THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Donald B. Hocker
The Honorable Maite D. Murphy

Case No. 2021-CP-30-000256

Appellate Case No. 2023-000053

Guadalupe J. Colorado and Sandra B. Colorado

Appellants,

vs.

Maurice Powers

Respondents.

INITIAL BREIF OF RESPONDENTS

Christopher L. Jones (SC bar No. 77892)
Christopher L. Jones, Attorney at Law, LLC
650 East Washington Street
Greenville, South Carolina 29601
T: 864-625-2523
F: 864-762-1460
chris@chrisLjoneslaw.com

ATTORNEY FOR RESPONDENT

September 5, 2023
Greenville, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Stevens & Wilkinson of S.C., Inc., v. City of Columbia, 409 S.C. 563, 567, 762 S..E.2d 693, 695 (2014)

Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993).

Cock-n-Bull Steak House, Inc., v. Generali Ins., Co., __ S.C. __, 466 S.E.2d 727 (1996).

Toyota of Florence, Inc. v. Lynch, 314 SC 257 (1994),

Youmans v. S.C. DOT, 380 S.C. 263, 670 S.E.2d 1 (2008),

Worrell v. South Caroilina Power Co., 186 S.C. 306, 195 S.E. 638 (1938).

Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990).

Mills v. S.C. State Ports Auth., 435 S.C. 213, 865 S.E.2d 910 (Ct. App. 2021)

Curtis v. Blake, 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011)

Brinkley v. S.C. Dep't Corr., 386 S.C. 182, 185 687 S.E.2d 54, 56 (Ct. App. 2009)

Burke v. AnMed Health, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011).

STATEMENT OF THE CASE

The Respondent Maurice Powers resides at 566 Bull Hill Road, Gray Court, South Carolina since moving there in 2011 with his long term girlfriend, and their three children. Respondent's children, at the time of the trial, were six, fourteen, and nineteen. The nineteen-year-old has Down Syndrome and requires constant supervision. Since 2011, Respondent has had several employers, including working at a chemical plan, a car dealership, and as a handy ma. Respondent also owned two rental properties. As a hobby, the Respondent fixes up vehicles, typically with a salvaged title and in need of body work. At the time of the trial, Respondent owned seven vehicles.

The Appellants, Sandra and Guadalupe Colorado, reside and own 544 Bull Hill Road, directly beside the Respondent. The Appellants also own 520 Bull Hill Road. The Appellants' dispute began with the Respondent in 2012 when they and their son got in a verbal argument with the Respondent, and their son was charged with pointing and presenting a firearm at the Respondent.

Since 2012, the Appellants called Law enforcement twenty-three times to make complaints concerning the Respondent. Def. Exh. 1. During that same time period, the Appellants called South Carolina DHEC seven times to make complaints about the Respondent. Def. Exh. 4. Appellant's also called the Laurens County Building inspector, and the fire department numerous times to make complaints all about the Respondent. To law enforcement, ten occasions the Appellants complained of an odor, and mentioned Respondent was "cooking drugs." Def. Exh. 1 & 6. Appellants complained of smoke six times. Id. The the other complaints were regarding noise, dogs out of the fence, or they could hear arguing. There is no record indicating that law enforcement ever found an odor or smoke that was caused by the

Respondent, despite the Appellants' incessant claims. On numerous occasions law enforcement entered the Respondent's home and searched for drugs. Of course, law enforcement found none. Shortly after law enforcement questioned the Respondent about drugs in the home, DSS responded to the Respondents home and performed an investigation. All allegations were unfounded, and the case was closed.

Regarding calls to South Carolina DHEC, on February 8, 2015 the Appellants called DHEC and complained about fumes and odors. A DHEC official responded, investigated, and found that any odors or fumes were not regulated by DHEC because there was no sign of a business. Def. Exh. 4. On March 28, 2018, Appellants called DHEC for the fourth time to make a complaint about the Respondent. A DHEC report indicated there were no violations of air quality, no evidence of odors or overspray and "powers does not operate a business. He paints his own cars and helps friends." Id. On July 18, 2019, the Appellants called DHEC and made a complaint claiming that the Respondent dumped kitty litter in their yard. Id. Just before filing suit, the Appellants filed their last complaint with DHEC on August 16, 2021 about the Respondent painting cars. DHEC inspected the site, and promptly closed the case. Id.

