 130, 881, emphasis added.

Plaintiff would note the failure to allow her leave to amend on granting a dismissal pursuant to Rule 12(b)(6) is particularly unfair and unjust considering the Court only recently allowed Defendant CCU to amend its Answer to assert the very grounds upon which the 12(b)(6) motion was granted.

The procedural timeline of this case (*see* Sec. I above), shows that the Court allowed Defendant CCU to amend their answer via an Order filed November 5, 2020 and Defendant's initial 12(b)(6) motion followed. After the back-and-forth over the 30(b)(6) depo, the Court's refusal to postpone that deposition, Defendant CCU's proposal to reschedule the depo to give Plaintiff time to obtain the transcript (*see* above), the day after that deposition, January 21st, Defendant CCU refiled their 12(b)(6) motion. As soon as the Plaintiff obtained the transcript, she diligently worked to prepare her response and get it e-filed in time for both the Court and Defendant CCU to be on notice of the additional materials she was submitting for review, e-filing her response with its seven (7) exhibits on February 5, 2021, almost a month before the hearing on Defendant CCU's refiled 12(b)(6) motion.

In short, the Court allowed Defendant CCU to amend their Answer to assert the affirmative defense upon which the motion to dismiss has been granted, was aware that the Plaintiff was obtaining additional evidence to allow her to address that affirmative defense, was

aware that the Plaintiff had submitted additional materials outside the pleadings based on the 30(b)(6) deposition she had fought to pursue before the Court had a hearing on the matter and has now issued an order denying the Plaintiff the opportunity to amend her complaint to address that affirmative defense, while not considering the additional materials submitted by the Plaintiff.

As noted above, if a Plaintiff can show additional factual allegations or a different theory of recovery, which taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted, it would be reversible error to dismiss the Plaintiff's case:

When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted. Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell, 1998 ME 70, 708 A.2d 283, 286-87 (Me. 1998) (trial court acted within its discretion in dismissing case with prejudice pursuant to Rule 12(b)(6) where plaintiff was unable to show how he would cure defects in his complaint if granted leave to amend it); Barkley v. Good Will Home Asso., 495 A.2d 1238 (Me. 1985) (in absence of bad or dilatory motives on the part of plaintiff or undue prejudice to defendant, the trial court abused its discretion by denying the plaintiff and opportunity to amend her complaint after it was dismissed pursuant to Rule 12(b)(6); Baker v. Town of Middlebury, 753 N.E.2d 67, 74 (Ind. App. 2001) (dismissal of complaint pursuant to Rule 12(b)(6) with prejudice was harmless error because plaintiff failed to show how he would have amended his complaint to avoid dismissal).

Spence at 130, 881-882, emphasis added.

Contemporaneously with the filing of this motion, the Plaintiff is also filing a *Motion to Amend Complaint*, pursuant to Rule 15(a) and (b) SCRCp. For the reasons discussed above, if the Court does not reconsider its order granting Defendant CCU's motion to dismiss, the Plaintiff respectfully requests that the Court grant her motion to amend her complaint.

CONCLUSION

Viewing the evidence in a light most favorable to the non-moving party, Plaintiff asks the Court to reconsider its prior Order, and DENY Defendant CCU's motion to dismiss. In the alternative, the Plaintiff asks the Court to grant her motion to amend her complaint pursuant to Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

Respectfully submitted,

s/Patrick J. McLaughlin
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March 8, 2020

Exhibit 1

Patrick McLaughlin

From: Patrick McLaughlin <Patrick@wukelalaw.com>
Sent: Thursday, January 7, 2021 1:13 PM
To: 'Joe McLean'
Subject: RE: Doherty v CCU

That's fine with me.

From: Joe McLean [mailto:JMcLean@cjpmllaw.com]
Sent: Thursday, January 7, 2021 12:00 PM
To: Patrick McLaughlin
Subject: RE: Doherty v CCU

How about I just withdraw both the motion for protective order and motion to dismiss without prejudice and re-file the motion to dismiss/ motion for summary judgment after the 30(b)(6)?
Joe

From: Joe McLean
Sent: Wednesday, January 6, 2021 3:48 PM
To: Patrick McLaughlin <Patrick@wukelalaw.com>
Subject: Re: Doherty v CCU

Jan. 21. Thanks much. I will file consent motion and order for continuance of hearing on Motion to Dismiss.
Joe

Sent from my iPhone

On Jan 6, 2021, at 2:01 PM, Patrick McLaughlin <Patrick@wukelalaw.com> wrote:

The 19th is my birthday and we may be out of town. 20th or 21st work for you and your folks?

From: Joe McLean [mailto:JMcLean@cjpmllaw.com]
Sent: Wednesday, January 6, 2021 10:31 AM
To: Patrick McLaughlin
Subject: Doherty v CCU

Patrick

Will you agree to postpone the depo until Jan. 19? In exchange, I will ask that the hearing on Jan 27 be postponed to allow you to get the transcript back.

CCU is still in the process of returning employees to campus from the University's winter break closure. Moreover, the particular employees who can address the noted topics are swamped with preparing the campus for students to begin returning on the 11th.

