THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Debra R. McCaslin, Circuit Court Judge

Appellate Case No. 2022-000597

Case No. 2019-CP-32-01442

Suzan Garland, ... Respondent,

v.

Robert Cade, Christy Cade, and Roger Singleton ..... Defendants.

of whom

Robert Cade and Christy Cade are the Appellants,

and Roger Singleton is a Respondent.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR (1) IN GRANTING ROGER SINGLETON'S MOTION FOR A DIRECTED VERDICT WHEN THERE WAS NO EVIDENCE TO SUPPORT APPELLANTS' CLAIMS AGAINST HIM AND (2) IN DENYING APPELLANTS' MOTION FOR A DIRECTED VERDICT AS TO RESPONDENT WHEN THERE WAS EVIDENCE TO SUPPORT RESPONDENT'S CLAIMS AGAINST APPELLANTS?

2. DID THE TRIAL COURT ABUSE ITS DISCRETION IN REFUSING TO ALLOW THE JURY TO VIEW THE PROPERTIES AT ISSUE IN THIS CASE ALTHOUGH THERE WERE NUMEROUS PICTURES AND DRONE FOOTAGE IN THE RECORD AND THE REQUEST WAS THEREAFTER ABANDONED BY APPELLANTS?

3. DID THE TRIAL COURT ERR IN ALLOWING THE TESTIMONY OF RESPONDENT'S EXPERT, WILLIAM MATTHEWS, PE?

4. DID THE TRIAL COURT ERR IN SUBMITTING THE LEXINGTON COUNTY STORMWATER ORDINANCE TO THE JURY WHEN THE SUBMISSION WAS APPROVED BY APPELLANTS' COUNSEL?

5. DID RESPONDENT ESTABLISH THAT ANY CONDUCT ON THE PART OF APPELLANTS PROXIMATELY CAUSED HER HARM?

6. WAS THE JURY'S ACTUAL DAMAGE AWARD PROPER AND SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL?

7. DID THE TRIAL COURT ERR IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY?

STATEMENT OF THE CASE

Respondent Suzan Garland is a longtime resident of Lexington County. She owns thirteen acres of land off Fish Hatchery Road near the Airport in West Columbia. As is relevant to this case, there is a two-acre pond on Respondent's property. Appellants Robert and Christy Cade own property uphill from Respondent. Appellants cleared their property, which included the removal of thousands of trees, stumping, and grading. Appellants, despite consulting with an expert on the best practices for removing a significant number of trees on their property, took no actions to minimize the silt and debris from flowing downstream during the tree-removal process. The silt and debris ruined Respondent's pond.

Thereafter, Respondent brought this action against Appellants on April 11, 2019, asserting causes of action for gross negligence, trespass, and private nuisance. Appellants timely answered Respondent's Complaint.

Discovery revealed that Appellants intentionally and recklessly ignored advice from their own expert, and others, about siltation caused by their land-clearing activities, as well as best practices for mitigating such damage. Respondent subsequently amended her Complaint and added claims against Roger Singleton ("Singleton"). Singleton was primarily involved in repairing a dam on Appellants' property and cleaning up the debris left from the clear cutting. He was not hired for sediment and erosion control. Both Singleton and Appellants answered the Amended Complaint.

The parties engaged in pretrial discovery, and the case was mediated on July 20, 2021. At mediation, Respondent settled her claims as to Singleton for $62,500.00.

After mediation, Appellants filed a motion requesting leave from the Court to add claims against Singleton. Respondent, along with Singleton, filed a motion for court approval of the settlement negotiated at mediation. Appellants subsequently filed a motion to supplement their Third-Party Complaint to add cross claims against Singleton for breach of contract and negligence. These outstanding motions were heard by the Honorable H. Steven DeBerry IV ("Judge DeBerry"), on November 1, 2021. On November 4, 2021, Judge DeBerry issued his Order allowing Appellants' cross claims against Singleton.

Appellants subsequently filed their Third-Party Summons and Complaint against Singleton, who timely answered on January 6, 2022. Critically, the only two causes of action Appellants brought against Singleton were for breach of contract and negligence.

A jury trial was held before the Honorable Debra R. McCaslin ("Judge McCaslin") from March 28, 2022, until March 31, 2022. At the close of Respondent's case, Appellants moved for a directed verdict as to Respondent's causes of action for negligence, nuisance, trespass, and as to damages. The trial judge denied these motions.

At the close of all the evidence, Singleton moved for a directed verdict as to the breach of contract and negligence causes of action asserted by Appellants against him. The trial court granted Singleton's motion because no evidence existed that Singleton had breached a contract with Appellants or was negligent such that he breached any duty to Appellants.

Appellants also moved again for a directed verdict, and the trial court denied that motion. On March 31, 2022, the jury returned a verdict in favor of Respondent as to her

claims for negligence and nuisance against Appellants. The jury found for Appellants as to Respondent's claims for trespass. The jury awarded actual damages to Respondent of $125,000.00 as to her claim for nuisance. Based on the verdict form returned by the jury, no damages were awarded as to Respondent's negligence claim. The jury awarded Respondent $8,000.00 in punitive damages.