On March 22, 2021, the Appellants filed suit in Laurens county Court of Common Plea for Breach of Restrictive covenants, Nuisance, and an injunction enjoining the Respondent from keeping unsightly materials on his property and operating an auto pain shop on his property. Compl., dated March 22, 2021. On May 12, 2021, the Respondent filed an Answer, denying that he operated a business from his home, denying that he breached the covenants in anyway, and denying that he caused a nuisance. Answer, dated May 12, 2021. On May 28, 2021, the Appellants filed a motion for temporary injunction enjoining the Respondent from painting activities on his property. Mot. For Temp. Inj., dated May 28, 2021. In their Memorandum in

Support of Motion for Temporary Injunction the Appellants claimed they had no significant health issues prior to the Respondents moving in. Id. pg 2. The appellants further alleged that they experienced "numerous allergic reactions" due to paint fumes. Id. On July 27, 2021, a hearing on Appellants motion for temporary injunction was held before the honorable Donald B. Hocker. Judge Hocker ordered the parties engage in discovery for 60 days, and come back for a subsequent hearing. (Order, dated Aug. 6, 2021.) On October 8, 2021, the parties had a second hearing for Appellants Motion for a Temporary Injunction before Judge Hocker. Prior to the second hearing, the parties engaged in discovery, and despite the Respondent requesting all relevant medical records in his request to produce and interrogatories, the Appellants objected, and refused to turn over *any* medical records supporting the claims in their complaint and in their motion for a temporary injunction. (See Plaintiffs' Responses to Defendant's First Set of Interrogatories and Plaintiffs' response to Defendants Request to Produce.) On October 25, 2021, the court issued an order denying the Appellants motion because they failed to produce medical records that supported their claims that they would suffer irreparable harm. The Court stated "the plaintiffs failed to provide ample evidence of irreparable harm…" and "[s]pecifically, the Plaintiffs failed to produce medical evidence to support Mrs. Colorado's claim of physical injury cause by paint fumes." (Order, Dated October 25, 2021.)

From October 25, 2021 until February 2, 2022, Respondent's counsel spoke numerous times to Appellants trial counsel concerning Appellants medical records they failed to provide. Appellants chose to only move forward as to the breach of covenants claim and injunction, and not the nuisance claim. Given this agreement, Respondent did not file a motion to compel regarding the medical records. (See email between trial counsel dated February 2, 2022 and Trial Tr. p. 232.)

On February 2, 2022, Respondent filed a motion to amend his Answer, and file a counterclaim for Intentional Infliction of Emotional Distress. Mot. To Am. Answer, filed Feb. 2, 2022. On February 9, 2022, the Appellants filed a memorandum in opposition to the motion to amend. On April 12, 202 a hearing was held before the Honorable Eugene Griffith, and he granted Respondent's motion to amend his Answer and file a Counterclaim. On April 15, 2022, the Respondent filed an amended Answer and Counterclaim for Intentional Infliction of Emotional Distress, and on April 25, 2022 the appellants filed their reply. (Am. Answer and Countercl., April 15, 2022, & Reply to Countercl., April 25, 2022.)

On August 31, 2022, the Appellants filed a motion for Summary Judgment as to the Respondent's Intentional of Infliction of Emotional Distress claim, and as to their injunction claim. (Mot. for Summ. J. August 31, 2022.) Notably missing was an argument for Summary Judgment as to the appellants nuisance claim, due to the fact that the appellants chose not to move forward on that claim per the aforementioned email. After hearing the arguments, the court again found in favor of the Respondent, and denied Appellants' motion. (Form order 4 dated October 18, 2022.)

The trial began on November 14, 2022 in the Laurens County Courthouse. In the Appellants case in chief for their Breach of Restrictive Covenant claim and Injunction, they called three witnesses. One of the witnesses was the Defendant, and they other two were the Appellants. The Appellants failed to bring a single third-party witnesses who corroborated their claims that odors came from the Respondent's home, or that the Respondent ran a business out of his home. The Appellants relied solely on their testimony and social media posts to persuade the court. In stark contrast to their lack of evidence, the Respondent presented two neighbors, Bryan Noone, and Charles Hunter, testified they never noticed smells coming from Power's home, and

they did not see any evidence he ran a business from his home. (Tr. Trans. 146-151 and 152-157.) Further, the Respondent presented Mac Brown who is employed by Laurens County as a building inspector. (Tr. Trans 157-163.) Mr. Brown testified he has been called out to the properties approximately ten times regarding Mr. Powers painting, and whether he operated a business. Id. Mr. Brown went on to state that he saw no evidence of a business being operated at the residence. Id. at 160. Of the numerous times Brown has been out ether he had never smelled odors. Finally, Brown stated he has never found the complaints of the Colorados' to be legitimate. Id.

