

**STATE OF MISSISSIPPI  
CIRCUIT COURT OF HARRISON COUNTY  
FIRST JUDICIAL DISTRICT**

DEAN E. KELLY and LAUREN M. BRUNELLE,

Plaintiffs,

vs.

KENAN BEL BUCHERT, MISSISSIPPI DEPARTMENT OF  
TRANSPORTATION, GRANITE CONSTRUCTION, INC.,  
et al.

Defendants.

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Case No.: A2401-09-369

**CONSOLIDATED FOR ALL PURPOSES WITH:**

JOSHUA DRIGHT,

Plaintiff,

vs.

MISSISSIPPI DEPARTMENT OF TRANSPORTATION AND  
COUNTY OF HARRISON, MISSISSIPPI TRANSPORTATION  
COMMISSION, GRANITE CONSTRUCTION COMPANY,  
et al.,

Defendants.

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Case No.: A2401-09-377

**CONSOLIDATED FOR ALL PURPOSES WITH:**

BRANDON ALEXANDER,

Plaintiff,

vs.

MISSISSIPPI DEPARTMENT OF TRANSPORTATION AND  
COUNTY OF HARRISON, MISSISSIPPI TRANSPORTATION  
COMMISSION, GRANITE CONSTRUCTION COMPANY,  
et al.,

Defendants.

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Case No.: A2401-09-378

**CONSOLIDATED FOR ALL PURPOSES WITH:**

KENAN BEL BUCHERT,

Plaintiff,

vs.

MISSISSIPPI DEPARTMENT OF TRANSPORTATION,  
GRANITE CONSTRUCTION COMPANY, et al.

Defendants.

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Case No.: A2401-10-32

**CONSOLIDATED FOR ALL PURPOSES WITH:**

EDWARD VINCENT BRADLEY,

Plaintiff,

vs.

KENAN BEL BUCHERT,

Defendant.

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Case No.: A2401-09-370

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**POWELL CONSTRUCTION SERVICES, INC.'S  
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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COMES NOW, POWELL CONSTRUCTION SERVICES, INC. ("PCS"), a defendant in the above styled cause, by and through counsel, and hereby submits the following brief in support of its Motion for Summary Judgment:

**SYNOPSIS**

This lawsuit is a consolidated personal injury action arising out of an October 26, 2008 night-fishing trip that ended when the boat hit the Bay St. Louis Bridge. The plaintiffs allege that PCS and others are liable for their injuries and damages because certain lights on the bridge were not illuminated on the night in question. This brief will demonstrate PCS's blamelessness for two reasons: PCS accomplished the job it was hired to do, thus breaching no

duty; and the unusual circumstances leading to the wreck preclude a finding of legal causation – as a matter of law.

PCS did not design, construct, maintain or control the Bay St. Louis Bridge, or the bridge's lighting system. PCS's role was limited to certain repairs of the lighting system following Hurricane Gustav. The plaintiffs contend that PCS failed to timely inspect and/or timely repair the bridge lights. Undisputed facts will show that PCS accomplished the scope of work for which MDOT engaged PCS.

Additionally, the plaintiffs cannot establish proximate causation because boat operator, Kenan Bel Buchert attempted to pass underneath the Bay St. Louis Bridge with full knowledge that (1) the bridge was up ahead, (2) the navigation lights over the channel were not illuminated and (3) his heading was based on a previous GPS course through the bridge in a location far from the channel. "Far from the channel" means 1½ football fields away. Basically, Mr. Buchert was not attempting to pass through the channel when he hit the bridge. Therefore, the context of the accident shows the navigation lights to be a pretext for the lawsuit.

## **NARRATIVE STATEMENT OF UNDISPUTED FACTS**

### **The Boat Accident**

1. On or about September 1, 2008, Hurricane Gustav struck the Gulf Coast and knocked out the lights at the Bay St. Louis Bridge (see Plaintiffs' Complaints and Affidavit of Kelly Castleberry).

2. On October 26, 2008, a boat owned and operated by defendant Kenan Bel Buchert struck the Bay St. Louis Bridge (see Plaintiffs' Complaints). On board the boat at the time of the accident were plaintiffs Dean E. Kelly, Lauren Brunelle, Joshua Dright, Brandon Alexander and Edward Vincent Bradley (see Plaintiffs' Complaints).<sup>1</sup>

3. Mr. Buchert was operating his GPS-equipped 21-foot fishing boat that had a 150 horsepower Yamaha (Deposition of Kenan Bel Buchert at pages 32-36). Mr. Buchert and his party were out on a night-fishing excursion (Deposition of Lauren Brunelle at pages 81-82).