Appellants timely filed their motion for new trial, new trial *nisi*, and judgment *non obstante veredicto* (JNOV) on April 6, 2022. On April 22, 2022, Judge McCaslin issued her Order denying all Appellants' post-trial motions.

Appellants timely filed their Notice of Appeal on or about April 22, 2022.

FACTS

This is a pond siltation case. Respondent Suzan Garland ("Respondent") is an 82-year-old widow who owns thirteen acres of land off Fish Hatchery Road near the Airport in West Columbia. Tr. p6. 46-47, lines 22-6. Respondent and her late husband purchased the property in 1985, and they both lived there until his death in 2011. Tr. p. 47, lines 7-9. Respondent still lives there today. Tr. p. 316, lines 12-22. Located on the property is a two-acre pond that was built in the 1950s. Tr. p. 132, lines 3-11. The pond is in Respondent's front yard. Tr. p. 318, lines 8-9. Respondent and her late husband purchased the property in 1985 because it had a pond, and they both used it for recreational purposes. Tr. p. 317, lines 3-13. Respondent and her late husband meticulously maintained the pond to keep it healthy and attractive. Tr. pp. 75-78, lines 21-5. The pond was a great source of enjoyment for them. Tr. p. 317, lines 3-13.

In March 2018, Robert and Christy Cade ("Appellants") purchased a thirty-nine-acre tract of land (the "property") uphill from Respondent's pond. Tr. p. 454, lines 15-17; Tr. p. 288, lines 16-21. At the time of Appellants' purchase, the property was heavily wooded. Tr. p. 163, lines 9-12. Shortly thereafter, Appellants timbered, stumped, grubbed, and mass graded the property. Tr. p. 425, lines 17-20. Then, Appellants began to build structures on the property. Tr. p. 436, lines 2-10. The aforementioned clearing and construction were performed by both Appellants and other contractors and not Singleton. Appellants failed to obtain a land-disturbance permit for the aforementioned clearing and construction, nor did they effectuate any preventative measures (silt fences, stabilization, etc.) to prevent erosion from their property onto land downhill. Tr. p. 434, lines 12-14, Exhibit 10.

After a drought in the summer of 2018, rain began to pour in earnest during the month of October. Tr. p. 238, lines 17-23. In particular, on October 18, 2018, Respondent noticed her pond turn orange with mud. Tr. p. 320, lines 13-20. Respondent called Lexington County, who sent an inspector named Brandon Corder ("Mr. Corder") to investigate the damage to Respondent's pond and the potential causes. Tr. pp. 231-33, lines 2-7. Mr. Corder issued a report that same day, and Lexington County issued a Stop Work Order to Appellants. Tr. p. 237, lines 3-7. The Stop Work Order was removed five days later on October 23, Tr. pp. 246-47, lines 4-13, based on Appellants' commitment to Lexington County Director of Public Works Michael Spires that Appellants would stabilize the property. Tr. pp. 256-58, lines 6-16. Mr. Cade testified that the Lexington County Public Works Department issued a verbal stop work order in June, not October. Tr. p. 502, lines 4-6. Regardless, stabilization is a best management practice for erosion control that can prevent siltation off-site. Tr. p. 250, lines 5-1, Exhibit 10.

Appellants failed to stabilize their property after the Stop Work Order was lifted. Tr. p. 236, lines 17-25; Tr. pp. 249-50, lines 23-4. On November 27, 2018, Respondent sent a "Notice of Claim and Cease and Desist" letter to Appellants. Tr. pp. 516-17, lines 5-6.

On December 10, 2018, Appellants hired an engineer named Gerald Lee ("Mr. Lee") of Chao and Associates to assess the situation. Tr. p. 159, lines 19-25. Mr. Lee's field notes included the following statements concerning Appellants' failure to obtain a necessary permit for the tree cutting:

- "Don (sic) not put in report but mention to him: Spoke with Kim Swaggert with Lexington County and she said [Appellants] should have filed for a permit before [starting to build] the structures[.] [E]ven though [Appellants] called it a barn[,] it still required a land disturbance permit because [Appellants] introduced impervious areas." Lee Report, Garland Trial Ex. 10, p.34.
- "I did not have access to the downstream pond[,] so I cannot comment on the extent of the alleged impact. But my observations of the conditions of the discharge as it crossed under Davis Drive[,] I can only say that there potentially could be an impact and advised [Appellants of their] responsibility to protect downstream impacts even if a land disturbance permit is not required." Id.

Mr. Lee issued a report on December 12, 2018. Tr. p. 160, lines 4-7; Exhibit 10, Lee Report. Mr. Lee's written findings included the following:

- "The purpose of this report was to determine if the clearing of the property could be contributing to the alleged adverse impact to the pond downstream. The short answer is yes." Tr. p. 171, lines 11-14 (emphasis added).
- "[T]his is an environmental impact that directly affects the health of the pond." Tr. p. 173, lines 16-23.
- "A majority of the site drains directly into the wetlands below the pond with no sediment control measures in place to control the loss of soil." Lee Report, Garland Trial Ex. 10, p.8.

- "*To avoid litigation from the downstream property owner* you should work with the County to bring the site into a compliant and stable condition." Id. (emphasis added).

