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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Circuit Court for the Eleventh Judicial Circuit

Debra R. McCaslin, Circuit Court Judge

App. Case No. 2022-000597

Suzan Garland.....Respondent,

vs.

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

of Whom

Robert Cade and Christy Cade are the..... Appellants,

and Roger Singleton is a .....Respondent.

APPELLANTS' FINAL BRIEF

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STATEMENT OF THE CASE

Respondent Suzan Garland initiated the above-referenced action with the filing of a Summons and Complaint in the Lexington County Court of Common Pleas on April 11, 2019. (Complaint dated April 11, 2019; R. pp. 12-16). Respondent's Complaint asserted causes of action against Appellants Robert Cade and Christy Cade for Gross Negligence, Trespass and Private Nuisance. (Complaint dated April 11, 2019; R. pp. 12-16). Appellants timely answered Respondent's Complaint. (Answer dated May 3, 2019; R. pp.17-18). Respondent subsequently amended her Complaint (Amended Complaint dated January 10, 2020, R. pp. 19-23) adding claims against Roger Singleton. Appellants Robert Cade and Christy Cade timely answered Respondent's Amended Complaint. (Answer to Amended Complaint dated January 23, 2020; R. p. 27). Roger Singleton answered the Amended Complaint. (Answer of Roger Singleton to Amended Complaint dated January 22, 2020; R. pp. 24-26). The parties engaged in pretrial discovery, including depositions and written discovery.

This case was mediated on July 20, 2021. During mediation, Respondent settled her claims as to Mr. Singleton for $62,500.00. (Proof of ADR or Exemption dated July 26, 2021; R. pp. 37-38). The Respondent's claims against Appellants did not settle at mediation. (Proof of ADR or Exemption dated July 26, 2021; R. pp. 37-38). Subsequently, Appellants filed a Motion to add claims against Mr. Singleton. (Notice of Motion and Motion to Add Claim for Indemnification dated July 22, 2021; R. p.39). Respondent (along with Mr. Singleton) filed a Motion for Court Approval of Settlement. (Motion for Court Approval of Settlement; R. pp. 40-42). Appellants subsequently filed a Motion to supplement their Third-Party complaint to add claims for breach of warranty and neglect. (Motion to Supplement dated October 25, 2021; R. pp. 43-44). Mr. Singleton filed a Memorandum in Opposition to Appellants' Motion to Add Claims. (Defendant Roger

Singleton's Memorandum in Opposition to Defendants Robert and Christy Cade's Motion to Add Claims; R. pp. 45-51).

These outstanding motions were heard by the Honorable H. Steven DeBerry IV, Presiding Judge of the Eleventh Judicial Circuit on November 1, 2021. On November 4, 2021, Judge DeBerry issued his Order allowing Appellants' cross claim against Roger Singleton. (Order Allowing Crossclaim and/or Third-Party Complaint dated November 4, 2021; R. pp. 9-11). Appellants subsequently filed their Third Party Summons and Complaint against Roger Singleton. (Third Party Summons and Complaint dated November 29, 2021; R. pp. 28-32). Roger Singleton filed his Answer to the Appellants' Third Party Complaint on January 6, 2022. (Defendant Roger Singleton's Answer to Third-Party Plaintiff's Complaint dated January 6, 2022; R. pp. 33-36).

The case was tried before the Honorable Debra R. McCaslin, Presiding Judge of the Eleventh Judicial Circuit and a Jury from March 28, 2022, until March 31, 2022. (Transcript of Record, Pages 1 – 698; R. pp. 70-767). At the close of Respondent's case, counsel for Appellants moved for a Directed Verdict as to the Respondent's cause of action for Negligence. (Transcript of Record, Page 390, Lines 6-18; R. p. 459). Appellants' counsel also moved for a Directed Verdict as to Respondent's nuisance and trespass causes of action and as to damages. (Transcript of Record, Page 390, Lines 19 – Page 399, Line 12; R. pp. 459-468) (Transcript of Record, Page 401, Line 20 – Page 403, Line 10; R. pp. 470-472). These motions were denied by the Trial Court. (Transcript of Record, Page 404, Line 21 – Page 405, Line 12; R. pp. 473-747).

At the close of all of the evidence, counsel for Roger Singleton moved for a Directed Verdict. (Transcript of Record, Page 530, Lines 12 – Page 536, Line 23; R. pp. 599-605). The Trial Court granted Mr. Singleton's motion. (Transcript of Record, Page 536, Lines 22-24; R. p. 605). Counsel for Appellants also moved for a Directed Verdict. (Transcript of Record, Page 537, Line

21 – Page 539, Line 25; R. pp. 606-608). These motions were denied by the Trial Court. (Transcript of Record, Page 439, Lines 20-23; R. p. 508).

On March 31, 2022, the Jury returned a verdict on behalf of Respondent as to her claims for negligence and nuisance. (Verdict, R. pp. 52-53). (The jury found for Appellants as to Respondent's claims for trespass. (Verdict; R. pp. 52-53). The jury awarded actual damages to Respondent of $125,000.00 as to her claims for nuisance. (Verdict; R. pp. 52-53). Based on the verdict form returned by the jury, no damages were awarded as to Respondent's negligence claims. (Verdict; R. pp. 52-53). The jury awarded Respondent $8,000.00 in punitive damages. (Verdict; R. pp. 52-53).

Appellants timely filed their Motion for New Trial, New Trial NISI and Judgment notwithstanding the Verdict (JNOV) on April 6, 2022. (Motion for New Trial, New Trial NISI and JNOV dated April 6, 2022; R. pp. 54-59). On April 22, 2012, Judge McCaslin issued her Order denying all of the Appellants' post trial motions. (Order of the Honorable Debra R. McCaslin dated April 22, 2022; R. pp. 1-5). Appellants timely filed their Notice of Appeal on or about April 22, 2022. (Notice of Appeal; R. pp. 60-61).

STATEMENT OF THE FACTS

I. INTRODUCTION

This case involves Respondent Suzan Garland and Appellants Robert Cade and Christy Cade. All parties are residents of Lexington County, South Carolina. Respondent Suzan Garland owns real property in Lexington County located at 105 Davis Drive, West Columbia, South Carolina 29172 and bearing tax map number 007899-01-022 ("the Garland Property"). There is an approximately two acre pond ("the Garland Pond") on the Garland Property that Respondent has used for recreational purposes for decades. Appellants own real property in Lexington County

located on New Cassel Drive, West Columbia, South Carolina and bearing tax map number 007899-01-013 ("the Cade Property"), which they purchased in 2018. The Cade Property is uphill from the Garland Property in the same watershed. Upon acquiring the Cade Property, the Cades timbered their property, grubbed stumps, graded the soil, and planted seed. Appellants' property is classified and zoned as agricultural. After purchasing the Cade Property in 2018, there were two hurricanes, Hurricane Michael and Hurricane Florence, which occurred and resulted in excessive and heavy amounts of water that rained on the properties.