4. The party fished for 45 minutes to an hour north of the Bay St. Louis Bridge, fishing around pier lights (Deposition of Kenan Bel Buchert at pages 68-69 and 72-73; Deposition of Lauren Brunelle at pages 75 and 77). It was very dark (Deposition of Kenan Bel Buchert at pages 68-69). They decided to go fish under the lights at the train bridge (located south of the Bay St. Louis Bridge) (Deposition of Lauren Brunelle at pages 81-82).

5. As the party motored south toward the Bay St. Louis Bridge, the lights along U.S. Highway 90 over the bridge were illuminated (Deposition of Kenan Bel Buchert at pages 86-87 and 270-271; Deposition of Edward Bradley at pages 58-59; Deposition of Officer Scott Saucier at 18-19, 54-58, 73-76 and 141-144).

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<sup>1</sup> There was one other occupant in the boat but not listed here because she is not a party to this

6. The channel in the Bay of St. Louis passes underneath the Bay St. Louis Bridge at the rise in the bridge (Deposition of Edward Bradley at pages 60-61). Mr. Buchert was able to observe the rise in the Bay St. Louis Bridge from afar (Deposition of Kenan Bel Buchert at pages 86-87 and 92-95).

7. Mr. Buchert observed that the red and green navigation lights - located below the rise in the bridge and above the channel - were not illuminated (Deposition of Kenan Bel Buchert at pages 92-93).

8. As of 10:00 p.m., Mr. Buchert did not expect the bridge's decorative column lights or necklace lights to be illuminated, as they were on a timer and automatically shut off at that time each night (Deposition of Kenan Bel Buchert at pages 218-221; Deposition of Officer Scott Saucier at page 54-58; Affidavit of Kelly Castleberry; Affidavit of Lemon Sullivan).

9. As the party approached the Bay St. Louis Bridge, the purpose was to go fish under the train bridge lights (Deposition of Lauren Brunelle at pages 81-82). There was no emergency that compelled the party to go through the Bay St. Louis Bridge in the dark (Deposition of Kenan Bel Buchert at pages 205-206).

10. Though the navigation lights were not illuminated, the Bay St. Louis Bridge did not take Mr. Buchert by surprise (Deposition of Kenan Bel Buchert at pages 217-218). Mr. Buchert was looking for the bridge and could see the bridge by virtue of the illuminated lights along U.S. Highway 90 above

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consolidated action.

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the bridge (Deposition of Kenan Bel Buchert at pages 86-87). Mr. Buchert knew the Bay St. Louis Bridge was in front of him (Deposition of Kenan Bel Buchert at page 226).

11. With the knowledge that the navigation lights were not illuminated, prior to the party reaching the Bay St. Louis Bridge they had time to slow down, stop or turn around (Deposition of Kenan Bel Buchert at pages 214-215).

12. Instead, Mr. Buchert pressed on and decided to pass under the Bay St. Louis Bridge at an opening other than the channel (Deposition of Kenan Bel Buchert at pages 211-213, 230 and 272-273).

13. Due to the darkness, Mr. Buchert was relying upon and following his Lowrance GPS and a GPS-generated course from a previous trip (Deposition of Kenan Bel Buchert at pages 84-85 and 226-227).

14. Though his GPS also showed a GPS-generated course under the bridge through the channel, Mr. Buchert did not attempt to pass in the channel (Deposition of Kenan Bel Buchert at pages 211-213, 228-229 and 272-273). Mr. Buchert made no effort to pass under the highest part of the Bay St. Louis Bridge (i.e., at the channel) (Deposition of Edward Bradley at page 61).

15. The 44-year-old Buchert was an experienced boater, having fished those same waters since age 8 (Deposition of Kenan Bel Buchert at pages 21-23 and 26-29). Mr. Buchert was a commercial crab fisherman and had made at least 300 to 500 trips under the Bay St. Louis Bridge (since it had been built

following Hurricane Katrina in 2005) (Deposition of Kenan Bel Buchert at pages 26-29 and 78-79).

16. Between 10:30 and 11:00 p.m., the fishing party struck the Bay St. Louis Bridge (Deposition of Brandon Alexander at pages 63-64; Deposition of Lauren Brunelle at pages 57-58 and Deposition of Joshua Dright at page 87). The boat struck column 41 under the bridge (Deposition of Kenan Bel Buchert at pages 98-99). Officer Scott Saucier received the call from dispatch at 10:48 p.m. (Deposition of Officer Scott Saucier at 22-24).

17. Mr. Bradley summed it up when he testified:

“It was just the most obvious thing in the world. We all knew we were coming up on the bridge.”