The Respondent also presented Samuel Madden, an environmental health manager with South Carolina DHEC who testified he or another representative from DHEC responded to numerous odor complaints made by the Appellants concerning the Respondent. Madden indicated that DHEC does regulate body shops and businesses that paint cars. Tr. Trans. p. 139. Madden further read from a report that stated in 2015 a DHEC representative responded to the Appellants' complaint concerning odors, and informed them that DHEC did not regulate odors. Id 141. Madden stated he responded again in 2018 concerning odors coming from the Respondents' home, and again told the Colorados that DHEC does not regulate odors, and "Mr Powers does not operate a business." Id.

And finally, Michelle Vance, the Respondent's long term girlfriend, and mother of his three children, testified as to how the Appellants actions affected the Respondent. Ms. Vance testified that after one allegation of drug use in the home by the Colorados, DSS responded to her home and questioned their children. Tr. Trans. p. 254. Vance stated that the DSS worker told her that neighbors complained of drug activity and that was why they are responded. Id. Ms. Vance testified that law enforcement came to their home on numerous occasions to search for drugs as

she was cooking dinner for her family. Id. Each time law enforcement found no evidence of drugs. Id. Ms Vance stated her husband had many sleepless nights, had to miss work because they were scared, and had suffered from erectile dysfunction due to his increased stress levels caused by the Appellants. Trans. 252-253.

The parties gave closing statements on November 16, 2022, and the Appellants only objection was that the Respondent mentioned health insurance during closing. Tr. Trans. part 2 p. 35. Notably absent was any objection to damages or the mention of the selling of a home. On November 16, 2022, the jury returned a verdict in favor of the Respondent for $70,000.00. On November 22, 2022, the court issued an order finding for the Respondent regarding the Appellants only claim before the court, Breach of restrictive covenants and injunction. Order, dated November 22, 2023.

ARGUMENT

I. SUMMARY JUDGMENT

a. STANDARD OF REVIEW

"In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP." Companion Prop.&Cas.Ins. Co. v. Airborne Exp., Inc., 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006). Summary judgment should be affirmed if there is no genuine issue of material of fact and the moving party is entitled to the judgment as a matter of law. Id. The nonmoving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party. Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Since it is a drastic

remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Watson v. Southern Ry.Co., 420 F. Supp 483, 486 (D.S.C. 1975.)

b. SUMMARY JUDGMENT ARGUMENT

i. Appellants are not entitled to summary judgment on their claims for Breach of Restrictive Covenants, Nuisance, and Injunction

1. Breach of Restrictive Covenants

Appellants failed to show there was no genuine issue of material fact, and therefore they were not entitled to a summary judgment as to the breach of covenants claims.

At trial, Appellants asserted the Respondent was in violation of section A, I, and K of the restrictive covenants. Tr. Trans p. 232. Those sections read as follows:

> A: the said lots shall be sued for residential purposes only and no part of said lots shall be sued for any business, commercial, mercantile, or industrial purpose."
>
> I: all garages storage building or barns may be used incidental to residential purposes only and shall not be rundown or dilapidated."
>
> K: No noxious or offensive activity shall be carried on or upon said lots and nor shall anything be done thereon which may become a substantial annoyance or nuisance to the owners of the other lots.

The question at the time of summary judgment was whether there was, in the light most favorable to the Respondent, a genuine issue of material fact as to whether the Respondent violated the restrictive covenants mentioned above. As the Appellant stated in their memorandum in support of the Summary Judgment, "[t]he only major dispute is whether the Defendant

operates a business or whether his painting… activities are a hobby." Appellants' Memo. in Support of Summary Judgment p. 7. In support of their claim, the Appellants cite affidavits of the Appellants used at the temporary injunction hearing that occurred on July 27, 2021, over a year before the hearing on summary judgment, and their own memorandum in support of their motion. See Appellants' brief p. 10. Appellants argue their damages are "undisputed" by pointing to Sandra Colorados' affidavit from July 27, 2021 where she indicated she had sinus infections, and allergic, and anxiety all due to the Respondent's painting of vehicles on his property. Id. The Appellants provided no new affidavits attached to their motion for summary judgment.

Contrary to Appellants' claims that their damages as to Breach of the Restrictive Covenants. are "undisputed," the very reason the court ruled against them at the temporary injunction hearing in July and October 2021 was because they refused to comply with the Respondents discovery request and present any medical records corroborating their claims. Interim order August 6, 2021 and Order Denying Temp. Inj. Oct. 25, 2021. "Specifically, the plaintiffs failed to produce medical evidence to support Mrs. Colorado's claim of physical injury caused by paint fumes." Id.