Despite Mr. Lee's written findings, Appellants aggressively refuted any wrongdoing and forcefully denied that they needed a permit. Tr. pp. 476-77, lines 24-9; Tr. p. 492, lines 2-19; Tr. pp. 518-19, lines 25-5. The record indisputably shows that Appellants were put on notice, numerous times, about the damage their actions, and inactions, were causing to Respondent's pond, yet Appellants intentionally and willfully ignored these notices, as shown by the following timeline:

- May 2018 — Appellants begin the land disturbance. Tr. p. 521, lines 18-19.
- June 2018 – Lexington County issues a verbal Stop Work Order (the "1st notice"). Tr. p. 502, lines 4-6.
- October 18, 2018 — Lexington County issues a written Stop Work Order from Lexington County after complaint and inspection by Mr. Corder (the "2nd notice") (Garland Exhibit 6). Tr. p. 237, lines 3-16.
- October 23, 2018 — Removal of written Stop Work Order by Lexington County (Garland Exhibit 8) stating, "Please move forward with the stabilization of the project site to eliminate offsite impacts." (the "3rd notice"). Tr. p. 246, lines 4-23.
- November 27, 2018 — Notice of Claim and Cease & Desist letter from Respondent to Appellants (Garland Exhibit 9) stating, "Please be advised that your negligent failure to stabilize your property after logging, stumping, and grading . . . violates Federal, State, County and Common Law. I am writing for two reasons: (1) to put you on notice of an environmental water quality and

property damage claim that I intend to file and (2) to instruct you to immediately take measures to cease and desist further discharges." (the “4th notice”). Tr. pp. 516-17, lines 11-6.

- December 12, 2018 — issuance of report from Mr. Lee reporting, "At the time of this observation the site remains in a disturbed state and no stabilization or sediment control is in place." This report demonstrates Appellants’ inaction after 4 notices over 7 months and refutes Appellants’ self-serving claims that they seeded the property and installed silt fences earlier. Further reporting, "To avoid litigation from the downstream property owner you should work with the County to bring the site into a compliant and stable condition." (the “5th notice”). Tr. pp. 164-65, lines 15-5; Tr. p. 584, lines 3-9.
- December 24-26, 2018 — After 5 notices over 8 months, Appellants finally sprig Bermuda grass, which by Appellants’ admission was the first and only thing they did to stabilize soil. Tr. p. 510, lines 15-16.
- February 2019 — Appellants claim Bermuda grass established Tr. p. 521, lines 3-11.
- April 11, 2019 – Respondent files lawsuit.

On several occasions since Respondent filed the lawsuit, including in July 2019, Appellants approached, videotaped, and intimidated Respondent. For example, Appellants put blue dye in the watershed draining into Respondent’s pond in July 2019. Tr. p. 375, lines 22-25.

In February 2019, and then again in December 2020, Respondent had her pond evaluated for sedimentation impacts. Bill Matthews (“Mr. Matthews”), a geotechnical

engineer from the firm of Bunnell Lammons in Greenville, performed the most recent evaluation, finding sediment deposits in the pond totaling 1,428 Cubic Yards. Tr. pp. 277-78, lines 24-5.

In April 2019, and then again in July 2021, Respondent obtained a sediment removal estimate from Heath Hanna of Contour Mining in Columbia. Tr. p. 119, lines 1-3. The cost to remove the sediment in today's dollars is $435,075.08. Tr. p. 119, lines 10-13.

When asked about the value of her real estate, Respondent testified as to a range of values applicable to her house. Appellants had sold about a third of an acre of their property to a neighbor for $10,000, (app. $30,000 per acre value), and a neighbor listed property comparable to Respondent's for $80,000 per acre ($400,000 for five acres). Tr. p. 334, lines 5-19. Because the two-acre pond had been ruined, the diminution in value of Respondent's property would be approximately $160,000 using an $80,000 per acre value. Thus, in that Respondent's property was thirteen acres, at an $80,000 an acre valuation, the total value of Appellant's property would be $1,040,000.

The sedimentation in Respondent's pond has now largely stopped, as Appellants' property is largely stabilized, grassed, and used as pasture land for their many heads of livestock. However, the sediment in Respondent's pond needs to be removed, and she is unable to use and enjoy her pond as she once did. Tr. p. 335, lines 16-23. Consequently, the pond has no value. Moreover, the pond is now filling up with undesirable algae and lily pads caused by Appellants' fertilization of their pasture and the feces that their livestock produce. Tr. pp. 77-82 lines 18-6.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED ROGER SINGLETON'S MOTION FOR A DIRECTED VERDICT BECAUSE THERE WAS NO EVIDENCE TO SUPPORT APPELLANTS' CLAIMS AGAINST HIM AND PROPERLY DENIED APPELLANTS' MOTION FOR A DIRECTED VERDICT AS TO RESPONDENT BECAUSE THE CLAIMS WERE DIFFERENT AND SUPPORTED BY EVIDENCE

At the end of the presentation of evidence, Singleton moved for a directed verdict against Appellants, who sued him for breach of contract and negligence. Because Appellants presented no evidence as to a breach of the contract (or any of the terms of the contract), and no evidence existed showing negligence by Singleton, the trial court granted Singleton's motion and directed a verdict in favor of him.