(Deposition of Edward Bradley at page 128).

### **The Accident Location**

18. On March 30, 2012, PCS's William E. Powell visited the accident site (Affidavit of William E. Powell). Mr. Powell is an estimator and project manager for PCS (Affidavit of William E. Powell). Using coordinates provided by Mississippi Department of Marine Resources and a hand-held GPS device, Mr. Powell located the column that Mr. Buchert struck on the night of the accident (Affidavit of William E. Powell).

19. Marked with a white “X” is the column nearest the coordinates provided by the Department of Marine Resources (Affidavit of William E. Powell and Exhibit B attached thereto). Officer Scott Saucier confirmed that Column

X was the column that Mr. Buchert struck (Deposition of Officer Scott Saucier at page 13-14). Column X is the third column east of the center line of the channel below the Bay St. Louis Bridge (Affidavit of William E. Powell). Column X is the same as column 41 (Deposition of Officer Scott Saucier at pages 13-14).

20. Exhibit C attached to Mr. Powell's affidavit is a photograph of the column marked with a white "1", the first column west of Column X (Affidavit of William E. Powell).

21. Exhibit D attached to Mr. Powell's affidavit is a photograph of the column marked with a white "2", the second column west of Column X (Affidavit of William E. Powell). Column 2 also is the east side channel column (Affidavit of William E. Powell).

22. Exhibit E attached to Mr. Powell's affidavit is a photograph of the column marked with a white "3", the third column west of Column X (Affidavit of William E. Powell). Column 3 also is the west side channel column (Affidavit of William E. Powell).

23. Exhibit A attached to Mr. Powell's affidavit is a photograph depicting a wider view of the Bay St. Louis Bridge (Affidavit of William E. Powell). The photograph was shot north of the Bay St. Louis Bridge looking to the south (Affidavit of William E. Powell). Exhibit A shows the train bridge in the background (Affidavit of William E. Powell). On Exhibit A, the raised section of the train bridge is located between Column X and Column 1



(Affidavit of William E. Powell).

24. HNTB Corporation was the design subcontractor to Granite-Archer Western, A Joint Venture, to design the Bay St. Louis Bridge following Hurricane Katrina (Affidavit of Frank Blakemore). Frank Blakemore was Project Manager for bridge design (Affidavit of Frank Blakemore).

25. Attached to Mr. Blakemore's affidavit as Exhibits A and B are copies of pages from the Final Plans of Completed Work for the Bay St. Louis Bridge project. Exhibit A is a cover sheet. Exhibit B is the General Plan and Elevation sheet depicting a bird's eye view and an elevation view for the spans of Bay St. Louis Bridge from column 37 to column 42. In addition, Exhibit B depicts the following information:

- Column 38 is the column immediately to the west of the channel;
- Column 39 is the column immediately to the east of the channel;
- Between columns 38 and 39 is a span of 250 feet;
- Between columns 38 and 39 is the center of the channel;
- Between columns 39 and 40 is a span of 200 feet; and
- Between columns 40 and 41 is a span of 151 feet and 3 inches.

Therefore, from the center of the channel to the center of column 41 there are 476 feet and 3 inches (Affidavit of Frank Blakemore).

### **The Bridge Lights After Hurricane Gustav**

26. Kelly Castleberry is the Gulf Coast Regional Engineer with the Mississippi Department of Transportation ("MDOT") (Affidavit of Kelly

Castleberry). In 2008, Mr. Castleberry's responsibilities included overseeing all road and bridge construction, including lighting in the Gulf Coast Regional District (Affidavit of Kelly Castleberry).

27. MDOT has control of and maintenance responsibility for the Bay St. Louis Bridge and its lighting system, to include highway lights, navigation lights and the decorative column lights (Affidavit of Kelly Castleberry; Affidavit of Lemon Sullivan). That was also the case following Hurricane Gustav in 2008 up to and through the present date (Affidavit of Kelly Castleberry; Affidavit of Lemon Sullivan).

28. In 2008, the Bay St. Louis Bridge had decorative column lights that were controlled by a timer so they turned on and off at set times (Affidavit of Kelly Castleberry). The decorative lights were not mandated by any statute, rule or regulation (Affidavit of Kelly Castleberry). At the time Hurricane Gustav knocked out the decorative column lights on the bridge, the decorative column lights were set to go off every night at 10:00 p.m. (Affidavit of Lemon Sullivan). Because the decorative column lights were on a timer, had they been working as of October 26, 2008, they would have gone off at 10:00 p.m. (Affidavit of Lemon Sullivan).