II. FACTUAL BACKGROUND

Respondent Suzan Garland is the owner of thirteen (13) acres of land located at 106 Davis Drive in Lexington County, South Carolina. Ms. Garland and her late husband purchased the property in 1985. (Transcript of Record, Page 316, Lines 16-22; R. p. 385). Respondent's property contains a 1200 square foot, 60 year old house, an 800 square foot building, a greenhouse, and a pond of approximately 2 acres. (Transcript of Record, Page 345, Lines 11-21; R. p. 414) (Transcript of Record, Page 132, Lines 3-11; R. p. 201). The pond is located approximately 200 feet from Davis Drive. (Transcript of Record, Page 357, Lines 13-15; R. p. 426). The pond, which varies in size, is fed almost entirely by runoff and rainwater. The pond needs runoff and rainwater to survive. (Transcript of Record, Page 94, Lines 15-18; R. p. 163). It takes water from whatever is upstream from it in the watershed. (Transcript of Record, Page 94, Lines 15-18; R. p. 163) (Transcript of Record, Page 141, Lines 16-19; R. p. 210) (Transcript of Record Page 345, Line 24 – Page 346, Line 4; R. p. 414-415). Like most ponds, the Respondent's pond would naturally contain silt. (Transcript of Record, Page 96, Lines 3-12; R. p. 165). Natural silt is part of the aging process of a pond. (Transcript of Record, Page 96, Lines 3-12; R. p. 165). The Respondent's property, including all improvements and the aforementioned pond, is valued for Lexington

County tax purposes at $90,000.00. (Transcript of Record, Page 381, Line 19 – Page 383, Line 2; R. pp. 450-452) (Defendant's Exhibit 33; R. p. 1325).

Appellants are the owners of 36 acres of rural property, located near, but not adjacent to Respondent's property. (Transcript of Record, Page 488, Lines 20-24; R. p. 557). Appellants' property does not adjoin the Respondent's property. (Transcript of Record, Page 346, Lines 23-24; R. p. 415). The Appellants' property actually abuts property owned by an individual named Paul Shearer, who also testified at trial via video. (Transcript or Record, Page 407; R. p. 476). The Cades' property is separated from Respondent's property by a 50 to 60 foot vegetated buffer, some wetlands, Mr. Shearer's property, and Davis Drive (the road on which the Respondent lives) which would slow down the flow of any silt escaping Appellants' property. (Transcript of Record, Page 300, Lines 12 – Page 301, Line 2; R. pp. 369-370). There is an 18 inch dirt berm that runs along Davis Drive, caused by the County scraping Davis Drive (which is a gravel/dirt road). (Transcript of Record, Page 348, Lines 23-25; R. p. 417). This dirt and sand berm is created by Lexington County scraping it in order to maintain it. (Transcript of Record, Page 349, Lines 7-12; R. p. 418). The berm runs the entire length of Respondent's property. (Transcript of Record, Page 349, Line 24 – Page 350, Line 1; R. pp. 418-419). The jury heard testimony that this berm effectively acts as a diversion dam preventing the flow of water onto the Respondent's property. (Transcript of Record, Page 305, Lines 5-11; R. p. 374). (Transcript of Record, Page 304, Lines 11-23; R. p. 373). As set forth below, this berm "blew out" during the 2018 hurricanes. (Transcript of Record, Page 84, Lines 5 – Page 85, Line 4; R. pp. 153-155). (Transcript of Record, Page 62, Lines 10-21; R. p. 131). (Transcript of Record, Page 372, Lines 15-17; R. p. 441). (Transcript of Video testimony Paul Shearer, Pages 36, Line 23 – Page 37, Line 13; R. pp.776-777). On the opposite side of Davis Drive (from the berm and opposite of Respondent's property), there is a ditch.

(Transcript of Record, Page 349, Lines 13-15; R. p. 418). This ditch has been in existence the entire time that Respondent has owned her property. (Transcript of Record, Page 356, Lines 12-15; R. p. 425).

There is a drainage pipe that crosses under Davis Drive into the Respondent's property. (Transcript of Record, Page 350, Line 24 – Page 351, Line 10; R. pp. 419-420). This pipe comes off of Mr. Shearer's property and goes under Davis Drive. (Transcript of Record, Page 350, Lines 8-13; R. p. 419). Respondent testified that the pipe has been present since she purchased her property. (Transcript of Record, Page 351, Lines 14 – 19; R. p. 420). In addition, the pipe carries water from a natural spring off of Appellants' property. (Transcript of Record, Page 352, Lines 9-16; R. p. 421). This spring has fed into Respondent's pond during the entire time that she has lived on her property. Water from this pipe would be the only source of water into the Respondent's pond (other than natural rainwater). (Transcript of Record, Page 353, Lines 14-17; R. p. 422). The jury heard conflicting testimony from various witnesses as to whether or not this pipe under Davis Drive onto the Respondent's property is open or buried. (Transcript of Record, Page 92, Lines 7-23; R. p. 161) (Transcript of Record, Page 201, Lines 11-13; R. p. 270) (Transcript of Record, Page 466, Line 18 – Page 467, Line 5; R. pp. 535-536) (Transcript of Record, Page 495, Line 16 – Page 496, Line 4; R. pp. 565-565) (Transcript of Video Testimony Paul Shearer, Pages 29 – 33; R. pp. 775-776).

Appellants purchased their property in March of 2018. (Transcript of Record, Page 454, Lines 15-17; R. p. 523). When Appellants bought the property, which is zoned as Agricultural Property, the only improvement on it was a 3-4 acre rainwater fed pond. (Transcript of Record Page 494, Lines 7-20; R. p. 563). Like the Respondent's pond, it is fed by runoff from its watershed and by rainwater. (Transcript of Record, Page 494, Lines 7-10; R. p. 563) (Transcript of Record,

Page 416, Lines 19-23; R. p. 485). Appellants potentially planned to make improvements to their property (as outlined below) and then retire on it. (Transcript of Record, Page 454, Lines 18-20; R. p. 523).

Shortly after purchasing their property, Appellants learned that there were serious safety issues involving the pond's dam. (Transcript of Record, Page 457, Lines 14-20; R. p. 526) (Transcript of Record, Page 414, Line 14 – Page 415, Line 18; R. pp. 483-484). Appellants hired Roger Singleton to make the necessary repairs to the dam. (Transcript of Record, Page 457, Line 25 – Page 458, Line 6; R. pp. 526-257). Mr. Singleton's repairs involved repairing the spillway and re-coring the dam where it was leaking. (Transcript of Record, Page 493, Lines 21-23; R. p. 562) (Transcript of Record, Page 414, Lines 4-18; R. p. 483). After Mr. Singleton completed his work on the dam, Mr. Cade had someone come in and hydro-seed the work area. (Transcript of Record, Page 417, Line 13 – Page 418, Line 3; R. pp. 486-487) (Transcript of Record, Page 460, Lines 13-18; R. p. 529). The repairs to the dam took several weeks and were completed by Mr. Singleton prior to the hurricanes discussed below. (Transcript of Record, Page 458, Lines 7-13; R. p. 527) (Transcript of Record, Page 416, Lines 1-3; R. p. 485). The dam remained stable during the hurricanes. Mr. Singleton testified at trial that he was solely responsible for the repair work done to the dam. (Transcript of Record, Page 423, Lines 13-15; R. p. 492).