At the same time, Appellants moved for a directed verdict on Respondent's claims against them, apparently on the basis that if Singleton was dismissed from the lawsuit, then they should be too. The trial court denied Appellants' motion, pointing out that the claims of Respondent against Appellants were based primarily on the clearing of, and construction on, Appellants' land, which Singleton had nothing to do with.

When reviewing a motion for directed verdict or judgment notwithstanding the verdict, the appellate court applies the same standard as the circuit court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (2004). The evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. Minter v. GOCT, Inc., 322 S.C. 525, 527, 473 S.E.2d 67, 69 (Ct. App. 1996). A case must be submitted to the jury if more than one inference can be drawn from the evidence. Id. When reviewing a circuit court's granting or denial of a motion for directed verdict or JNOV, the appellate Court will reverse only when there is no evidence to support the ruling, or when the ruling is governed by an error of law. Austin v. Stokes–

Craven Holding Corp., 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010) (internal citation omitted).

In this case, Appellants failed to provide the trial court with evidence of a breach of contract or negligence. Appellant Christy Cade admitted that she had absolutely no problems with any of Singleton's work, and she had no idea if there was any evidence that Singleton did anything wrong. Tr. p. 482, lines 8-23. Appellant Robert Cade testified that he was satisfied with Singleton's work, and the only reason he sued Singleton was "because his lawyer told him to." Tr. p. 526, lines 11-24. He then admitted he had no evidence that Singleton did anything wrong. Tr. p. 527, lines 8-12.

Appellants argue that if Singleton is not liable to them, then Appellants are not liable to Respondent. This argument is misplaced. Appellants ignore that Singleton was not the only person that worked on Appellants' property. On page 14 of Appellants' brief, they state "Mr. Singleton testified that other than cutting trees or constructing the Appellant's farm buildings, he did all of the work on their property." To the contrary, this statement sums up the reason the trial court ruled in favor of Singleton and Respondent. As admitted by Appellants, most of the clearing work was not done by Singleton.

The record shows that: Appellants decided to use *other* persons/businesses to clear their land. Appellants decided to erect structures on their property. Appellants decided to ignore permitting requirements. Appellants ignored Lexington County at best and intentionally deceived Lexington County at worst. Appellants were the ones that harassed and threatened Respondent, not Singleton. Appellants decided not to stabilize

their property in a timely manner or take any steps to eliminate offsite impacts. These were all actions and inactions attributable to Appellants themselves, not to Singleton.

No evidence existed to show that Singleton breached any contract with Appellants. Nor was there any evidence of any actionable negligence by Singleton towards Appellants. At bottom, there is no reason, as between Singleton and Appellants, that Appellants' causes of action should stand, hence the reason the Court dismissed those claims.

On the other hand, Appellants' actions of cutting trees, constructing farm buildings, and failing to take proper measures – or any timely measures for that matter – to stabilize their property or take any measures to eliminate offsite impacts, were the exclusive result of Appellants actions and inactions. At trial, counsel for Singleton neatly summarized these indisputably facts when arguing in favor of a directed verdict: "[Appellants] did lots of things, Your Honor. They got permits [to build the house and other structures]. They maybe didn't get the right permits [in that they failed to get a land disturbance permit]. They had some other company come and clear the land. They decided what the buffer would be." Tr. p. 536, lines 14-21.

The report of Mr. Lee, the engineer hired by Appellants, is damning. As set forth in the statement of facts above, Mr. Lee reported the following to Appellants:

- "The purpose of this report was to determine if the clearing of the property could be contributing to the alleged adverse impact to the pond downstream. The short answer is yes." Tr. p. 171, lines 11-14 (emphasis added).
- "This is an environmental impact that directly affects the health of the pond." Tr. p. 173, lines 16-23.

- "A majority of the site drains directly into the wetlands below the pond with no sediment control measures in place to control the loss of soil." Lee's Report, Garland Trial Ex. 10, p.8.
- "*To avoid litigation from the downstream property owner* you should work with the County to bring the site into a compliant and stable condition." Id. (emphasis added).

A more detailed discussion of the damages proximately caused by Appellants is set forth below in Section V. Suffice it to say, though, the Court properly ruled on both directed verdict motions.

II. THE TRIAL COURT PROPERLY REFUSED APPELLANTS' REQUEST THAT THE JURY VIEW THE PROPERTIES AT ISSUE BECAUSE THERE WERE NUMEROUS PICTURES AND DRONE FOOTAGE IN THE RECORD AND THE REQUEST WAS THEREAFTER ABANDONED BY APPELLANTS.

Appellants moved to allow the jury to view Appellants' and Respondent's property. Tr. p. 344, lines 2-3. The trial court denied this motion, noting there were many photographs in evidence, including those taken by Mr. Lee, who had been hired by Appellants in the first place. Tr. p. 344, lines 4-19. Appellants' attorney then asked the trial court to postpone ruling on the motion until the following morning so that he could provide legal authority to support Appellants' motion, and the trial court agreed to revisit the issue. Tr. p. 344, lines 20-25. Appellants' counsel subsequently failed to produce any legal authority to the trial court. Thus, Appellants' arguments made in the briefing before this appellate court are the first instance of such arguments being made.