29. Following Hurricane Gustav, MDOT called on PCS to help restore the navigation lights at the Bay St. Louis Bridge and to quote the removal and replacement of the electrical control panels (Affidavit of Kelly Castleberry; Affidavit of Lemon Sullivan).

30. PCS came on site and got the navigation lights and highway lights working in September 2008 (Affidavit of Kelly Castleberry; Affidavit of Lemon Sullivan). However, it took some time to get the control panels quoted, approved, ordered, designed, fabricated, shipped and installed (Affidavit of Kelly Castleberry; Affidavit of Lemon Sullivan). From the time PCS got the bridge's navigation lights and highway lights working in September 2008 until the night of the boat accident on October 26, 2008, MDOT had not received any notice that the navigation lights had stopped working (Affidavit of Kelly Castleberry; Affidavit of Lemon Sullivan).

#### **The Chronology and Scope of Lighting Repairs**

31. On or about September 16, 2008, MDOT contacted PCS with the following verbal scope of work: (a) to get the navigation lights back on at the Bay St. Louis Bridge and (b) to quote the removal of the existing electrical control panels and their replacement with new control panels in different locations (Affidavit of William E. Powell).

32. The then-existing control panels contained components that were highly corroded and damaged (Affidavit of William E. Powell). MDOT did not hire PCS to get the decorative lights or column lights back on (Affidavit of William E. Powell). Nor did PCS undertake to get the decorative lights or column lights back on (Affidavit of William E. Powell).

33. On September 16, 2008, PCS arrived on site and began work (Affidavit of William E. Powell). On that date, PCS got highway lights and the

navigation lights working at the Bay St. Louis Bridge (Affidavit of William E. Powell). Permanent repairs could not be made until the removal and replacement of the damaged control panels (Affidavit of William E. Powell). However, when PCS left the site on September 19, 2008, the highway lights and navigation lights were working (Affidavit of William E. Powell).

34. Also on September 16, 2008, Mr. Powell met Chad Martin of Stuart C. Irby Company (“Irby”) on site (Affidavit of William E. Powell). PCS called on Irby to source the new electrical control panels (Affidavit of William E. Powell).

35. From September 19, 2008 through October 26, 2008 (the date of the accident), MDOT never notified PCS: (a) that roadway lights were not functioning; (b) that navigation lights were not functioning; or (c) that further repairs were needed prior to the permanent installation of new electrical control panels (Affidavit of William E. Powell).

36. On or about October 15, 2008, PCS submitted its proposal to MDOT for the relocation and replacement of two secondary power controllers at the Bay St. Louis Bridge on the east and west sides (PCSI 0018-0019) (Affidavit of William E. Powell).

37. On or about October 23, 2008, MDOT accepted PCS’s October 15, 2008 proposal (Affidavit of William E. Powell). By that date, MDOT had not given PCS any indication that the highway lights or navigation lights at the Bay St. Louis Bridge were not illuminated (Affidavit of William E. Powell). For all PCS knew, the highway lights and navigation lights were illuminated as they

had been on September 19, 2008 (Affidavit of William E. Powell). MDOT had not hired PCS to maintain the lighting system at the bridge (Affidavit of William E. Powell).

38. On or about October 23, 2008, PCS submitted its purchase order to Irby for the two electrical controllers (PCSI 0023) (Affidavit of William E. Powell).

39. The boat wreck happened three days later (See Plaintiffs' Complaints).

40. On January 20, 2009, PCS began site work for the placement of the two new control panels (Affidavit of William E. Powell).

41. According to Irby's invoice, the two new control panels shipped on March 17, 2009 (PCSI 0031) (Affidavit of William E. Powell).

42. On March 18, 2009, PCS set the two new control panels in place on the east and west sides of the Bay St. Louis Bridge (Affidavit of William E. Powell).

43. By March 25 and March 26, 2009, PCS had completed the installation of the two new electrical control panels (Affidavit of William E. Powell).

44. Chad Martin is a Sales Specialist with Stuart C. Irby Company in Gulfport, Mississippi (Affidavit of Chad Martin).

45. Following Hurricane Gustav, PCS called on Irby to source and provide equipment for the lighting repair project at the Bay St. Louis Bridge

(Affidavit of Chad Martin). In September 2008, Mr. Martin met with PCS on site to see what was involved and to get started (Affidavit of Chad Martin).