Joe

Joseph P. McLean

Clarke, Johnson, Peterson & McLean, P.A.

P.O. Box 1865

Florence, S.C. 29503-1865

Phone (843) 669-2401

Direct (843) 519-1670

jmclean@cjpmlaw.com

ELECTRONICALLY FILED - 2021 Mar 08 11:07 AM - Horry - COMMON PLEAS - CASE#2019CP2607922

Exhibit 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO: 2018-CP-26-07922
Sierra Doherty	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AMENDED COMPLAINT
	)	
Coastal Carolina University,	)	(JURY TRIAL DEMANDED)
	)	
Defendant.	)	
	)	

The Plaintiff, Sierra Doherty, by and through her undersigned counsel, hereby makes the following claims and allegations:

JURISDICTION

1. That the Plaintiff is a citizen and a resident of the County of Frederick, State of Virginia.
2. That Plaintiff, Sierra Doherty, at the time of this incident, January 8, 2018, was a full-time student registered and attending classes at Coastal Carolina University in the County of Horry, State of South Carolina.
3. That the Plaintiff is informed and believes that the Defendant, Coastal Carolina University (hereinafter "CCU"), at all times relevant to this action, was a public university supported by State funds located in, transacting business in and owning property in Horry County, South Carolina. Additionally, the complained of acts and omissions in this matter took place within Horry County, South Carolina.
4. That the Defendant is subject to personal jurisdiction in South Carolina in that they transact business, operate and own property in Horry County, South Carolina, and in that they caused tortious injury within Horry County, South Carolina.

FACTUAL ALLEGATIONS

5. That on or about January 3, 2018, Winter Storm Grayson brought freezing rain, ice and snow to Horry County, South Carolina causing power outages, business and school closings and dangerous travel conditions.

6. That prior to January 3, 2018, CCU had created an "All Hazards Mitigation Plan" (AHMP) which:

- a. "at its core...identifies significant hazard threats and recommends specific actions to combat hazard vulnerability." AHMP, p.4;
- b. Recognized that CCU was "vulnerable to a wide range of natural and man-made hazards that threaten life and property." AHMP, p.26;
- c. Specifically identified severe winter storms like Winter Storm Grayson as hazards which can "down trees, cause widespread power outages, damages property and cause fatalities and injuries to human life." AHMP, p.29;
- d. Documented a history of winter events that had impacted CCU and led to disaster declarations and State of Emergencies. AHMP, p.39 & 99;
- e. Prioritized the risk of severe winter storms as "critical." AHMP, p.133;
- f. Grouped severe winter storm hazards with such other hazards as: fire, heat waves, hazardous materials incidents, utility failures, and bomb threats/explosions. AHMP, p.136.

7. That as a result of the AHMP identifying severe weather storms as a critical hazard for CCU, CCU was supposed to have a plan to combat the specific hazards associated with severe winter storms.

8. Due to hazardous and dangerous conditions imposed by Winter Storm Grayson, CCU closed its campus. This was accomplished by CCU affirmatively:

- a. Issuing a "Suspension of Operations" on Tuesday, January 2, 2018; and,
- b. Activating "Emergency Operating Level 2" for Wednesday, January 3, 2018.

From: Office of University Communication <noreply@coastal.edu>
 Sent: Tuesday, January 2, 2018 6:53 PM
 To: currentifs@coastal.edu
 Subject: Campus closed Wednesday
 Importance: High

The National Weather Service predicts weather in our area will deteriorate Wednesday (tomorrow) morning with potential for freezing rain and snow.
 Therefore, campus will be closed tomorrow.
 Essential employees will be contacted by their supervisors about reporting to duty.
 Non-essential personnel should NOT report to work unless directed.
 University administration will issue updates via CCU Alert text messages, CCU email and coastal.edu as information becomes available.
 University administration has officially issued a "Suspension of Operations" and will activate Emergency Operating Level 2 for Wednesday (see web link below).
 To view the "CCU Essential Personnel" policy, go to <https://www.coastal.edu/policies/pdf/fast-hreo%20482%20essential%20personnel-%20march%202017.pdf>.
 To review CCU's Emergency Operating Levels, go to https://www.coastal.edu/services/safety_and_security/emergencymanagement/emergencyoperatinglevels/.

Office of University Communication
 Coastal Carolina University
 450-A Century Circle
 Conway, SC 29526

9. In taking the affirmative actions described in the January 2, 2018 email above, CCU directed and linked to their "Emergency Operating Levels."

10. CCU's "Emergency Operating Levels" page documents that "when...there are emergency conditions on campus, CCU will take precautionary measures to prepare and safeguard the University community."

11. That CCU has marked concrete walkways throughout their campus to direct and control the pedestrian traffic of students, faculty and guests.

12. That despite their AHMP specifically categorizing severe winter storm hazards as "critical" and knowing that the ice and snow they generate can "cause fatalities and injuries to

human life,” CCU’s AHMP does not in any way address standards for inspecting and treating the walkways that direct and control pedestrian traffic around campus, nor impose guidelines on what Emergency Operating level should be activated when specific severe winter hazards like melt/refreeze conditions exist.