Moreover, a review of the record indicates Appellants' attorney intentionally abandoned his request for a site visit. Specifically, Appellants' attorney, after making the

motion for a site visit, introduced previously undisclosed drone footage and stated ". . . we're not gonna to take the jury out to your home to look at it . . . . " Tr. p. 467, 6-17. After Appellants introduced the previously undisclosed drone footage, there is no further mention of the motion in the record, as Appellants' attorney abandoned his request for a site visit. Therefore, the trial court did not err.

Regardless, either on the merits, or due to the abandonment by Appellants, the trial court properly denied Appellants' motion to view the property.

S.C. Code Ann. § 14-7-1320 provides that a request for a jury to view the place in question should be granted when "it appears to the court that such view is necessary to a just decision". Although jury views are permitted by statute in South Carolina, they are left to the discretion of the trial judge. Sturkie v. Constance, 309 S.C. 526, 424 S.E.2d 545 (Ct. App. 1992). The trial court's decision will not be reversed absent an abuse of discretion. Kincaid v. Landing Development Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).

In this case, there were numerous photographs and drone footage of the properties at issue. The seminal case on this issue, Sturkie, 309 S.C. at 528–29, 424 S.E.2d at 546, is instructive. In Sturkie, the plaintiff was a housecleaner who stepped on the corner of a rug, slipped, fell, and was injured. At trial, the plaintiff moved for the jury to view the premises, stating that the combination of the hardwood floor and the rug was a "critical operative fact". The court of appeals held that there was no abuse of discretion when the lower court denied the motion to view. The court of appeals found that there were several photographs of the scene admitted into evidence, as well as evidence that the hardwood floors were slick, and the rugs tended to slip. The court of

appeals noted that merely the fact that there is evidence to the contrary does not necessitate a jury view.

In this case, as noted above, there were hundreds of photographs entered into evidence, as well as drone footage, expert reports, and maps. There was no basis for a site visit at the time of Appellants' motion. Substantively, the trial court properly denied the motion.

Additionally, until after trial, Appellants abandoned the motion. Appellants asked for – and received – additional time to submit authority and allow the judge to revisit the issue. Instead, Appellants' attorney stated, while questioning one his clients, that they were not going to make a site visit. Apparently, as a trial strategy, Appellants decided to rely on previously undisclosed drone footage that was sprung on the trial court, Respondent, and Singleton.

Either substantively, or by virtue of abandonment of the request to view the property, there was no abuse of discretion by the trial judge.

III. THE TRIAL COURT PROPERLY ALLOWED TESTIMONY OF THE RESPONDENT'S EXPERT, WILLIAM MATTHEWS, PE, BECAUSE THE TESTIMONY WAS PROPER, AND THERE WAS NO CONTEMPORANEOUS OBJECTION TO IT.

Appellants complain on appeal about the testimony of Mr. Matthews, an expert witness for Respondent. The testimony was proper, and, because Appellants failed to contemporaneously object to its admission, they waived the right to object on appeal.

Expert qualification and admissibility of expert testimony are matters largely within the discretion of the trial judge. Creed v. City of Columbia, 310 S.C. 342, 426 S.E.2d 785 (1993); See also Love v. Gamble, 316 S.C. 203, 448 S.E.2d 876 (Ct. App.

1994) (the admission or exclusion of evidence, including the decision to qualify a witness as an expert, resides in the sound discretion of the trial judge).

Counsel waives the right to appeal the introduction of evidence if there is no objection to admissibility. Calcutt v. Calcutt, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984). Generally, questions concerning the admissibility or exclusion of evidence cannot be raised on appeal if there was no objection when the evidence is offered. Branton v. Martin, 243 S.C. 90, 132 S.E.2d 285 (1963). Cogdill v. Watson, 289 S.C. 531, 347 S.E.2d 126 (Ct. App. 1986).

The Court qualified Mr. Matthews as an expert witness in civil engineering and geotechnical engineering. Tr. p. 273, lines 17-25. Appellants did not object. Tr. p. 273, lines 20-23. Appellants did not voir dire the witness. The trial court informed the jury it was free to give Mr. Matthews testimony whatever weight it saw fit, and that the jury did not have to accept it. Tr. pp. 273-74, lines 24-3.

Respondent's attorney questioned Mr. Matthews, and Appellants' counsel did not object to any of the direct testimony given by Mr. Matthews. Tr. pp. 269-82, lines 21-6. On cross, Appellants elicited testimony about the expert's time sheets and implied that Respondent had withheld information in the expert's file. However, Respondent submitted everything he received from the expert, and nothing was withheld. Apparently, Appellants, after failing to take Mr. Matthews' deposition prior to trial, after failing to object to the testimony in a timely manner, after failing to voir dire Mr. Matthews, and after failing to subpoena Mr. Matthews' file, are attempting to shift blame and ask the court of appeals for a second bite at the apple. This request must be denied.