46. After meeting Mr. Powell on site, Irby contacted South Coast Electric Systems, LLC ("South Coast") of Pearlington, Mississippi as a vendor for the light control panels for the Bay St. Louis Bridge project (Affidavit of Chad Martin).<sup>2</sup> On September 23, 2008, South Coast responded to Irby and provided a quotation for the light control panels (Exhibit A, IRBY 0001-0007) (Affidavit of Chad Martin). South Coast proposed to provide approval drawings within one to two (1-2) weeks after receiving an order for the equipment (Exhibit A, IRBY 0002) (Affidavit of Chad Martin). That means that once Irby placed the order with South Coast, South Coast would provide drawings within one to two (1-2) weeks to be approved by others (Affidavit of Chad Martin). Further, South Coast proposed to deliver the light control panels within six to seven (6-7) weeks after the return of approval drawings (Exhibit A, IRBY 0002) (Affidavit of Chad Martin). That means that once South Coast's drawings were approved by others and returned to South Coast, South Coast would fabricate and deliver the light control panels within six to seven (6-7) weeks (Affidavit of Chad Martin).

47. On September 24, 2008, based on South Coast's quotation from the day before, Irby submitted to PCS a quotation for two light control panels for the Bay St. Louis Bridge project (Exhibit A, IRBY 0008-0010) (Affidavit of

Chad Martin).

48. On or about October 23, 2008, Irby received PCS's Purchase Order for the two light control panels (or SPC controllers) for the Bay St. Louis Bridge project (Exhibit A, IRBY 0011) (Affidavit of Chad Martin).

49. On October 24, 2008, in response to PCS's Purchase Order, Irby forwarded a Purchase Order to South Coast for the two light control panels, with instructions to hold off on fabrication until drawings were approved (Exhibit A, IRBY 0012) (Affidavit of Chad Martin).

50. South Coast failed to provide the requested drawings or submittals (Affidavit of Chad Martin). By December 2008, Irby had contacted Myers Power Products ("Myers") to design and fabricate the two (2) Light Control Panels (Exhibit A, IRBY 0013-0016) (Affidavit of Chad Martin).

51. Myers provided quotations dated January 6, 2009 and January 7, 2009 for the light control panels (Affidavit of Chad Martin). Both quotations include standard lead times of six to eight (6-8) weeks "ARO" (Exhibit A, IRBY 0020-0023) (Affidavit of Chad Martin). That means Myers proposed to deliver the light control panels within six to eight (6-8) weeks after release of order (Affidavit of Chad Martin).

52. Attached as Exhibit A, IRBY 0031 is a Myers drawing with a handwritten signature indicating Mississippi Power Company's approval (Affidavit of Chad Martin). Irby received that drawing signed by Mississippi Power

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<sup>2</sup> For clarification, PCS also refers to the light control panels as "SPC controllers" (Exhibit A, IRBY 0011).

Company on January 15, 2009, and then directed Myers to release the order “as is” for immediate shipment (Exhibit A, IRBY 0032) (Affidavit of Chad Martin). Attached as Exhibit A, IRBY 0033-0035 is a copy of Irby’s Purchase Order to Myers for the two light control panels, directing Myers to release for immediate production and shipment (Affidavit of Chad Martin).

53. Irby’s invoice dated March 17, 2009, to PCS reflects a ship date of March 17, 2009 for the two light control panels from Myers (Exhibit A, IRBY 0038-0039) (Affidavit of Chad Martin).

### **LAW AND ARGUMENT**

Rule 56(c) of the *Mississippi Rules of Civil Procedure*

“allows summary judgment where there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law. When reviewing a decision to grant summary judgment, this Court will conduct a de novo review. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993); *Short v. Columbus Rubber & Gasket Co.*, 535 So. 2d 61, 63 (Miss. 1988). Evidentiary matters are viewed in a light most favorable to the non-moving party. *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993); *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So. 2d 1346, 1354 (Miss. 1990). However, where the party opposing the motion for summary judgment on a claim or defense upon which it bears the burden of proof at trial, and the moving party can show a complete failure of proof on an essential element of the claim or defense, other issues become immaterial and the moving party is entitled to summary judgment as a matter of law. *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413, 416 (Miss. 1988); *Galloway et al. v. The Travelers Insurance Co., et al.*, 515 So. 2d 678 (Miss. 1987); *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-24, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265, 273 (1986).”

*Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1188-89 (Miss. 1994).



In order to establish their negligence cause of action against PCS, the plaintiffs must prove that PCS owed them a duty, that PCS breached that duty and that the breach proximately caused their damages. *Rolison v. City of Meridian*, 691 So. 2d 440 (Miss. 1997). PCS will demonstrate that it breached no duty owed to the plaintiffs for the following reasons:

- PCS timely inspected the navigation lights at the Bay St. Louis Bridge once called upon by MDOT.
- PCS made timely temporary repairs prior to the boat wreck, permanent repairs being impossible until long after the boat wreck.
- MDOT never hired PCS to perform daily or weekly inspections or maintenance of the bridge lighting system. Nor was PCS ever called back out or notified because of problems with the temporary repairs.