13. That in emails to “Approved Extended Stay Residents” who were on campus on January 2, 2018, CCU specifically warned students: “If you do leave your room, exercise caution and stay on salted sidewalks.”

14. CCU continued with their activation of Emergency Operating Level 2 for Thursday, January 4, 2018 to “safeguard the University community.”

15. That as early as January 4, 2018, at 11:41 a.m., CCU’s Director of Emergency Management Department, Carissa Medeiros, specifically noticed CCU’s Emergency Management Team about the specific hazard that harmed the Plaintiff, melt/refreeze hazards, by noting in an email that:

- a. “the sun is beginning to melt some of the snow and ice” but that “temperatures will spend most of their time below freezing through Saturday night...Black ice will plague the area for several days. Highs through Saturday will only be in the 30s with near record cold expected tonight through Saturday night with lows of 10 to 15 degrees and as cold as the single numbers;”
- b. “Public Safety, Facilities Planning and Facilities Operations have been on campus assessing the facilities and...the walkways have icy patches...Staff is treating those areas today and has set aside enough ice-melt and sand to treat icy areas in the morning;”

- c. That email SCDOT was "expecting everything to refreeze tonight and days ahead."

16. That because of the potential for the specific hazard of melt/refreezes, Mederios subsequently sent an email notifying that "the President, Provost and the Emergency Management Executive Group" were activating Emergency Operating Level 4, which is:

Level	Situation	University Operations
4	Emergency situation/severe weather is forecast for our area.	Classes, administration and staff offices will operate on an abbreviated schedule. Essential Personnel report.

17. That in the email explaining why CCU had activated Emergency Operating Level 4, Mederios explained this "will "give Facilities Planning and Facility Operations time to treat the refrozen areas on campus..."

18. In noting the need to operate at Emergency Operating Level 4 to treat the refrozen areas on campus, Mederios noted, "unfortunately, I don't believe there will be any additional melting after today due to below freezing temperatures tomorrow day and night" including an extended forecast through Monday night in that email which showed very cold temperatures.

19. Attached to that email explaining the activation of Emergency Level 4 to address the specific hazard of melt/refreezes, was the updated NWS briefing from January 4th at 1:30 p.m., which specifically noted on its cover page under "What has changed?": "Re-freeze/black ice conditions expected" and "Very cold temperatures..."

20. Via an email dated Friday (Jan. 5th) at 10:38 a.m., Medeiros included yet another forecast. That forecast predicted the conditions ripe for melt/refreeze hazards would continue through Saturday day (Jan 6th) "sunny, with a high near 34," Saturday night "low around 14," Sunday "Sunny with a high near 38" and Sunday night "low around 28."

21. Via email dated Sunday, January 7, 2018 at 7:02 p.m., CCU acknowledged that the severe winter weather conditions continued to be ideal for melt/refreeze hazards:

From: Office of University Communication <noreply@coastal.edu>
 Sent: Sunday, January 7, 2018 7:02 PM
 To: currentfs@coastal.edu; currentstudents@coastal.edu
 Subject: Be cautious on campus
 Importance: High

Temperatures have continued to remain at or below freezing for our area.

While the bright sunshine has helped melt some ice, the remaining water refreezes when temperatures drop at night, leaving some patches of ice throughout campus.

Please be cautious of icy areas when in parking lots or walking around campus.

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22. That the actions to activate Emergency Operating Levels were made to protect the safety of CCU's students and that when CCU closed campus or delayed opening campus the reason was because CCU did not want students on campus because it was unsafe.

23. That despite the exact same potential melt/refreeze conditions existing for Monday January 8, 2018 that had existed on Friday, January 5, 2018, and despite Monday holding the likelihood of much greater campus traffic, as it was the first day of classes coming back from the winter/holiday break, CCU deactivated their Emergency Operating Levels and went back to normal operations.

24. That as student registered for classes at CCU, when CCU returned to operating on a normal schedule, the Plaintiff had to attend class or face a potential unexcused absence.

25. That on the morning of January 8, 2018, before 9:00 a.m., Plaintiff was on the campus of CCU walking to class between the Wall Building and Brittain Hall.

26. That as the Plaintiff passed through the sidewalk intersection between the Wall Building and Brittain Hall, she encountered one of the melt/refreeze hazards CCU had documented their awareness of and known reasonable care to counter in the emails above.

27. That upon encountering the melt/refreeze hazard, the Plaintiff went airborne and attempted to break her fall by extending her arm, suffering a catastrophic injury to her arm resulting in surgery, therapy, scarring, and continued treatment.