The Cades intended to convert a portion of their property to be used for the grazing of cattle. (Transcript of Record, Page 489, Lines 6-14; R. p. 558). They decided to turn a portion of the wooded part of their lands into pasture and hayfields. (Transcript of Record, Page 489, Lines 6-14; R. p. 558). These plans were consistent with the agricultural zoning of the Appellants' property. (Transcript of Record, Page 488, Line 23 – Page 489, Line 5; R. pp. 557-558). In order to convert a portion of their property to pasturelands, Appellants had to cut trees. (Transcript of

Record, Page 461 Lines 5-16; R. p. 530). They sold the timber to a timber buyer who retained loggers to cut trees. (Transcript of Record, Page 501, Lines 4-7; R. p. 570). No evidence was presented to the jury that the actual logging of their property by Appellants caused any harm to Respondent.

Appellants hired Mr. Singleton to remove the debris left by the loggers and to fill in the stumps and smooth out the land for the planting of grass and the creation of pastureland. (Transcript of Record, Page 423, Line 18 – Page 425, Line 6; R. pp. 492-494). Appellants testified that they paid Mr. Singleton approximately $130,000.00 to perform this work on their property. (Transcript of Record, Page 491, Line 25 – Page 492, Line 1: R. p. 560-561). Because Appellants' property was zoned agricultural, he did not have to obtain any permit or put up any silt fencing or similar structures around the work area. (Transcript of Record, Page 424, Lines 9-17; R. p. 493) (Transcript of Record, Page 434, Lines 12-20; R. p. 503). Mr. Singleton removed all of the debris left by the loggers and dug up and filled in stumps. After clearing the land, he assisted Mr. Cade in seeding the area. (Transcript of Record, Page 424 Line 18 – Page 425, Line 11; R. pp. 494-494). Mr. Singleton testified that the land was seeded prior to the 2018 hurricanes. (Transcript of Record, Page 425, Lines 7-11; R. p. 494).

After clearing Appellants' pastures, Mr. Singleton left a 30-50 foot buffer that had originally been left by the loggers. (Transcript of Record, Page 426, Line 5- Page 427, Line 18; R. pp. 495-496). This buffer ran along the entire property line between Appellants and Mr. Shearer. The buffer area contained trees, pine straw and leaves. (Transcript of Record, Page 427, Lines 1-18; R. p. 496). Mr. Singleton testified that the work that he did on the property could not have silted Respondent's pond. (Transcript of Record, Page 432, Line 14 – Page 433, Line 2; R. pp. 501-502).

Appellants testified that all of the clearing work was performed by Mr. Singleton. (Transcript of Record, Page 430, Lines 5-7; R. p. 499). The Appellants testified that they paid Mr. Singleton for this work and relied upon him to do it correctly. (Transcript of Record, Page 461, Line 25 – Page 462, Line 8; R. pp. 530-531). Christy Cade testified that while she does not know if Mr. Singleton did anything wrong in the clearing of her property, he did the work and if anything was done wrong, it was done wrong by Mr. Singleton. (Transcript of Record, Page 483, Line 1-11; R. p. 552). Appellant Robert Cade also testified that if anyone did anything wrong in connection with the clearing of the land, it was Mr. Singleton because Mr. Singleton was hired to do the work (and did the work). (Transcript of Record, Page 492, Lines 9-11; R. p. 561) (Transcript of Record, Page 492, Lines 2-11; R. p. 561). Mr. Cade also testified that if anyone did anything "wrong" or incorrectly it was done by Mr. Singleton, since he did the work in question on the property. (Transcript of Record, Page 492, Lines 9-11; R. p. 561).

Prior to commencing any work, Appellants went to Lexington County to obtain necessary permits to work on their property. (Transcript of Record, Page 489, Line 15- Page 491, Line 7; R. pp. 558-560). Since the Appellants' property was zoned for Agricultural use, no permit was required to remove the timber from Appellants' property or to clear out the brush and stumps. (Transcript of Record, Page 489, Line 15 – Page 491, Line 7; R. pp. 558-560). In October of 2018, around the time of the two hurricanes, Lexington County received an anonymous complaint regarding the work going on Appellants' property. (Transcript of Record Page 231, Lines 2-9; R. p. 300) (Transcript of Record, Page 239, Lines 15-18; R. p. 308). After receiving a complaint regarding the work being performed by Appellants on their property, Lexington County issued a stop work order on October 22, 2018. (Transcript of Record, Page 242, Lines 7-25; R. p. 311) (Transcript of Record, Page 245, Lines 20-25; R. p. 314) (Defendant's Exhibit 31; R. p. 1323).

The Appellants did not know who filed the complaint, only that a complaint had been filed. The stop work order was lifted on the following day. (Transcript of Record, Page 252, Lines 1-3; R. p. 321) (Defendant's Exhibit 32; R. p. 1323). Appellants received no citations or fines. Appellants were requested to move forward with stabilization of their site to minimize impacts. (Defendant's Exhibit 32; R. p. 1324). No deadline was given for this work to be completed. Appellants received no further citations or any fine in connection with the work done on their property. (Transcript of Record, Page 198, Lines 10-17; R. p. 267) (Transcript of Record, Page 244, Lines 12-18; R. p. 313).

Shortly after the completion of Mr. Singleton's work on Appellants' property, the State of South Carolina and Lexington County suffered the impact of two storms/hurricanes, Hurricane Michael and Hurricane Florence. (Transcript of Record, Page 83, Lines 18-23; R. p. 152) (Transcript of Record, Page 85, Lines 8-10. R. p. 154). Flooding from the hurricanes "blew out" the 18 inch berm that ran along Davis Drive. (Transcript of Record, Page 84, Line 12 – Page 85, Line 7; R. pp. 153-154) (Defendant's Exhibit 3; R. p. 1204). The jury heard testimony that the only time any significant water flowed down the watershed from Appellants' property to Respondent's property was during and after these two storms.

Respondent testified and presented evidence that she began noticing silt in her pond after the 2018 hurricanes and that there was no silt in her pond prior to 2018. (Transcript of Record, Page 77, Lines 15-18; R. p. 146) (Transcript of Record, Page 320, Lines 13-23; R. p. 389). Respondent testified that she never had any issues with silting in her pond prior to the two hurricanes. (Transcript of Record, Page 362, Line 4 – Page 364, Line 22; R. pp. 431-433). The jury heard conflicting testimony as to the condition of the Respondent's pond today. (Transcript

of Record, Page 80, Lines 18 – 23, R. p. 149) (Transcript of Record, Page 470, Line 24 – Page 471, Line 8; R. pp. 539-540) (Transcript of Record, Page 487, Lines 18-25; R. p. 556).