Thereafter, PCS will demonstrate that the plaintiffs cannot establish proximate causation.

### **No Breach of Duty**

Following Hurricane Gustav, MDOT called upon PCS to do two things at the Bay St. Louis Bridge: to get the navigation lights back on and to quote the removal and replacement of two control panels at the bridge. Following the September 1, 2008 hurricane that damaged the bridge's lighting system, PCS first met MDOT on site on September 16, 2008. On that day, PCS got the navigation lights back on. Between September 16 and September 19, 2008,

PCS continued making temporary repairs to the system. Also, PCS engaged an electrical vendor that ultimately sourced and provided the new electrical control panels. When PCS left the site on September 19, 2008, the roadway lights along U.S. Highway 90 and the navigation lights above the channel were illuminated.

Thereafter began the lengthy process required for the proposal, acceptance, ordering, designing, approval, fabrication, shipment and installation of the two new electrical control panels at the bridge. Until that process could be finished, no permanent repairs were possible at the Bay St. Louis Bridge. One vendor quoted a 7 to 9 week turnaround period for the new equipment. Another vendor quoted a 6 to 8 week turnaround period for the new equipment. Accordingly, just the design, approval, fabrication and shipment processes would take approximately 8 weeks. Over 2 weeks were needed for the electrical vendor to make its proposal and for MDOT to approve PCS's proposal. Even if it only took PCS an additional 2 to 4 weeks to prepare its proposal, to prepare the site for the new equipment and to ultimately install the equipment once delivered, the whole process would require at least 12 weeks - - if everything went without a hitch.

The facts in hindsight show that there were only 37 days between September 19, 2008 (when PCS completed its temporary repairs and the navigation lights were illuminated) and October 26, 2008 (the date of the accident). Plaintiffs' use of 56 days as a reason to criticize PCS is unfair and

not supported by the evidence. MDOT did not call PCS the moment Hurricane Gustav's winds quieted and the second the waves receded on September 1, 2008. Even if we used the plaintiffs' unfair 56-day number, still there was insufficient time to remove, replace and relocate the control panels and to make the permanent repairs.

Again, the accident occurred 37 days after temporary repairs were made. The accident occurred 3 days after MDOT approved the proposal for the new equipment. As demonstrated, at least 84 days would be needed for permanent repairs. Tort law required of PCS the prudence of a reasonable contractor. The chronology indicates that PCS timely inspected and timely accomplished temporary repairs following MDOT's engagement of PCS after Hurricane Gustav. The chronology demonstrates the impossibility for PCS to have accomplished permanent repairs at the bridge prior to the boat accident.

The plaintiffs cannot blame PCS simply because on October 26, 2008, the navigation lights were not illuminated. PCS cannot be held strictly liable for the navigation lights merely by virtue of having come to the site to accomplish temporary repairs while awaiting new equipment. PCS was not hired to be the constant keeper of the bridge lights. PCS's duties were limited by the terms of MDOT's engagement and the circumstances at that time. PCS came onsite and found an electrical system that was badly damaged and corroded. Ultimately the control panels would have to be removed and replaced, but that would take some time. PCS was faced with a non-functional

electrical system. PCS did all that was asked of it under the circumstances.

By September 19, 2008, PCS had the highway lights and the navigation lights illuminated. That is undisputed. Thereafter, the highway lights continued to operate up to and through the date of the accident. According to the allegations, on the night of October 26, 2008, the navigation lights were not illuminated. When and why the navigation lights went out again no one knows. Whether it was September 20, 2008 or October 25, 2008, or on some date in between, no juror will be allowed to speculate. What is undisputed is that MDOT did not hire PCS to perform daily or weekly inspections or to perform maintenance on the lighting system. What is undisputed is that after September 19, 2008, PCS never received notice from MDOT that (1) the highway lights went out, (2) that the navigation lights went out or (3) that more temporary repairs were needed prior to installation of the new permanent equipment. For all PCS knew, on October 23, 2008, when MDOT approved the proposal for new electrical control panels, the highway lights and navigation lights were still illuminated. Over the course of the next three days, PCS had no reason to believe otherwise.

In summary, PCS accomplished temporary repairs to the navigation lights in a timely manner. The chronology shows that it was impossible to accomplish permanent repairs in the 37 days that existed prior to the accident. Finally, once PCS got the navigation lights back on in mid-September, PCS had no reason to believe that the temporary repairs were deficient or that more

work was necessary. Therefore, since PCS breached no duty owed to the plaintiffs, there can be no tort liability against PCS. Accordingly, the plaintiffs' negligence and wantonness claims against Powell Construction Services, Inc., are due to be dismissed as a matter of law.