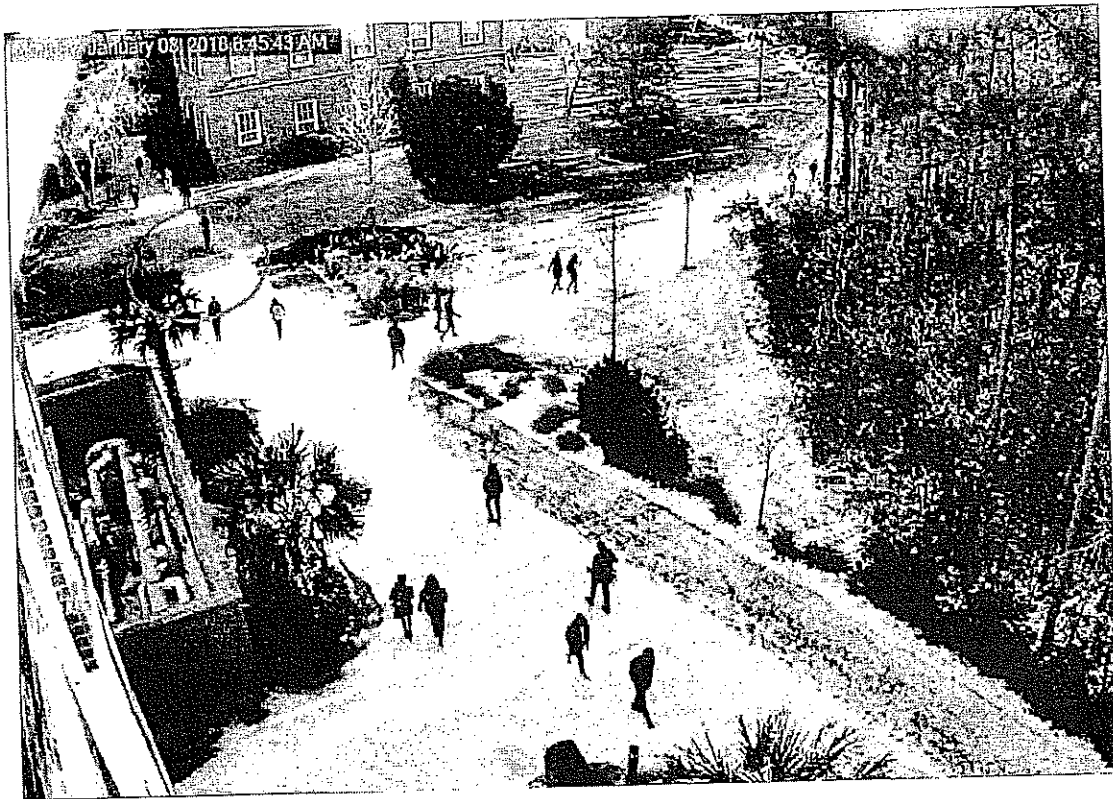
28. That CCU agents/employees responded to the Plaintiff at the location of her fall.

29. That one of the agents/employees responding for CCU was CCU Fire Inspector Keith Williams, who specifically noted in an email dated January 8, 2018 at 10:30 a.m.:

As you can see in the photos attached the sidewalk was ice covered, the portion she fell on appears to have melted and frozen back over last night. The area was extremely slick, as we even had trouble standing on it.

30. That as an off-campus, commuting student, if CCU had been operating at Emergency Operating Level 4 on January 8, 2018, under the same precautions CCU had taken for the same conditions on Friday, January 5, 2018, there would have been no reason for the Plaintiff to have been on campus that early.

31. That if CCU not deactivated Emergency Operating Level 4 and instead delayed opening to allow Public Safety, Facilities Planning and Facilities Operations on campus time to assess the facilities and the walkways to identify icy patches for treatment, as they had for similar weather conditions on Thursday January 5 and (allegedly) Friday, January 6, they could have discovered the melt/refreeze hazard that caused the Plaintiff's loss. As persons who had been briefed about the high potential for melt/refreeze hazards like CCU Public Safety, Facilities Planning and Facilities Operations agents/employees, the clear line of demarcation present where the Plaintiff fell (that is indicative of potential melting/refreezing) was visible to the naked eye, should have been sufficient to warn informed inspectors that the area needed to be checked.



32. On January 8, 2018, five days after the storm began and three days after the school reopened on Emergency Operating Level 4, 24-year old Sierra Doherty was walking to class on the sidewalk between the Wall Building and Brittain Hall, on a sidewalk that unbeknownst to her was one of the walkways that had not been treated or inspected for ice by CCU because they had deactivated their Emergency Operating Levels and safety precautions. Ms. Doherty slipped on ice on the untreated sidewalk, went air born and attempted to break her fall by extending her arm, suffering a catastrophic injury to her arm resulting in surgery, therapy, scarring, and continued treatment.

33. That any inspection of the area by CCU would have revealed the melt/refreeze hazard, as video shows numerous other students slipping on the melt/refreeze hazard that injured the Plaintiff.

34. At the time of this injury, Plaintiff Sierra Doherty was a full-time student registered and attending classes at Coastal Carolina University in the County of Horry, State of South Carolina.

35. At the time of this injury, CCU's Horry campus was within the municipal limits of Conway, South Carolina.

FOR A FIRST CAUSE OF ACTION
(Negligence: Premises Liability against Defendant CCU)

36. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

37. That as the Plaintiff was a full-time student registered and attending classes at Coastal Carolina University, she was an invitee on Defendant CCU's premises.

38. That Defendant CCU owed the Plaintiff, as an invitee, a duty to maintain the premises in a reasonably safe condition.

39. That the Defendant CCU owed the Plaintiff a duty to use reasonable care to discover any risks on the premises and then either put the premises in a reasonably safe condition or warn the Plaintiff of the risk.