Appellants' brief states that Appellants' counsel raised the prejudicial nature of some of the testimony, but there was no objection to it at the proper time. Further, the documents complained about, the expert's time sheets, had nothing to do with the expert's opinions and testimony. It appears, as a matter of trial strategy, Appellants' counsel tried to discredit or attack the weight of Mr. Matthews' testimony by accusing him, during his direct examination, of being paid in exchange for his testimony, Tr. p. 299, lines 18-22; Tr. p. 311, lines 18-21, and making disparaging comments about Mr. Matthews throughout Appellants' closing argument. Tr. pp. 629-30, lines 20-5.

In sum, Appellants failed to subpoena Mr. Matthews' file and now complain they do not know what was in it. Appellants failed to depose Mr. Matthews and now complain they were unaware what his testimony would be. Appellants failed to voir dire Mr. Matthews and now complain he was allowed to testify as an expert witness. Most importantly, ostensibly as trial strategy, Appellants failed to object to any of Mr. Matthews testimony, instead attempting to undermine his credibility with a serious of blistering personal attacks that the jury seemingly ignored.

This Court should reject Appellants' argument because it is meritless.

IV. THE TRIAL COURT PROPERLY SUBMITTED THE LEXINGTON COUNTY STORMWATER ORDINANCE TO THE JURY BECAUSE APPELLANTS NOT ONLY FAILED TO OBJECT BUT ALSO SPECIFICALLY APPROVED ITS SUBMISSION.

Because Appellants' counsel approved the submission of the jury charge, this ground for appeal should be rejected.

Counsel must object to an instruction out of the hearing of the jury, and before they retire to consider a verdict, or the objection is waived. Rule 51, SCRCP; see also Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 232 S.E.2d 728 (1977) (a party who fails to

call error to the attention of the trial judge at the conclusion of the jury charge, and in absence of the jury, cannot later complain). Failure to object to a jury charge makes it the law of the case. Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994) (where there is no objection to a jury charge, it is the law of the case); Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994)

Appellants imply that the trial court erred in denying their motion for directed verdict on the applicability of the Stormwater Ordinance in question. Using the standard recited above, that the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party, Minter v. GOCT, Inc., 322 S.C. 525, 527, 473 S.E.2d 67, 69 (Ct. App. 1996), the trial court properly denied Appellants' motion.

Lexington County Code of Ordinances # 16-04 (the "Stormwater Ordinance") reads in pertinent part:

> Sec. 1-5(a) states that the purpose of the Stormwater Ordinance is "to protect, maintain, and enhance water quality and the environment of Lexington County and the short- and long-term public health, safety, and general welfare of the citizens of Lexington County and minimize property damage by establishing requirements and procedures to control the potential adverse effects of increased stormwater runoff and related pollutant loads associated with both future development (including re-development) and existing developed land."
>
> Sec. 3-2 of the Stormwater Ordinance provides that "No person shall (1) develop any land …or (5) otherwise promote and/or allow the transport of sediment or other pollutants associated with stormwater runoff beyond property boundaries without have provided for compliance with this Ordinance and all other applicable State and Federal regulations."
>
> Sec. 3-4 of the Stormwater Ordinance requires that all land-disturbance activities be proceeded by the submittal and approval of a Land Disturbance Permit Application.

> Sec. 6-3(a) of the Stormwater Ordinance authorizes the Director of Public Works to "issue a stop work order if it is found that a land-disturbance activity is being conducted in violation of this Ordinance."
>
> Sec. 3.2 of the Stormwater Ordinance exempts three categories of land disturbance activities: (a) land disturbance activities undertaken on forestland for the production and harvesting of timber and timber products conducted in accordance with best management practices and minimum erosion protection measures established by the South Carolina Forestry Commission; (b) agricultural land disturbances that disturb less than one acre; and (c) agricultural land disturbing activities that disturb more than one acre and do not create new impervious surfaces.

Taking the evidence in the light most favorable to Respondent, sufficient evidence existed to so show that the Stormwater Ordinance applied. First, Mr. Lee, who was an expert hired by Appellants, when questioned about the Stormwater Ordinance, testified that Appellants had failed to obtain the proper permits. Lee Report, Garland Trial Ex. 10, p. 34. Second, Mr. Corder, who worked for Lexington County, testified that he observed impervious surfaces and disturbed land, which would place the Appellants' property within the context of the Stormwater Ordinance. Tr. p. 232, line 21 through 233, line 2. Third, there was some confusion about why the Stop Work Order was lifted, but there was testimony the main reason it was lifted was due to Appellants' promise to stabilize the property, which they failed to do. Tr. p. 246, lines 4-23; Tr. p. 247, lines 9-13; Tr. pp. 256-58, lines 6-24; Tr. p. 236, lines 17-25; Tr. pp. 249-50, lines 23-4. Fourth, although Appellants' attorney argued there was no conflicting testimony about the applicability of the Stormwater Ordinance, the trial court disagreed, with Judge McCaslin noting that much of the county testimony "skimmed over" whether the Stormwater Ordinance applied or not. Tr. p. 389, lines 14-18. The trial court then found persuasive the testimony that the only reason the Stop Work Order was lifted was a direct result of

promises made by Appellants and left the applicability of the Stormwater Ordinance in the hands of the jury.