The jury heard testimony regarding a number of different ways that sand and silt could have entered into the Respondent's property. The jury heard testimony that the silting of a rain filled pond such as the Respondent's pond is a natural occurrence, especially in a pond as old as the Respondent's pond. (Transcript of Record, Page 96, Lines 6-12; R. p. 165). In fact, the jury heard testimony that the Respondent's pond had silting issues back to 1990, long before the Appellants bought their property. (Transcript of Record, Page 97, Lines 19-25; R. p. 166) (Transcript of Record, Page 98, Lines 11-24; R. p. 167). The jury heard testimony that another landowner in the same watershed as the Respondent annually denudes or plows his land for wheat. (Transcript of Record, Page 14-17; R. pp. 83-86) (Transcript of Record, Page 291, Lines 21 – Page 292, Line 6; R. pp. 360-361) (Transcript of Record, Page 268, Line 9 – Page 269, Line 4; R. pp. 337-338). The jury heard testimony that land other than Mr. Shearer's and the Appellants' drains into the Respondent's property. (Transcript of Record, Page 367, Line 13 – Page 369, Line 4; R. pp. 436-438) (Transcript of Record, Page 301, Lines 6-25; R. p. 370) (Transcript of Video Testimony Paul Shearer, Page 20, Line 10 – Page 21, Line 14; R. pp. 772-773) (Transcript of Video Testimony Paul Shearer, Page 34, Lines 18-23; R. pp. 776) (Transcript of Video Testimony Paul Shearer, Page 62, Line 3 – Page 63, Line 17; R. pp. 782-783) (Transcript of Video Testimony Paul Shearer, Page 487, Lines 5-12; R. p. 556). Another potential cause of silt in the Respondent's pond included sand from the 18 inch berm adjacent to and along Davis Drive which blew out during the 2018 hurricanes. (Plaintiff's/Appellants' Exhibit 3; R. p. 1204) (Transcript of Record, Page 84, Lines 7-17; R. p. 153).

Respondent did not present any testimony that linked the silting of the Respondent's pond back to the Appellants' property – or specifically the work done on either the dam or the pasturelands. (Transcript of Record, Page 97, Lines 8-25; R. p. 166) (Transcript of Record, Page 99, Lines 1-16; R. p. 168) (Transcript of Record, Page 141, Lines 12-24; R. p. 210) (Transcript of Record, Page 208, Lines 22-25; R. p. 277). The jury heard no testimony that the silt in the Respondent's pond came from any dirt from Appellants' property as no silt analysis was done by Respondent. (Transcript of Record, Page 145, Line 10-23; R. p. 214). The Respondent's entire case was built on the assumption that Appellants were the only individuals "upstream" from Respondent who had done work on their property and therefore any dirt/silt in the Respondent's pond came from this work.

Respondent presented testimony that the cost of removal of silt from her pond would be approximately $436,000.00. (Transcript of Record, Page 119, Lines 8-13; R. p. 188) (Plaintiff's Exhibit 11; R. pp. 1192-1193) (Plaintiff's Exhibit 12, R. p. 1197). This estimate involved removal of all of the silt that was in the pond from the past 60 years and not just silt that Respondent alleged is attributable to Appellants. Respondent called as a witness Heath C. Hanna who testified that in his opinion there was 210 dump truck loads of silt or 6 million pounds of dirt. (Transcript of Record, Page 147, Lines 9-17; R. p. 216) (Transcript of Record, Page 207, Lines 2-16; R. p. 276).

STANDARD OF REVIEW

When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court. *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58, (Ct.App.2010) (quoting *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 680 S.E.2d 778 (Ct.App.2009)). "The Court is required to view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the nonmoving

party." *Id.* (quoting *Gibson,* 383 S.C. at 405, 680 S.E.2d at 781). "The motions should be denied when the evidence yields more than one inference or its inference is in doubt. " *Id.* "An appellate court will only reverse the [trial] court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law. " *Id.* "On appeal, the appellate court reviews a denial of a new trial motion for an abuse of discretion." *Duncan v. Hampton Cty. Sch. Dist. No. 2*, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999). "The grant or denial of new trial motions rests within the discretion of the [circuit court] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). In determining whether the circuit court erred in denying a motion for a new trial, the appellate court must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Id.*

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING ROGER SINGLETON'S MOTION FOR A DIRECTED VERDICT AND DENYING THE APPELLANTS' MOTION FOR A DIRECTED VERDICT

At the close of the evidence, counsel for Mr. Singleton moved for a Directed Verdict. (Transcript of Record, Page 530, Lines 12-22; R. p. 599). Counsel for Appellants also moved for a Directed Verdict. (Transcript of Record, Page 537, Lines 2-3; R. p. 606). The Trial Court granted Mr. Singleton's Motion for a Directed Verdict but denied Appellants' Motion for a Directed Verdict. (Transcript of Record, Page 537, Line 12 – Page 539, Line 23; R. pp. 606-608). The Trial Court erred in granting Mr. Singleton's Motion for a Directed Verdict and subsequently erred in denying Appellants' post-trial motions on these identical grounds.

First, in denying the Appellants' Post-Trial Motions the Court stated in her Order denying Appellants' request for post-trial relief there was no record of Mr. Singleton's involvement. This

statement nearly defies all logic and will not survive a cursory review of the record in this case and the evidence presented to the Court and the Jury.

The Appellants hired Roger Singleton to fix the issues with their dam and to prepare their property for use as pastureland by removing all stumps and debris and filling in where the stumps had been pulled. (Transcript of Record, Page 423, Line 18 – Page 425, line 6; R pp. 492-494). They paid him $130,000.00 to do this work. (Transcript of Record, Page 491, Line 25 – Page 492, Line 1; R. pp. 560-561). Mr. Singleton testified that other than cutting trees or constructing the Appellants' farm buildings, he did all of the work on their property. (Transcript of Record, Page 430, Lines 5-7; R. p. 499). In fact, Mr. Singleton testified at length about the work that he did on and to Appellants' property. Both of the Appellants' testified that if anything was done incorrectly or negligently on their property, Mr. Singleton did it. (Transcript of Record, Page 483, Lines 1-11; R. p. 552) (Transcript of Record, Page 492, Lines 9-11; R. p. 561). The Court's conclusion that there was no evidence of Mr. Singleton's involvement is simply not supported by the facts of this case.

The Appellants took the position that they did nothing wrong to cause any silting of the Respondent's pond. They took the position that while they did not believe they did anything wrong, if anything was in fact done wrong (or negligently), responsibility lay with Mr. Singleton who actually did the work that Respondent claims silted her pond and damaged her.