40. That Defendant CCU's actions and failures to act amount to a breach of said duties as well as negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct in the following particulars, to wit:

- a. Failing to adequately and properly treat the ice covered walkways before re-opening campus to the students, creating an unsafe condition for students at Coastal Carolina University, South Carolina in a reasonably safe condition. Specifically, but not limited to the fact that despite knowing of the potential for invitees to encounter melt/refreeze hazards

"in parking lots or walking around campus," CCU's standard operating procedure is to only treat the entrances/exits to building and bridges;

- b. Failing to adequately and properly remedy the unsafe condition that the Defendant knew or should have known existed. Specifically, but not limited to the fact that despite knowing of the potential for invitees to encounter melt/refreeze hazards "in parking lots or walking around campus," CCU's standard operating procedure is to only treat the entrances/exits to buildings and bridges;
- c. Failing to adequately and properly warn of the unsafe condition of the walkway. Specifically, but not limited to the fact that despite knowing of the potential for invitees to encounter melt/refreeze hazards "in parking lots or walking around campus" and instructing students to "exercise caution by staying on salted sidewalks," CCU's standard operating procedure is to only treat the entrances/exits to buildings and bridges.
- d. Failing to adequately and properly inspect campus before allowing students back on for normal operations. Specifically, but not limited to the fact that despite knowing of the potential for invitees to encounter melt/refreeze hazards "in parking lots or walking around campus," CCU's standard operating procedure made it "unlikely that anybody would have been directed to look at any" walkway area "that doesn't have a building entry or exit or a bridge."

41. That as a direct and proximate result of Defendant CCU's negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

FOR A SECOND CAUSE OF ACTION
(Negligence per se Against Defendant)

42. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

43. That the property where the Plaintiff encountered the melt/refreeze on CCU's campus is within the municipal limits of the City of Conway, South Carolina.

44. That as real property within the municipal limits of the City of Conway, the Code of City Ordinances for the City of Conway applies to campus where the Plaintiff was injured.

45. That Title 5, Chapter 1, Art. B, Sec. 5-1-38 of the City Ordinances for the City of Conway adopted and incorporated the International Property Management Code and all subsequent amendments and revisions and that this adoption had occurred well before the Plaintiff's injury.

46. That Chapter 3, §302.3 IPMC states "Sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions."

47. That Defendant CCU failed to comply with IPMC Chapter 3, §302.3 and as such, violated Title 5, Chapter 1, Art. B, Sec. 5-1-38 of the City Ordinances for the City of Conway.

48. That the violation of a local ordinance is negligence per se. *See Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).

49. That the causative violation of an applicable statute/ ordinance is evidence of reckless or willful conduct. *Carraway v. Pee Dee Block*, 278 S.C. 511, 273 S.E.2d 340 (1980).

50. That as a direct and proximate result of Defendant CCU's negligence per se, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

FOR A THIRD CAUSE OF ACTION
(Negligence Against Defendant for Voluntary Undertaking)

51. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

52. That Defendant CCU voluntarily undertook duties to the Plaintiff. Specifically, Defendant CCU voluntarily undertook a duty to:

- a. Restrict the Plaintiff's access to campus if it was unsafe;
- b. Not open campus and/or areas of campus unless and until it was inspected and any melt/refreeze hazards were identified and treated;
- c. Treat the walkways to protect against known hazards.

53. That the Defendant CCU breached its duty to the Plaintiff and was negligent, careless, and reckless in the following particulars:

- a. Failing to use due care in returning to normal operating level and opening access to campus when it was unsafe;
- b. Failing to use due care by not inspecting areas of campus other than entrances/exits and bridges;
- c. Failing to use due care by failing to treat walkways other entrances/exits and bridges.

54. That the Defendant CCU's actions and failures to act amount to negligence, gross negligence, carelessness, recklessness, willful and wanton conduct, and violations of state and federal safety rules, regulations, and laws.

55. That as a direct and proximate result of Defendant CCU's negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

FOR A FOURTH CAUSE OF ACTION
(Gross Negligence Against Defendant for Failing Duties to a Student)

56. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

57. That as student, Defendant CCU owed responsibilities and duties of supervision, protection, control, confinement and/or custody to the Plaintiff. *See* S.C. Code §15-78-60(25).

58. That Defendant CCU exercised those responsibilities and duties to the Plaintiff in a grossly negligent manner. Specifically, but not limited to:

- a. Gross negligence in deactivating Emergency Operating Level 4 and returning to normal operations despite knowing the proper precautionary actions for operations should have, at a minimum, remained the same for Monday January 8, 2018 as they had been for Friday January 4, 2018;
- b. Gross negligence in only treating entrances/exits to buildings and bridges despite knowing that the melt/refreeze conditions existed throughout campus;
- c. Gross negligence in only inspecting entrances/exits to buildings and bridges despite knowing that the melt/refreeze conditions existed throughout campus;
- d. Gross Negligence in operating a normal operating level during known hazardous conditions, yet not having real-time monitoring of campus surveillance footage, which showed numerous students slip on the melt/refreeze hazard that injured the Plaintiff prior to her fall.