In any case, Appellants' attorney waived this argument by consenting to the jury charge. First, Appellants' counsel believed the Stormwater Ordinance spoke for itself, and as part of an overall objection to any witness making conclusions about its applicability, told the trial judge "I don't have any problem at all with them telling - - reading the [Stormwater] [O]rdinance to the jury, telling the jury what the [Stormwater] [O]rdinance says by way of reading it . . . ." Tr. p. 152, lines 19-24. During the charging conference, Appellants' counsel asked the trial court to place the Stormwater Ordinance into evidence, which was done. Appellants' counsel then proceeded to ask the trial court to add language to the jury charges that stated it is up to the jury to decide whether the Stormwater Ordinance applied, which the trial judge added. Tr. pp. 552-53, lines 2-24.

Because, taken in the light most favorable to Respondent, evidence existed to support the applicability of the Stormwater Ordinance, and because Appellants' attorney specifically approved and requested that the Stormwater Ordinance be placed into evidence, and also approved and requested language in the jury charges about the Stormwater Ordinance, there is no cause or reason to invade the province of the jury or to disturb the verdict.

V. RESPONDENT ESTABLISHED THAT APPELLANTS' ACTION AND INACTION PROXIMATELY CAUSED HER DAMAGES

The record in this case is replete with evidence from which the jury could find that Appellants' action, and inaction, proximately damaged her.

The standard of review as to directed verdict and JNOV motions is discussed in detail above. When reviewing JNOV motions, courts must "review the evidence and the inferences deducible from it in the light most favorable to the non-moving party." Rewis v. Grand Strand Gen. Hosp., 290 S.C.40, 41, 348 S.E.2d 173, 174 (1986).

In the case at hand, the jury had access to, among other things, the report of Mr. Lee, issued on December 12. Tr. p. 160, lines 4-7; Exhibit 10, Lee Report. His written findings included the following:

- "The purpose of this report was to determine if the clearing of the property could be contributing to the alleged adverse impact to the pond downstream. The short answer is yes." Tr. p. 171, lines 11-14 (emphasis added).
- "This is an environmental impact that directly affects the health of the pond." Tr. p. 173, lines 16-23.
- "A majority of the site drains directly into the wetlands below the pond with no sediment control measures in place to control the loss of soil." Lee Report, Garland Trial Ex. 10, p.8.
- "*To avoid litigation from the downstream property owner* you should work with the County to bring the site into a compliant and stable condition." Id. (emphasis added).

Then, in addition, Mr. Matthews, another properly qualified expert witness, testified "I can tell you based on the clearing that it's my opinion that the bulk of [the soil run off] came off your client's property." He followed up that statement by saying that ninety percent "is a fair assessment." Tr. pp. 312-13, lines 17-6

Appellants' brief attacks the weight of the evidence of not only both the experts, but all the testimony in the case. However, the time to attack the weight to be given is over. Stated differently, the time to discuss the credibility of the witnesses is over. Those questions were placed into the hands of the jury. The proper analysis is, taking the evidence and the inferences deducible from it, whether there is evidence to support the verdict. Taking Mr. Lee's damning report and Mr. Matthew's findings alone, there is more than enough evidence to support the jury's award, and the award should not be disturbed on appeal.

VI. THE JURY'S ACTUAL DAMAGE AWARD WAS PROPER AND SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL

The jury's award was supported by the evidence presented at trial and should be upheld.

When reviewing JNOV motions, courts must "review the evidence and the inferences deducible from it in the light most favorable to the non-moving party." Rewis v. Grand Strand Gen. Hosp., 290 S.C. 40, 41, 348 S.E.2d 173, 174 (1986). The trial court lacks "the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." RFT Management Co. LLV v. Tinsley & Adams LLP, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012). A JNOV motion should be denied "if the evidence is susceptible to more than one reasonable inference." Henderson v. St. Francis Cmty. Hosp., 303 S.C. 177, 179, 399 S.E.2d 767, 768 (1990). In other words, JNOV can be granted only "if no reasonable jury could have reached the challenged verdict." Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

The jury's determination of damages is entitled to substantial deference. Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 723. (Ct. App. 1996), and it should be upheld when it is possible to do so and carry into effect the jury's clear intention.

"It is the well-settled law of this State that an owner is qualified by the fact of ownership to give his or her estimate of the value of damaged real and personal property." Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 594–95, 493 S.E.2d 875, 880 (Ct. App. 1997) .

Further, if a landowner is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for (a) the difference between the value of the land before the harm and the value after the harm, or at the election of the landowner in an appropriate case, the cost of restoration that has been or may be reasonably incurred, (b) the loss of use of the land, and (c) discomfort and annoyance to him as an occupant. *See* The Restatement (Second) of Torts § 929(1), Harm to Land from Past Invasions (1979).

With the above in mind, the verdict is supported by the evidence and proper. When asked about the value of her real estate, Respondent testified as to a range of values applicable to her house. For example, Appellants had sold about a third of an acre of their property to a neighbor for $10,000, (app. $30,000 per acre), and a neighbor listed property comparable to hers for $80,000 per acre ($400,000 for five acres). Tr. p. 334, lines 5-25. Because the two-acre pond had been ruined due to Appellants' action and inaction, the diminution in value of Respondent's property would be a minimum of $160,000 in land value alone using the $80,000 per acre value, not including other damages for the hassle undergone by Respondent over the entire process.