The Trial Court granted Mr. Singleton's Motion on the grounds that the Appellants themselves failed to present any evidence that Mr. Singleton was negligent in this case. This erroneous ruling basically put Appellants in a "Catch 22" situation of having to prove the Respondent's case in order to keep Mr. Singleton in the case and submit any claims that they asserted against him to the jury. While the Appellants continue to take the position that they did

nothing wrong, if the evidence presented by Respondent in her case was enough to keep Appellants in the case, it should have been enough evidence to keep Mr. Singleton in the case as well. The Appellants presented sufficient evidence that the work complained of by Respondent was actually performed by Mr. Singleton, who they paid to do the work. The Trial Court's denial of the Appellants' Directed Verdict Motion and post–trial motion for a JNOV and New Trial were clearly erroneous and an abuse of discretion and should be reversed by this Court.

The Court compounded this erroneous ruling by denying the Appellants' Directed Verdict Motion made immediately after the Court dismissed Mr. Singleton from the case. After the Court ruled as a matter of law that there was no evidence that Mr. Singleton did anything wrong, counsel for Appellants renewed their Motion for a Directed Verdict and moved before the Court to strike all of the allegations in the complaint against Appellants related in any way to anything Mr. Singleton did or did not do. (Transcript of Record, Page 537, Line 25 – Page 538, Line 23; R. pp. 606-607). The Court denied Appellants' Motion. (Transcript of Record, Page 538, Line 24 – Page 539, Line 23; R. pp. 607-608). The Court's exoneration of Mr. Singleton by granting his Directed Verdict Motion should have resulted in the granting of Appellants' Motion for a Directed Verdict – or at the very least – a Directed Verdict for Appellants as to any of the work performed by Mr. Singleton. The Court's denial of the Appellants' Motions at the close of the evidence and after the jury verdict on these grounds was clearly erroneous and should be reversed by this Court.

II. THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE JURY TO VIEW THE PROPERTIES AT ISSUE IN THIS CASE

During the cross-examination of the Respondent, Appellants' counsel moved to place the properties at issue in this case into evidence and have the jury view them. Appellants' counsel agreed to pay for any costs that would be accrued in connection with the jury's visit. (Transcript of Record, Page 343, Lines 1-4; R. p. 412). Counsel for Respondent objected. (Transcript of

Record, Page 343, Line 5-6; R. p. 412).The Court denied this request. (Transcript of Record, Page 344, Lines 4-5; R. p. 413). The Court based this ruling on grounds the parties had introduced numerous pictures of the properties at issue and surrounding areas into evidence. (Transcript of Record, Page 344, Lines 1-25; R. p. 413). Later Appellants' counsel played drone footage of some of the properties at issue to the jury. However, this footage was incomplete (and gave the jury an incomplete picture of the land at issue in this case) because it did not involve any pictures taken of the Respondent's property or pond (due to the fact that taking this footage would have potentially consisted of a trespass).

The Trial Court erred in denying the Appellants' request to have the jury view the properties at issue in this case. Her denial of the Appellants' request was a clear abuse of discretion on her part. South Carolina Code Section 14-7-1320 (1976 as Amended) provides that the jury in any case may, at the request of either party, be taken to view the place or premises in question or any property, matter or thing relating to the controversy between the parties when it appears to the court that such view is necessary to a just decision, if the party making the motion advances a sum sufficient to pay the actual expenses of the jury and the officers who attend them in taking the view. The purpose of a jury view is to enable the jury to better understand the evidence presented in the courtroom. *Jacks v. Townsend,* 228 S.C. 26, 88 S.E.2d 776 (1955). Viewing the premises is not regarded as the taking of evidence. *Baroody v. Anderson,* 195 S.C. 422, 11 S.E.2d 860 (1940). Under Section 14–7–1320, a request to allow the jury to view the place in controversy is addressed to the discretion of the trial judge. *Moody v. Dillon Co.,* 210 S.C. 458, 43 S.E.2d 201 (1947). The exercise of a trial judge's discretion in this regard will not be reversed on appeal absent an abuse of discretion. *Johnson v. South Carolina State Highway Dept.,* 236 S.C. 424, 114 S.E.2d 591 (1960).

The Trial Court's denial of the Appellants' request to have the jury view the properties at issue in this case was erroneous and a clear abuse of discretion. This case involved a large watershed consisting of multiple pieces of property and multiple competing theories of how silt got into the Respondent's pond. The present condition of the Respondent's pond was also an issue of conflicting testimony. There was conflicting testimony as to the existence or condition of the berm on Davis Drive. There was conflicting testimony as to the condition of the ditch on Davis Drive. There was conflicting testimony as to the drainage pipe that passed under Davis Drive and onto the Respondent's property. The parties introduced multiple photos and maps, as well as witnesses, and even expert witnesses, who struggled on the stand to orient themselves as to these properties. (Transcript of Record, Page 293, Line 2 – Page 296, Line 10; R. pp. 362-365). An inspection of the properties would have been extremely beneficial to assisting the jury understand this case and the evidence presented to them. The Trial Court clearly erred and abused her discretion in denying the Appellants' request and in denying Appellants' Motion for a new trial based on this error on her part.

III. THE TRIAL COURT ERRED IN ALLOWING THE EXPERT TESTIMONY OF THE RESPONDENT'S EXPERT WILLIAM MATTHEWS, PE

The Respondent called William Matthews as an expert witness. (Transcript of Record, Page 269, Line 20; R. p. 338). Mr. Matthews was identified as a potential expert by Respondent on December 30, 2020. (Plaintiff's Second Supplemental Discovery Response; R. pp. 62-69). In her expert disclosures, Respondent indicated that Mr. Matthews would testify consistent with his report. (Plaintiff's Second Supplemental Discovery Response; R. pp. 62-69). A copy of Mr. Matthews' report was introduced as an Exhibit during the trial. (Plaintiff's Exhibit 11; R. pp. 1187-1197) (Transcript of Record, Page 274, Lines 9-14; R. p. 343).

During his direct examination, Mr. Matthews admitted that the report he previously issued in no way identified any of the sediment in the Respondent's pond as coming from the Appellants' property, which he testified to at trial. (Transcript of Record Page 284, Lines 14-19; R. p. 353). He testified that he came up with this opinion after "subsequent discussions" after the issuance of his report. (Transcript of Record, Page 284, Line 25 – Page 285, Line 3; R pp. 353-354). He reached these new conclusions without ever visiting Appellants' property. (Transcript of Record, Page 285, Lines 8-20; R. p. 354). He came up with this additional opinion after looking at maps on a computer. (Transcript of Record, Page 286, Lines 6-11; R. p. 355). Appellants' counsel raised the prejudicial nature of these "new" and undisclosed opinions. Counsel for Respondent noted that Appellants' counsel did not take Mr. Matthews' deposition, but had provided a copy of Mr. Matthews' report (which did not contain these new opinions) and that Appellants' counsel's bringing this matter before the Court was "prejudicial." (Transcript of Record, Page 287, Lines 2-7; R. p. 356). Court stated on the record that, "I do think it's prejudicial and it should have been brought up long before today's date, so let's move on. I'm – I don't even want to go to that subject." (Transcript of Record, Page 287, Lines 8-16; R p. 356).