59. That as a direct and proximate result of Defendant CCU's gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

DAMAGES

60. That as a direct and proximate result of the above set out acts and omissions of Defendant CCU; the Plaintiff was damaged in the following particulars:

- a. Actual and Consequential damages resulting from Personal Injury, to wit:
 - i. disability, past and future;
 - ii. pain and suffering, past and future;
 - iii. stress, anguish and anxiety, past and future;
 - iv. medical costs, past and future;
 - v. lost wages, past and future.

WHEREFORE, the Plaintiff prays judgment for actual and consequential damages against Defendant CCU in an amount to be determined by a jury.

WUKELA LAW FIRM

s/Patrick J. McLaughlin
Patrick J. McLaughlin
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Email: patrick@wukelalaw.com

Florence, SC
March 8, 2020

Patrick McLaughlin

From: Patrick McLaughlin <Patrick@wukelalaw.com>
Sent: Thursday, March 4, 2021 10:40 AM
To: 'Joe McLean'; 'Culbertson, Benjamin H.'; 'Culbertson, Benjamin Secretary (Ramona Moree)'
Cc: patrick@wukelalaw.com; hmurphy@wukelalaw.com
Subject: RE: Doherty v CCU C/A # 2019-CP-26-07922
Attachments: 3.4.2021 - Proposed Order - Doherty v. CCU.docx

Judge Culbertson:

Pursuant to your instruction, attached is the Plaintiff's proposed order. Please let me know if you have any trouble accessing the attached word.doc.

Patrick J. McLaughlin

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On January 8, 2018, five days after the storm began, Sierra was walking to class on the sidewalk between the Wall Building and Brittain Hall, when she encountered a patch of ice, went airborne, tried to break her fall with her arm and suffered a serious injury to her arm which required surgery and therapy and left her with scarring. *Complaint* ¶6.

It is uncontested that Sierra was a student and attending classes at CCU's Horry County campus and that she suffered a fall during Winter Storm Grayson. *Amended Answer* ¶¶1,2, 6-7.

ARGUMENTS OF THE PARTIES

Defendant CCU

Defendant CCU bases their 12(b)(6) motion on the grounds that an exception to the waiver of liability under the SCTCA applies in this case:

The governmental entity is not liable for a loss resulting from:
(8) snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions unless the snow or ice thereon is affirmatively caused by a negligent act of the employee.
S.C. Code §15-78-60(8).

Defendant CCU argues that Doherty has failed to sufficiently plead an "act" in her complaint, claiming that she has only pled omissions.

Defendant CCU also argues that the gross negligence standard for duties to students in S.C. Code §15-78-60(25) should not be read in to the ice exception of S.C. Code §15-78-60(8), claiming that when the accident occurred, Defendant CCU was not supervising, protecting or controlling the Plaintiff.

Plaintiff Doherty

Doherty argues that her complaint does sufficiently plead facts that would constitute an "act" under the ice exception of S.C. Code §15-78-60(8). Specifically, Doherty argues that her factual allegations that Defendant CCU closed and then reopened campus due to the hazardous

conditions were affirmative acts taken by Defendant CCU. Doherty also argues that allegations of failing to adequately and properly perform certain acts (like inspections, treating sidewalks, warning students) are allegations of "acts" sufficient to satisfy the requirements of S.C. Code §15-78-60(8).

Doherty also argues that she does not have to plead an "act," because as a student, the gross negligence standard of S.C. Code §15-78-60(25) applies and must be read in to the application of the ice exception of S.C. Code §15-78-60(8) in her case.

Doherty also argued that if the motion to dismiss were granted, she should be afforded the right to file an amended complaint and she provided additional material outside the pleadings for the Court's consideration.

DISCUSSION

I. The Plaintiff has sufficiently pled factual allegations creating a material question of fact that Defendant CCU negligently "acted" in affirmatively causing her loss.

The Court first addresses the issue over whether Doherty has sufficiently pled an "act" by Defendant CCU to state a claim given the exception to the waiver of liability in ice situations pursuant to S.C. Code §15-78-60(8).

While the SCTCA itself notes that it is to be construed liberally in favor of limiting the liability of the State (*see* S.C. Code §15-78-20(f)), South Carolina courts have routinely held the burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense. Strange v. S.C. Dept. of Highways and Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994).

"[U]nder our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the evidence upon trial will prove, and not the evidence

which will be required to prove those facts.” Brown v. Inv. Mgmt. & Research, Inc., 323 S.C. 395, 400 n. 3, 475 S.E.2d 754, 756 n. 3 (1996). If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Clearwater Tr. v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).

In her Complaint, Doherty specifically pled the following:

¶5: Due to inclement weather and dangerous travel conditions, CCU closed its campus January 3-4, 2018 and re-opened on a delayed schedule resuming classes at 11:00 a.m. on Friday, January 5, 2018;

¶12a: Failing to adequately and properly treat the ice covered walkways before re-opening campus to the students, creating an unsafe condition for students at Coastal Carolina University, South Carolina in a reasonably safe condition;

¶12b: Failing to adequately and properly remedy the unsafe condition that the Defendant knew or should have known existed;

¶12c: Failing to adequately and properly warn of the unsafe condition of the walkway.