Even if the jury used a different methodology, the verdict is within the range of the potential damages. The $125,000 verdict was less than the value of any of Respondent's estimates as to the value of her property. For example, in that Respondent's property was thirteen acres, at $80,000 an acre valuation, the total value of Appellant's property would be $1,040,000. Also, the $125,000 award was significantly less than the $435,075.08 estimate to clean out the pond. See e.g., Tr. p. 119, line 12.

The jury was clearly not motivated by passion, caprice, or prejudice. The jury acted reasonably in evaluating the evidence, the arguments, and the instructions from the trial judge. The verdict is entitled to deference, and it should be affirmed.

VII. THE TRIAL COURT PROPERLY SUBMITTED THE ISSUE OF PUNITIVE DAMAGES TO THE JURY

Charging the jury on punitive damages, and the jury's award of punitive damages, were proper given Appellants' reckless, willful, wanton, and malicious behavior.

Punitive damages are recoverable where there is evidence that defendants' conduct was reckless, willful, or wanton. Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 (1986). Recklessness is the doing of a negligent act knowingly; it is a conscious failure to exercise due care, and the element distinguishing actionable negligence from a willful tort is inadvertence. Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). The terms "willful" and "wanton" when pled in a negligence action are synonymous with "reckless" and import a greater degree of culpability than mere negligence. Id. at 288, 709 S.E.2d at 612. "Evidence that the defendant's conduct breached this higher standard entitles the plaintiff to a charge on punitive damages." Id. (quoting Marcum v. Bowden, 372 S.C. 452, 458 n. 5, 643 S.E.2d 85, 88 n. 5 (2007));

see also S.C. Code Ann. § 15–33–135 (2005) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.").

In nuisance suits, punitive damages are recoverable where the defendants have acted recklessly, willfully, wantonly, or maliciously. Bradford W. Wyche, *A Guide to the Common Law of Nuisance in South Carolina*, 45 S.C. L. Rev. 337, 372 (1994). In the instant case, punitive damages were appropriate

In addition to the common law duty of care, as discussed above, Lexington County has a Stormwater Management Ordinance codified in Lexington County Code of Ordinances # 16-04. The trial court charged the jury, with the agreement of Appellants' attorney, that violations of the Stormwater Ordinance can be used to find negligence per se, and therefore acts as a predicate to the award of punitive damages. The jury considered evidence that the Stormwater Ordinance was violated as set forth above, particularly through the testimony and written report of Appellants' engineer, Mr. Lee.

However, even without a violation of the Stormwater Ordinance, it is beyond question that Appellants were on notice of the damage they were causing and did nothing for months. In fact, Appellants intentionally misled authorities about the status of their stabilization efforts to continue their land-clearing activities.

Given the facts of this case, the award of punitive damages is supported and confirmed by Hollis v. Stonington, 394 S.C. 383, 391, 714 S.E.2d 904, 908 (Ct. App. 2011). In Hollis, the Court of Appeals reduced, but upheld, an award of punitive damages. The plaintiff pond owners noticed silt and sediment coming from an upstream development. "The Hollises and Robinsons continually complained to Stonington and

asked it to fix the problem. Stonington assured them the problem would be fixed, but failed to take action." Id. at 391, 714 S.E.2d at 908. The defendants in Hollis ignored ordinances and their own engineer's plans, took no action to prevent or correct damage, and used threats and deception to avoid the consequences of their actions. Id. at 394, 714 S.E.2d at 910.

In this case, Appellants have ignored the Stormwater Ordinance and intentionally misled authorities about the status of stabilization. Appellants refused to follow the recommendations of their engineer, Mr. Lee. Appellants have threatened and intimidated Respondent. Under any metric, Appellants' actions have been reckless, willful, and wanton.

The case of Touchberry v. Nw. R. Co. of S.C., 88 S.C. 47, 70 S.E. 424, 426 (1911) also supports the trial court's submission of the question of punitive damages to the jury. In that case, the South Carolina Supreme Court was faced with challenges to a verdict on a nuisance cause of action based on the overflowing of the defendant's lands. The defendant appealed the submission of the question of punitive damages to the jury. The court noted that the plaintiff had complained to the defendant and the defendant did nothing. The South Carolina Supreme Court held that defendant's lands were overflowing and damaging the plaintiff's land. The Court concluded:

> The first question that will be considered is whether there was error on the part of his honor, the presiding judge, in submitting to the jury the question of punitive damages. The testimony set out in the first exception, which raises this question, shows that the defendant was informed by the plaintiff that it was injuring his lands, yet it took no steps to prevent such injury; thus tending to show a conscious disregard of the plain-tiff's rights. This exception is therefore overruled.

Id.

Punitive damages were appropriate in this case, and the jury properly awarded them.

CONCLUSION

The jury's award was based on proper evidence and supported by the record. For the reasons set forth above, Respondent respectfully asks the Court to deny Appellants' appeal in its entirely and to affirm the verdict below.

Respectfully Submitted,

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