The Court should have limited or excluded Mr. Matthews' testimony because it was beyond the scope of his disclosure/report during discovery, and allowing such a testimony would be prejudicial to the Appellants. The South Carolina Rules of Civil Procedure state, "a party is under a duty seasonably to supplement his response with respect to any question directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony." SCRCP 26(e).

Respondent's failure to supplement during the discovery process represents a violation of SCRCP Rule 26. Moreover, Mr. Matthews' departure from the previously disclosed scope and expertise of his testimony represents an unfair prejudice to the Appellants. Inclusion of this expanded testimony would unfairly prejudice the Appellants' ability to properly defend themselves at trial. Therefore, Mr. Matthews' testimony at trial should be limited/excluded because Respondent failed to supplement the scope of her expert's testimony, and allowing such a divergent testimony at trial would unfairly prejudice the Appellants. The Court erred in denying the Appellants' Motion for a New Trial based on this erroneous ruling.

IV. THE TRIAL COURT ERRED IN SUBMITTING THE LEXINGTON COUNTY STORM WATER STATUTUE TO THE JURY

At the close of the Respondent's case, Appellants' counsel moved for a Directed Verdict as to the Lexington County Storm Water Ordinance. (Transcript of Record, Page 388, Line 3 – Page 390, Line 5; R. pp. 357-359). Appellants' counsel argued that the applicability of the ordinance was a matter of law to be decided by the Trial Court. (Transcript of Record, Page 388, Line 3 – Page 390, Line 5; R. pp. 357-359). Appellants' counsel argued that the ordinance did not apply as a matter of law as evidenced by the clear language of the ordinance (its inapplicability to agricultural property) and the testimony of the Lexington County Officials called as witnesses by the Respondent. The Trial Court disagreed and denied Appellants' Motion. (Transcript of Record, Page). The jury heard much testimony regarding the Lexington County Storm Water Ordinance. The Storm Water Ordinance was charged to the jury. The Appellants' property was zoned agricultural and as a result, the ordinance did not apply to them. (Transcript of Record, Page 190, Lines 4-19; R. p. 259) (Defendants' Exhibit 18; R. pp. 1261-1278) (Defendants' Exhibit 19; R. pp. 1279-1286) (Transcript of Record, Page 192, Lines 12-21; R. p. 261). No evidence was presented by the Lexington County Officials called as witnesses by the Respondent that this ordinance

applied to Appellants. The Trial Court erred in denying the Appellants' Directed Verdict Motion and in charging the ordinance, which on its face did not apply to the Appellants, to the jury. Charging the Storm Water Ordinance to the jury clearly created a "standard" of care that was not applicable to Appellants. This was a clear abuse of discretion on the part of the Trial Judge. The Court's charging of this ordinance (which clearly did not apply to Appellants) was erroneous. The Trial Court's Order denying Appellants' post-trial motions was clearly erroneous and should be reversed by this Court.

V. RESPONDENT FAILED TO ESTABLISH THAT ANY CONDUCT ON THE PART OF APPELLANTS ACTUALLY CAUSED HER HARM

The Court erred in submitting Respondent's negligence and nuisance causes of action to the jury as Respondent failed to establish what, if anything, Appellants (or Mr. Singleton) actually did to cause her harm. In addition, Respondent failed to present any evidence to the jury that any specific act or omission on the part of Appellants caused her any harm. Respondent's claims for both negligence and nuisance fail as a matter of law the Court erred in denying the Appellants' Post-Trial Motions.

A. THE RESPONDENT'S NEGLIGENCE CLAIM FAILS AS A MATTER OF LAW

In order to prove a cause of action for negligence, a plaintiff must establish: "(1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached that duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages." *Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016) (citing, *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006)). Furthermore, the plaintiff bears the burden of establishing the negligence of the defendant. *Ross v. Paddy*, 340 S.C. 428, 433, 532 S.E.2d 612, 614 (Ct. App. 2000). The plaintiff also bears the burden of proving that the injury or damage was

caused by the actionable conduct of the particular defendant. *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1018 (D.S.C. 1981). "A determination of negligence, standing alone, is a far cry from a determination of liability. Liability encompasses all elements of a negligence claim, including damages proximately caused by the alleged negligence." *Hinds v. Elms*, 358 S.C. 581, 585, 595 S.E.2d 855, 857 (Ct. App. 2004). Therefore, the failure to prove on element of negligence is fatal to the cause of action. *Id.*

Taking the evidence in a light most favorable to the Plaintiff, the only testimony that the jury heard regarding the source of the silt in the Respondent's pond came from William Matthews who, relying solely on "some maps," testified that in his opinion 90 percent of the silt in Respondent's pond came from Appellants' property. Again, this opinion was based on his review of "maps" and not on any detailed soil investigation or analysis.

Further, the Respondent failed to prove that anything the Appellants did or did not do on their property caused the silt to flow from their property into the Respondent's pond. Other than proving that Appellants cut timber, cleared debris, and removed and filled stumps on their property, the Respondent failed to establish a specific act of the Appellants which caused the silting of her pond. In her trial testimony, the Respondent admitted under cross examination that she initiated this case on the "assumption" that since her pond silted and the Appellants were doing work on their property, the work done by Appellants was responsible for the condition of her pond. This testimony effectively summarizes the Respondent's case. Respondent presented no testimony that linked anything that the Appellants specifically did to her injury or damages in this case. The Respondent's engineering expert witness, Mr. Matthews could not say that the Appellants did anything wrong in connection with their property to cause injury to the Respondent. Mr. Matthews was specifically asked if he was, "….able to tell this jury what regulations…law, any other type

of legal requirement… (Appellants)…violated when they basically went out and cut – timbered the trees and cut up the stumps." (Transcript of Record, Page 311, Lines 12-16; R. p. 380). Mr. Matthews replied, "I can't tell you. I don't know." (Transcript of Record, Page 311, Line 17; R. p. 380). Attorney Moore asked Mr. Matthews once again, "So as the paid professional witness in this case, you're not able to tell this jury that my client violated any kind of law or standard?" (Transcript of Record, Page 311, Lines 18-20; R. p. 380). Once again Mr. Matthews responded, "I cannot tell you that." (Transcript of Record, Page 311, Line 21; R. p. 380). Attorney Moore then asked, "So as far as you know, everything that my client did was proper" and Mr. Matthews replied, "It may have been. I don't know." (Transcript of Record, Page 311, Line 22 – Page 312; Line 1; R. pp. 380-381). Attorney Moore concluded, "Do you know of anything my client did that would have deviated from any lawful standard of care?" to which Mr. Matthews replied, "I don't know." (Transcript of Record, Page 312; Lines 2-4; R. p. 381).