¶16: That the Defendant CCU owed a duty to the Plaintiff and any patron/invitee of Coastal Carolina University, to properly and adequately maintain the premises in question in a safe condition so there was no hazard to anyone making use of the walkways;

¶18: That the Defendant CCU breached its duty to the Plaintiff...in the following particulars: a) creating an unsafe condition by failing to adequately and properly keep the walkway clear and in a reasonably safe condition; b) failing to adequately and properly remedy the unsafe condition that Defendant CCU knew or should have known existed;

To ensure substantial justice to the parties, the pleadings must be liberally construed.

Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991).

Taking the facts and inferences drawn from the facts alleged in the complaint in the light most favorable to Doherty, the Court finds that the above facts alleged and inferences drawn from those facts support that the Plaintiff has sufficiently pled an "act" as required pursuant to S.C. Code §15-78-60(8).

Doherty argues, and the Court finds it at least presents a material question of fact, that the closing and reopening of the campus constituted "action" by Defendant CCU, and was more than just "omission" as Defendant CCU argues.

Doherty argues, and the Court finds it at least presents a material question of fact, that "adequately and properly" doing something can be inferred to be "action" and not just omission. If someone fails to "properly treat the ice covered walkways before reopening campus" and "properly remedy the unsafe condition that [they] knew or should have known existed," that is not necessarily an "omission." Merriam-Webster's defines "properly" as "in a way that is acceptable or suitable" or "in a way that is accurate or correct."¹

Someone treating or remedying ice covered walkways in an unacceptable/unsuitable or inaccurate/incorrect way could be affirmative action. When the evidence is susceptible to more than one reasonable inference, it should be submitted to the jury. Quesinberry v. Rouppasong, 331 S.C. 589; 503 S.E.2d 717 (1998). Put simply, incorrect action is still action and a reasonable jury could decide that bad action is still an affirmative act that resulted in Doherty's loss.

"The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

¹ Merriam-Webster online definition search conducted on 12/17/2020 from <https://www.merriam-webster.com/dictionary/properly>

If any triable factual issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402 (1991).

I FIND that Plaintiff Doherty has sufficiently pled factual allegations creating a material question of fact that Defendant CCU negligently “acted” in affirmatively causing her loss.

II. The gross negligence standard of S.C. Code 15-78-60(25) applies and that renders Defendant CCU’s argument that an affirmative act is required moot.

Under the “Exceptions to waiver of immunity” section of the S.C. Tort Claims act, it states that “the governmental entity is not liable for a loss resulting from...(25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student...except when the responsibility or duty is exercised in a grossly negligent manner.” S.C. Code 15-78-60(25), emphasis added.

“When an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception.” Steike v. SCDLLR, 336 S.C. 373 (S.C. 1999); Etheredge v. Richland School Dist. 1, 330 S.C. 447, 463 (Ct. App. 1998). In Etheredge, the trial court had originally granted summary judgment to the School District on several of the exceptions to the waiver of immunity under S.C. Code §15-78-60. In reversing the trial court, the Etheredge court specifically found:

Where an action is brought against a governmental entity for injuries or death allegedly caused to a student by the entity’s gross negligence in the exercise of its duty of supervision, protection and control of the students in its custody in accordance with subsection (25) of 15-78-60, all other subsections of 15-78-60 providing exceptions to the waiver of governmental immunity, must be read in light of subsection (25), which provides an exception to immunity where the governmental entity exercises its responsibilities or duties in a grossly negligent manner.

Etheredge at 463, 246, emphasis added. See Jackson v. S.C. Dept. of Corr., 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989).

As Plaintiff Doherty argued, *Etheredge* creates an “exception to the exception” by imposing the gross negligence standard on all exceptions if it is alleged that a student’s loss was suffered by the entity’s gross negligence. The complaint in this matter alleges gross negligence against Defendant CCU (*see* Complaint ¶¶12, 13, 19 & 20) in duties they owed Doherty, an admitted full-time student, alleging loss suffered on a campus that Defendant CCU controlled to the point of admittedly closing and reopening said campus to students like Doherty.

Notably, S.C. Code §15-78-60(25) does not contain the limiting “act” language Defendant CCU relies on so heavily in their argument. It simply states that if the duty owed to any student is “exercised in a grossly negligent manner,” then there is, as Doherty previously argued, an “exception to the exception.”

“Gross negligence is the intentional, conscious failure to do something which one ought to do or the doing of something which one ought not to do.” *Etheredge* at 454-455.

Since *Etheredge* states that the gross negligence “exception to the exception” applies, then Doherty has a valid claim even if the only conduct she alleged is the “conscious failure to do something which one ought to do.”

Defendant CCU argues that the Court does not need to look at S.C. Code §15-78-60(25) because “when the accident occurred, defendant was not supervising, protecting, or controlling the plaintiff/student who was merely walking to class on campus.” In support of this, Defendant CCU cited to the South Carolina Supreme Court’s decision in *Gardner v. Biggart*, 308 S.C. 331, 417 S.E.2d 858 (1992). However, in finding that the gross negligence standard of §15-78-60(25) did not apply to the defendant Department of Education in a bus accident, the *Gardner* court specifically noted that the State had been liable for bus accidents upon a showing of simple negligence since 1977, when the General Assembly had expressly waived sovereign immunity of

the State for bus transportation students. Gardner at 334, 860 (*citing* S.C. Code §59-67-765 (1990)).