In Appellants own memorandum in support of their Summary Judgment, they admitted there were questions for the jury: "while it is possible this is only a hobby for the Defendant…" App. Memo. in Support of Summary Judgment p. 7. And, "While residentially purposes is not defined in the covenants it is highly unlikely that it was intended to allow such noxious activity…" id at p. 8. By acknowledging that the activities of the Respondent in question, painting cars, is possibly a hobby and that "residential purposes" was a vague term in the covenants, Appellants are admitting that these are questions open to interpretation, and thus questions for the jury.

The Appellants acknowledge that the question of whether the Respondent Breached the Restrictive Covenants hinge on the determination of whether the Respondent's painting was a hobby or business. Whether the Respondent operated a business is a clear issue of material fact, and a question for the jury, and that is why Appellants were not entitled to a summary judgment as to the breach of covenants claim.

2. Nuisance

A summary judgment for Nuisance was not presented to the trial court, and therefore is not preserved for appeal. See Appellants Memorandum in Support of Summary Judgment; Email exchange with trial counsel. See In Re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (an issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.) Summary Judgment as to Nuisance was not ruled upon by the trial court, and therefore is not preserved for appeal. Moreover, appellants failed to raise any arguments as to nuisance in their post-trial motions for the trial court to consider. Obviously, because the issues of Nuisance had been laid to rest. Per the email exchange from appellants trial counsel, and evidence of appellants memorandum in support of their motion for Summary Judgment, they did not make an argument as to whether they were entitled to a Summary judgment as to Nuisance.

To the extent the Court would like to consider the Appellant's Nuisance argument, the Respondent would make the following reply: Nuisance is the unlawful use of property causing material annoyance, discomfort or hurt to another person. Green v. Blanton, 294 SC 14, 362 SE 2d 179, 181 n.2 (Ct. App. 1987). For nuisance, there must be a wrongful act by the defendant and the nuisance must be the natural and proximate cause of the plaintiff's injury. Homes Sales, Inc. v. City of North Myrtle Beach, 299 SC 70, 382 SE 2d 463, 469 (Ct. App. 1989).

Appellants failed to show there was no issue of genuine material fact for the jury to decide as to each of the elements of Nuisance. Most notably, damages. Appellants failed to provide any medical records as to whether they actually suffered health problem due to the Respondent's painting. Appellants point to the affidavits of appellants again from the initial motion for temporary injunction where they made their unsubstantiated medical claims, but fail to mention that the Court ruled against them because they failed to bring forth proof of their claims. Order dated October 25, 2021. The appellants failed to show there was no issue of genuine fact for the fact finder, thus and Summary Judgment was appropriately denied.

3. Injunction

Appellants failed to show any evidence to support the element of irreparable harm as to an injunction, and therefore the summary judgment motion was properly denied. Generally, to obtain an injunction, the plaintiff must show that 1) it would suffer irreparable harm if the injunction is not granted 2) it will likely succeed on the merits, and 3) there is an inadequate remedy at law. Scratch Golf Co. v. Dunes West Residential Golf Props., 361 S.C. 117, 603 SE 2d 905 (2004).

As stated previously, the appellants refused to submit medical records that corroborated their claims of damages. The court property denied the temporary injunction for the same reason. Order dated October 25, 2021. Given the Appellant's failure to make more than an accusation as to the damages they sustained, and the irreparable harm they would experience if the injunction is not granted, there is a genuine issue of material fact and Summary Judgment is not proper. For similar reasons, the Appellant's failed to provide any evidence at all that they would likely succeed on the merits.

ii. Appellants are not entitled to Summary Judgment as to Respondent's counterclaim for Intentional Infliction of Emotional Distress.

In order to recover for Intentional Infliction of Emotional Distress (IIED) a plaintiff must establish that the Defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would results from his conduct; 2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; 3) the action of defendant caused the plaintiffs emotional distress; and 4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it. State farm fire & Cas. Co. v. Barrett, 340 S.C. 1 530 SE 2d i132 (Ct. App. 2000).

Appellants argue that because they submitted "other documentary evidence demonstrate that there is an absence of genuine dispute of material fact…" and the Respondent did not, they are entitled to summary judgment. See Appellant's Brief p. 13. Appellants again make an argument for the first time on appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilkie, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Here, the appellant made no mention of lack of affidavit's from the Respondent in their argument before the court. Therefore, the issue as to rule 56(e) SCRCP is not preserved for review.