The jury was asked to assume that Appellants breached a duty to the Respondent and/or that their actions caused the silting of her pond without offering any proof of what specific acts of Appellants breached any duty to her and/or caused the silting and without tying any action of the Appellants (or dirt from their property) to the silt in her pond. The Respondent completely failed to prove her case of negligence against Appellants and the Court erred in submitting these claims it to the jury. In addition, the jury's finding of negligence on the part of Appellants was entirely unsupported by the evidence presented at Trial.

B. THE RESPONDENT'S NUISANCE CLAIM FAILS AS A MATTER OF LAW

The Respondent's claims for nuisance also fail as a matter of law and the Trial Court erred in submitting these claims to the jury for consideration in this case. Generally, a private nuisance is that class of wrongs that arises from the unreasonable, unwarrantable, or unlawful use by a person

of his own property, personal or real. *Clark v. Greenville County*, 313 S.C. 205, 437 S.E.2d 117 (1993). Nuisance law is based on the premise that every citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property. *Id.* The traditional concept of private nuisance requires the plaintiff to demonstrate that the defendants unreasonably interfered with his ownership or possession of the land. *Ravan v. Greenville County*, 315 S.C. 447, 434 S.E.2d 296 (Ct.App.1993). A nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property. *Id.* It is anything which hurts, inconveniences, or damages; anything which essentially interferes with the enjoyment of life or property. *Strong v. Winn–Dixie Stores, Inc.*, 240 S.C. 244, 125 S.E.2d 628 (1962).

The Respondent's nuisance claim fails as a matter of law. Respondent's property does not join the Appellants' property. It is separated by a natural buffer, a wetlands, property owned by Mr. Shearer, and a road containing an 18 inch berm. The Respondent's pond is in a large watershed involving other properties other than the Appellants' property. The jury heard testimony that some of these properties which are located further upstream are plowed and denuded on an annual basis for the planting of wheat. (Video transcript of Paul Shearer, Pages 20-22; R. pp. 772-773). In addition, the jury heard ample testimony that water, dirt and silt enter the Respondent's property from a variety of sources in addition to any water or silt that may enter the Respondent's property from the property of Appellants, and that this process has been occurring ever since Respondent purchased her property.

Taking the evidence in a light most favorable to the Plaintiff, the only testimony that the jury heard regarding the source of the silt in the Respondent's pond came from Mr. Matthews who, relying solely on "some maps," testified that in his opinion 90 percent of the silt in Respondent's

pond came from Appellants' property. Again, this opinion was based on his review of "maps" and not on any detailed soil investigation or analysis. All other evidence presented to the jury was based on assumptions and conjecture.

Further, the Respondent failed to prove that anything the Appellants did or did not do caused the silt to flow from their property into the Respondent's pond. Other than proving that Appellants cut timber, cleared debris, and removed and filled stumps on their property, the Respondent failed to establish a specific act of the Appellants which caused the silting of her pond. The jury was asked to assume that Appellants' actions caused the silting of Respondent's pond without her offering any proof of what specific acts of Appellants caused the silting and without tying any action of the Appellants (or dirt from their property) to the silt in her pond. The Respondent completely failed to prove her case of nuisance against Appellants and the Court erred in denying the Appellants' trial and post-trial motions and in submitting nuisance to the jury.

VI. THE JURY'S ACTUAL DAMAGE AWARD IS IMPROPER AND NOT SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL

The jury returned a verdict against Appellants of $125,000.00. This award was not supported by any of the evidence presented at trial. The Trial Judge erred in denying the Appellants' Motion for Directed Verdict as well as their post-trial motions regarding Respondent's damages and submission of this issue to the jury.

First, based on the Jury Verdict form that was submitted to the jury and returned by the jury, it appears that actual damages in this case were only awarded for the Respondent's nuisance cause of action. (Verdict Form, R. pp. 52-53) (Transcript of Record, Page 690, Lines 2-23; R. p. 759). While the jury found for the Respondent on her negligence claims, no damages appear to have been awarded for these claims. (Verdict Form, R. pp. 52-53) (Transcript of Record, Page 690, Lines 2-23; R. p. 759).

Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While proof with mathematical certainty of the amount of loss or damage is not required under South Carolina Law, the existence, causation nor can the amount of damages be left to the judge or jury's conjecture, guess or speculation. *Piggy Park Enterprises, Inc. v. Schofield*, 251 S.C. 385, 162 S.E.2d 705 (1968); *Gray v. Southern Facilities, Inc.,* 256 S.C. 558, 183 S.E.2d 438 (1971). The evidence should be such that a court of jury can determine an appropriate amount. Bald allegations are insufficient to establish a claim for diminution in value, and the evidence must not be speculative as to the amount of the alleged diminution. *Yadkin Brick Company, Inc. v. Materials Recovery Company,* 339 S.C.640, 529 S.E.2d. 764 (Ct. App. 2000).

Under South Carolina Law, the correct measure of damages for a nuisance is the diminution in the value of property caused by the nuisance. *Babb v. Lee County Landfill, SC LLC,* 405 S.C. 129, 747 S.E.2d. 468 (2013). The only credible evidence that was introduced at trial as to the value of the Respondent's property was its tax evaluation of $90,000.00. (Transcript of Record, Page 391, Lines 6-25; R. p. 460) (Transcript of Record, Page 394, Lines 4-14; R. p. 463) (Transcript of Record, Page 402, Lines 18-25; R. p. 471). The Respondent testified as to what she believed to be the value of properties surrounding her own (even though these properties were not compatible with the Respondent's property). Respondent presented no testimony or evidence as to the diminution in value to her property caused by the alleged nuisance. Respondent did not offer any testimony as to the diminution in value to her property she claims that were the result of Appellants' actions. (Transcript of Record, Page 333, Lines 10-19; R. p. 402) (Transcript of Record, Page 334; Lines 5-13; R. p. 403). Respondent also offered unsubstantiated testimony as to the amount that she believes she has spent in connection with her property through the years.

(Transcript of Record, Page 335, R. p. 404). However, she never testified as to how much she believes her property has been damaged or decreased in value as a result of the Appellants' alleged activities on their property and any alleged nuisance on the part of Appellants. Therefore the award of $125,000.00 for alleged nuisance is totally and completely speculative and is not supported by any of the evidence presented to the jury in this case. The verdict appears to be some type of impermissible compromise verdict, pulled out of thin air by the Respondent. It was certainly not based on any evidence presented to the Jury by Respondent in her case.