“Gross negligence is a mixed question of law and fact and should be presented to a jury unless the evidence supports only one reasonable inference.” Etheredge at 462 (*citing to* Clyburn v. Sumter County Sch. Dist. #17, 317 S.C. 50, 451 S.E.2d 855 (1994) and Doe v. Orangeburg County Sch. Dist. No. 2, 329 S.C. 221, 495 S.E.2d 230 (Ct. App. 1997).

“Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care.” Hendricks v. Clemson Univ., 353 S.C. 449, 457, 578 S.E.2d 711, 714, *citing* Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991).

“While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken.” Wright v. PRF Real Estate Mgmt., 426 S.C. 202, 217, 826 S.E.2d 285, 293 (2019) (internal citations omitted). “The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder.” Id. at 217-218, 293 (*quoting* Miller v. City of Columbia, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997)).

Doherty’s factual allegations specifically pled that Defendant CCU changed their operating levels due to the severe winter conditions. It is a reasonable inference those actions were taken to “protect” students like Doherty. The specific allegations that Defendant CCU closed and reopened its campus due to the dangerous conditions creates a question of fact for a jury to consider as to whether or not Defendant CCU acted in a grossly negligent manner in supervising/protecting/controlling Doherty.

Defendant CCU argued at the hearing “snow and ice are different.” While that may be, so

are students. The South Carolina Tort Claims Act says they are different and South Carolina's Appellate Courts have said that difference gets read into every applicable exception in cases involving student's alleging loss due to the gross negligence of a school's duty to supervise, protect and control. This recognized difference is why Defendant CCU's reliance on the North Carolina case of Flynn v. N.C. State Highway and Public Works Comm'n, 244 N.C. 617, 94 S.E.2d 571 (N.C. 1956) is not persuasive. Stieke and Etheredge are controlling precedent on this Court, Flynn is not.

Taking the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, granting the Defendant's motion to dismiss for failure to state a claim would be improper. Clearwater Tr. v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).

I FURTHER FIND that the gross negligence standard of S.C. Code 15-78-60(25) applies and that Plaintiff Doherty has sufficiently pled gross negligence against Defendant CCU to deny their motion to dismiss.

III. The discovery to date shows a decision to grant Defendant CCU's motion to dismiss would be against judicial economy as fairness and justice would afford the Plaintiff the right to file an amended complaint in which she could easily cure the claimed deficiencies of her complaint.

Plaintiff Doherty argued that even if the Court found that Defendant CCU's 12(b)(6) motion should be granted, she should be given opportunity to file and serve and amended complaint. Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). In doing so, Plaintiff Doherty proceeded to argue extensively how evidence discovered to date presents material questions of fact that Defendant CCU took "actions" which led to her injury and were grossly negligent.

Plaintiff Doherty specifically noted she was filing her *Response in Opposition to Defendant's 12(b)(6) Motion to Dismiss* well before the hearing date (*Response* filed February 5, 2021, hearing date March 2, 2021) and was doing so as a request that if the Court did not believe the allegations of her complaint and reasonable inferences drawn from those allegations were sufficient to deny Defendant CCU's motion, that the Court consider the matters outside the pleadings she provided through Sec. III of her *Response*. Defendant CCU chose not to provide any additional materials or file a reply to Sec. III of Plaintiff Doherty's response.

While the Court has made its findings above without considering any matters outside the pleadings, the Court wishes to address the fact it appears from the materials in section III that a granting of Defendant CCU's motion would have been against judicial economy. The Court believes that in the interest of doing substantial justice to all parties, a dismissal would have required allowing Plaintiff Doherty an opportunity to amend her complaint to cure any deficiencies.

It is reasonable to believe that the information contained in section III of Plaintiff Doherty's *Response* would have supported additional factual allegations she could make about both the "actions" Defendant CCU took (issuing "suspension of Operation," activating different Emergency Operating Levels, and the actual way CCU conducted inspections and treating of walkways during the severe winter conditions at the time Doherty's loss) and CCU's alleged gross negligence (internal communications showing the CCU had identified that specific weather conditions increased the possibility of the specific hazard that led to Doherty's loss, that CCU had identified proper actions to take to protect students like Doherty from that specific hazard, that CCU had in fact taken those protective actions at one point during such specific conditions, but did not take the same actions on the day that Doherty suffered her loss despite the same

conditions existing, instead taking action to return to a normal operating level that did not include the protective actions they had previously utilized).

It is highly likely an amended complaint would have only bolstered the Court's findings above. While information outside the pleadings was not considered in denying the motion, the Court is satisfied that denying the motion to dismiss is not only correct, but it is also the most judicially economical decision.

Having made the findings above, the Court finds that Defendant CCU's motion to dismiss is denied.

IT IS SO ORDERED!

(E-Signature Page to Follow)