### **No Proximate Causation**

Proximate causation contemplates reasonable foreseeability. *Rolison v. The City of Meridian*, 691 So. 2d 440, 444 (Miss. 1997). Tort law's requirement of ordinary care did not require that PCS foresee any "unusual, improbable or extraordinary occurrence." *Id.* Further, "[f]ailure to anticipate remote possibilities does not constitute negligence." *Id.* (citations omitted). The *Rolison* Court quoted *Mauney v. Gulf Refining Co.*, 193 Miss. 421, 9 So. 2d 780, 780-781 (1942), as follows:

"The rule is firmly established in this state, as in nearly all the common law states, that in order that a person who does a particular act which results in injury to another shall be liable therefor, the act must be of such character, and done in such a situation, that the person doing it should reasonably have anticipated that some injury to another will probably result therefrom, but that the actor is not bound to a prevision or anticipation which would include an unusual, improbable, or extraordinary occurrence, although such happening is within the range of possibilities. This rule is affirmed in one way or another in cases which will run into the hundreds in this state.

. . . .

Hence, the law must say, as it does that 'care or foresight as to the probable effect of an act is not to be weighed on jewelers' scales, nor calculated by the expert mind of the philosopher, from cause to effect, in all situations,' *Illinois Cent. R. Co. v. Bloodworth*, 166 Miss., page 618, 145 So. page 336; and that it would impose too

heavy a responsibility for negligence to hold the tortfeasor accountable for what was unusual and unlikely to happen, or for what was only remotely and slightly probable. . . . ‘A reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible.’”

691 So. 2d at 444 (citations omitted).

PCS denies breach of duty. Assuming *arguendo* breach of duty solely for the sake of this motion, PCS is not liable for “unusual, improbable, or extraordinary” occurrences, even if such occurrences may be “within the range of possibilities.” *Id.* It is always possible that a seasoned, late-night boater, having observed the upcoming bridge under the illuminated highway lights and having appreciated the absence of navigation lights over the channel, will disregard the safety of the 250-foot channel and plow ahead through a 150-foot opening located several blocks to the east. The world of possibility always will entertain that chance mariner who winks at the channel located under the highest point of the blazingly visible bridge, but then goes another way. The philosopher employing jeweler scales might reckon on the 40-year fishermen who, instead of shining his white Q-beam on column 39’s reflector, turns his hat around backwards and deliberately steers on another heading 1½ football fields away from the channel. However, the reasonably prudent contractor called out to make temporary repairs to navigation lights after another

hurricane is not required to consider and calculate such remote possibilities. The law did not expect Mr. Powell to wear a jeweler's loupe or a philosopher's tunic. MDOT did not call on a soothsayer.

The events of October 26, 2008 were unusual and extraordinary. Consider the speed of the boat and inattention required of Mr. Buchert to break his boat to pieces against column 41. Under conditions of darkness and without even the light of the moon, Mr. Buchert somehow drove his boat into a fixed object that was clearly in front of him. Lest the plaintiffs object that Mr. Buchert could not see column 41 due to the darkness, that much is admitted for purposes of this argument. Nevertheless, Mr. Buchert hit a visible bridge. Mr. Buchert saw the bridge by way of the highway lights up above, so he knew the bridge was there. Since Mr. Buchert knew the highway bridge was there, he knew the columns were right below. If you can see the vegetation of the trees, the trunks of the forest are right below. To see the one is to know the other is there.

Mr. Buchert knew the bridge was not supported by thin air, but by concrete columns every so many feet. Mr. Buchert knew that based on common sense, experience and observation. Indeed, Mr. Buchert was looking for the concrete columns even as he plowed into number 41. He knew the columns were right below the highly visible highway bridge which, according to Mr. Bradley, was "the most obvious thing in the world". In what can only be considered highly unusual and extraordinary, Mr. Buchert drove his boat

through the darkness right into a bridge support.

The improbability of the occurrence is highlighted when considered in light of Mr. Buchert's knowledge and deliberate choices. He saw the bridge up ahead with highway lights ablaze. He saw the navigation lights were out. At that moment there was more than enough time to slow, stop or turn around. Lest we forget, Mr. Buchert and his party were going to a fishing hole. They were not going to put out a fire, or to deliver Death Adder antivenom. Mr. Buchert's knowledge and deliberation are undisputed.