If this Court finds that the award in this case occurred under a negligence theory or cause of action, the evidence presented at trial still does not support the $125,000.00 award. Respondent presented testimony that the cost of removing the silt she alleges is in her pond would be approximately $435,000.00. (Transcript of Record, Page 119, Lines 12-13; R. p. 188). This cost of removing the silt from Respondent's pond far exceeds the actual value of the Respondent's entire property as presented to the jury by any witness in this case and is unreasonable. The true measure of damages to the Respondent should be either the diminution of value of the property (if the injury were deemed to be permanent in nature), or the depreciation in the usable value of the property in the event that the injury was non-permanent or temporary. *Yadkin Brick Company, Inc. v. Materials Recovery Company,* 339 S.C.640, 529 S.E.2d. 764 (Ct. App. 2000). In this case the jury heard conflicting testimony as to whether or not the Respondent's claimed damages to her pond were permanent or temporary. Under either theory, the Respondent failed to present any evidence that the jury could determine either the diminution in value of her property or the depreciation in value of her property allegedly caused by the Appellants' actions. The Trial Court erred in failing to grant Appellants' Directed Verdict or JNOV/New Trial motions as to the

insufficiency of proof as to damages. The Court's Order denying Appellants' post-trial relief should be reversed by this Court.

VII. THE TRIAL COURT ERRED IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY

The Trial Court erred in submitting the issue of Punitive damages to the jury. First, the evidence in this case did not support submitting punitive damages to the jury. At the close of the case, counsel for Appellants moved to strike punitive damages from the case on the grounds that there was no evidence to support submission of punitive damages to the jury. Appellants argued that the Respondent failed to prove either gross negligence or reckless conduct on the part of the Appellants. In addition, counsel for Appellants moved to bifurcate the issues of liability, actual damages and punitive damages. (Transcript of Record, Page 545, Line 25 – Page 546, Line 12; R. pp. 614-615). (Transcript of Record Page 545, Line 25 – Page 547, Line 12; R. pp. 614-616). The Court initially took the matter under advisement. (Transcript of Record, Page 549, Lines 19-20; R. p. 618). The Court subsequently instructed counsel that she was going to allow punitive damages to go forward. (Transcript of Record, Page 574, Line 9 - 587, Line 20; R. pp. 643-656). Appellants raised this issue in their Motions for post-trial relief. (Notice of Motion for New Trial, New Trial NISI, and JNOV; R. pp. 54-59).

In her order denying Appellants' motions, the Court found, "First, the record reflects that Defendants relied upon individuals and contractors other than Mr. Singleton to perform work on their property. Therefore, the Court ruled that punitive damages were appropriate for the jury's consideration." (Order Denying Defendant's Motion for New Trial; R. pp. 1-8).

Frankly this finding does not make any sense. Whether or not Appellants relied on anyone other than Mr. Singleton to perform work on their property (it should also be noted that Respondent never claimed any of the work performed on Appellants' property by anyone other than Mr.

Singleton caused harm to her pond) is irrelevant on the question/issue of whether or not punitive damages were appropriate to be submitted to the jury in this case.

Regardless of the flawed rationale for the Court's submission of punitive damages to the jury, the Court erred in submitting the issue of punitive damages to the jury as the Respondent failed to establish her entitlement to punitive damages in this case.

Punitive damages are quasi-criminal in nature and are imposed to punish a wrongdoer and to deter like conduct. *Atkinson v. Orkin Exterminating Co.,* 361 S.C. 156, 604 S.E.2d 385 (2004). Although appellate review of an award of punitive damages is limited to the correction of errors of law, an award of punitive damages must be proven under a significant burden of proof: clear and convincing evidence. *Austin v. Specialty Transp. Servs., Inc.,* 358 S.C. 298, 594 S.E.2d 867 (Ct.App.2004); *Hundley v. Rite Aid of South Carolina, Inc.,* 339 S.C. 285, 529 S.E.2d 45, (Ct.App.2000). In order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. *Lister v. NationsBank of Delaware, N.A.,* 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct.App.1997).

Furthermore, in order to recover punitive damages, the plaintiff must prove the defendant's misconduct was willful, wanton, or in reckless disregard of his rights. *Id.* "[T]rial judges in this state have long been required, as a threshold matter, to assess the culpability of a defendant's conduct to determine whether punitive damages are available in a given case (i.e., whether the issue should be submitted to the jury)." *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.,* 324 S.C. 149, 478 S.E.2d 57, (1996).

Respondent failed to establish by clear and convincing evidence that Appellants' actions in this case were willful, wanton, or in reckless disregard of the rights of others. In denying the

Appellants' Motion to Strike, the Court focused on both the Lexington County Stop Work Order and the report of Gerald Lee. Looking at these events in the light most favorable to the Plaintiff, this evidence simply does not support behavior entitling the Respondent to an award of punitive damages under South Carolina Law.

On October 22, 2018, after receiving an anonymous complaint, Lexington County issued a stop work order in connection to the work that was ongoing on Appellants' property by Mr. Singleton. (Transcript of Record, Page 242, R. p. 311) (Transcript of Record, Page 245, Lines 20-25; R. p. 314). The stop work order was rescinded the following day by Lexington County. The Appellants were not fined or cited in any way as a result of the one day stop work order. The jury heard ample testimony that the ordinance, on which the stop work order was based, did not apply to the Appellants' property and the ongoing work since the property was zoned agricultural. (Transcript of Record, Page 424, Lines 9-17; R p. 493). Appellants were requested to move forward with stabilization efforts which they did. Even before receiving the stop work order, the Appellants had hydro-seeded and sprigged portions of their property where work was ongoing. These efforts continued after the rescinding of the stop work order. (Transcript of Record, Page 424, Line 18 – Page 425, Line 11; R. pp. 493-494).

On or about November 29, 2018, the Appellants received a certified "cease and desist" letter from Respondent's counsel. As a result of this letter, the Appellants retained the services of Gerald Lee on December 10, 2018. (Transcript of Record, Page 159, Lines 19-25; R. p. 228). Mr. Lee visited the Appellants' property on December 12, 2018. (Transcript of Record, Page 160, Lines 1-3; R p. 229). Mr. Lee made no determination as to whether or not any dirt or silt was escaping Appellants' property into Respondent's pond. As a result of Mr. Lee's report, the Appellants continued with their stabilization efforts and put silt fences in place.

The evidence in this case clearly does not support a finding of gross negligence or willful and wanton conduct on the part of the Appellants. The Trial Court erred in denying Appellants' Motion to Strike punitive damages and in submitting the issue of punitive damages to the jury. The Court's order denying Appellants' Motion for post-trial relief as to the submission of punitive damages to the jury should be reversed by this Court.

CONCLUSION

For the reasons set forth above, the Trial Court erred in denying the Appellants' Directed Verdict Motions and in denying their Motion for New, Trial, New Trial NISI and JNOV made after the jury returned a verdict in this case. The jury's verdict is grounded on numerous errors of law and is not supported by the evidence presented at Trial. The Court's April 22, 2022, Order should be reversed by this Court.

Respectfully submitted,

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June 20, 2023

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Circuit Court for the Eleventh Judicial Circuit

Debra R. McCaslin, Circuit Court Judge

App. Case No. 2022-000597

Suzan Garland.....Respondent,

vs.

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

of Whom

Robert Cade and Christy Cade are the..... Appellants,

and Roger Singleton is a .....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellants complies with the requirements of Rule 211(b), SCACR.

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June 21, 2023
West Columbia, South Carolina