Next, Mr. Buchert decided not to search for the 250-channel below the highest point of the bridge which easily could have been found with a Q-beam striking the reflective tape on column 39. Instead, Mr. Buchert decided to rely upon his GPS instrument and his instinct. He decided to follow a previous electronic path that lead him through a 150-foot opening under the bridge. Our case is like the man who, instead of walking along an extra-wide path because it is unlit, chooses another narrower, never-lit path.

The navigation lights, when illuminated, assisted mariners in finding the channel. With full knowledge that the navigation lights were off, Mr. Buchert decided not to use the channel at all. Indeed, Mr. Buchert's GPS device had stored a course marking a previous trip through that 250-foot channel. Nevertheless, Mr. Buchert elected to take a detour through another passageway.



No one should imagine that Mr. Buchert tried to make the channel but missed it by a hair. No one can argue that Mr. Buchert was shooting for the 250-foot span but just missed his mark. No, Mr. Buchert elected to take a true detour. He struck the third column from the channel. Mr. Buchert struck a column that was 476 feet from the centerline of the channel. Not counting end zones, Mr. Buchert elected to take a detour over 1½ football fields away.

If Driver A's negligent operation of a vehicle blocks a thoroughfare, thus rendering the roadway inconvenient for other motorists, will a cause of action exist in favor of detouring Driver B who runs into a fixed object located three blocks away from Driver A's blocked thoroughfare? Of course not. Nor will the passenger of Driver B fare any better at law against Driver A. No, the passenger's only recourse is against his driver who struck the fixed object three blocks away.

The law does not permit liability to attach under scenarios as remote and unusual as ours. Proximate cause often is a question of fact for the jury. However, ours is no usual case. If there is no causal link between an omission of duty and an injury, there is no proximate causation. Where there is no evidence, proximate causation should not be left to the jury but should be answered by the court. *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1192 (Miss. 1994). The plaintiffs' lack of legal causation is as clear as a string of street lights burning over the bay on a moonless October night. Therefore, the claims against Powell Construction Services, Inc., are due

to be dismissed as a matter of law.

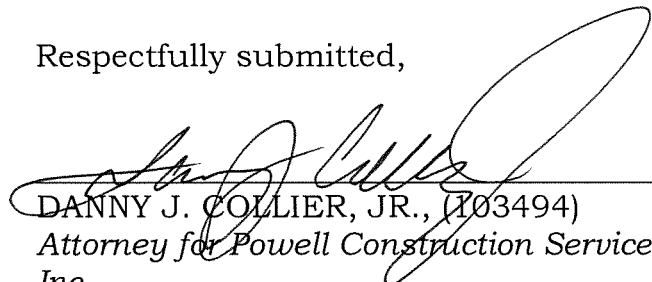
### **Irrelevance of the Decorative Lights**

The plaintiffs would complain that the Bay St. Louis Bridge's decorative lights were not illuminated at the time Mr. Buchert drove his boat into column 41. However, several reasons exist to make fast work of any such complaint. First, MDOT did not engage PCS to get the decorative lights working. PCS did not undertake to get the decorative lights back on. What MDOT hired PCS to do, PCS accomplished. Therefore, PCS had no duty as concerns the decorative lights on the date in question. Additionally, the decorative lights were merely ornamental and not required by law. They were set on a timer and went off every night at 10:00 p.m. The accident occurred between 10:30 p.m. and 11:00 p.m. Therefore, even if the decorative lights had been functional as of October 26, 2008, they would have been off before Mr. Buchert approached and struck column 41. For these separate and several reasons, the plaintiffs' negligence and wantonness claims against PCS are due to be dismissed with prejudice.

WHEREFORE, premises considered, POWELL CONSTRUCTION SERVICES, INC., respectfully asserts that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

### **ORAL ARGUMENT RESPECTFULLY REQUESTED**

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I do hereby certify that I have on this 19<sup>th</sup> day of July, 2012 served a copy of the foregoing pleading on counsel for all parties to this proceeding by:

- Electronic Court Filing
- United States mail, first class postage prepaid
- Electronic Mail
- Confirmed Facsimile
- Hand Delivery
- Overnight Courier

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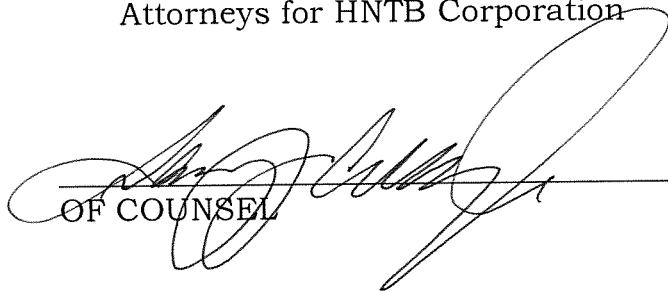
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