Appellants failed to produce the transcript of the summary judgment oral arguments. If they had bothered to request the transcript, they would see the discussion between trial counsel and Judge Hocker included twenty-three calls to law enforcement, seven calls to DHEC, and numerous to local building inspector made by Appellants. Further, Appellants presented Respondent's Responses to Plaintiffs' Second Set of Interrogatories which indicate documents had been produced supporting calls to DHEC and to law enforcement. At the hearing, RRespondent discussed the Respondent recently visited a doctor concerning his erectile

dysfunction. Respondent argued that the Respondent had not sought treatment for erectile dysfunction due to embarrassment and not having health insurance. Appellants trial counsel acknowledge as much at trial. Trial Trans. p. 30 ("the first time the mention of medical issue was brought up was at a summary judgment hearing on Ocotber 18th…"). It's the Appellants burden to request various transcripts to support their appeal. They failed to request the transcript and attempt to misconstrue Respondent's argument for their benefit.

All the evidence presented at the summary judgment argument supported the Respondent's claim that the appellants recklessly or intentionally inflicted severe emotional distress. Again, this is a basic question of fact for the jury. The evidence presented at the summary judgment motion was more than enough to show there was a genuine issue of material fact.

II. TRIAL AND POST TRIAL MOTIONS

a. MOTION FOR DIRECTED VERDICT ON APPELLANT'S CLAIMS

i. STANDARD OF REVIEW

"When reviewing a trial court's ruling on a directed verdict motion, an appellate court will reverse if no evidence supports the trial court's decision, or the ruling is controlled by an error of law." Burnett v. Family Kingdom, Inc., 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010). "When reviewing the trial court's decision on a motion for direct verdict, the appellate court must employ the same standard as the trial court by viewing the evidence and all reasonable inference in the light most favorable to the nonmoving party." Id. "The trial court must deny a directed verdict motion where the evidence yields more than one inference or its inference is in doubt." Id.

ii. Appellants are not entitled to a directed verdict on their claims for Breach of Restrictive Covenants and Injunction.

1. The Respondent does not use his property for business purposes.

The Appellants fail to show that there was no evidence supporting the trial court's decision to deny their motion for directed verdict. Therefore, the trial court's ruling show not be overturned. Appellants ignore the large swath of evidence presented at trial that supported the Respondent's position that they did not operate a business. Beyond the Respondents testimony, the Respondent presented two neighbors, Bryan Noone and Charles Hunter, who testified they did not see evidence that the Respondent operated a business. Tr. Transcript p. 146 & 152. Specifically, Noone testified that he lived at his residence for twelve years, and that his residence was approximately 60 yards from the Respondents home. Tr Trans. p. 147. Noone further testified that he never heard of the Respondent painting cars for money at his residence, although he was aware of the Respondent had a shop in Laurens. Id. Noone stated he has never smelled an odor coming from the Respondent's home, and he was not aware of other neighbors complaining of Respondent painting cars or smells coming from his home. Id. Noone believed that if someone was painting a car at the Respondent's home, he would be able to smell it at his home, and he has never smelled anything. Id. at 150. Noone confirmed that he operated a car shop from his home, and he had never heard of the Respondent operating a business out of his house. Id. at 151.

The Respondent presented Charles Hunter, another neighbor of Appellants and Respondent who testified that he lived less than fifty yards from the Respondent. Tr trans. 153. Hunter testified that he is not aware of the Respondent operating a business out of his home. Id. Hunter has never smelled anything coming from Powers home, and there's no sign or anything advertising a business out of his home. Id. Hunter testified that he is aware that the Respondent owns several vehicles that he will repair and work on but does not believe that the Respondent operates a b business out of his house. Id. at 155.

The Respondent also presented Mac Brown from Laurens County Building Department who testified that he had been to the Respondents property numerous times due to the Appellants making complaints that the Respondent operated a business out of his home. Id. at 158. Specifically, Brown testified that he investigated whether the Respondent operated a business out of his home, and "did not find that there was any business being operated at that residence." Id. 160.

Lastly, the Respondent presented Samuel Madden of South Carolina DHEC to testify concerning his encounters with the appellants and Respondent. Madden testified from a report made in 2018 from DHEC when they responded to a complaint from the Appellant, and stated "Mr. Powers does not operate a business. Paints his own cars and helps friends paint theirs." Id. at 142.

Clearly, there was ample evidence to support the trial court's ruling in denying the directed verdict as to the breach of restrictive covenants claim. Given the testimony of neighbors, government officials, and the reports from DHEC and Laurens building inspector which all supported the Respondents position that he did not operate a business from his home, the Appellants were not entitled to a directed verdict on the Breach of Restrictive Covenants due to business operation from the Respondents home.

2. The Respondent should not be enjoined from painting cars on his property as a matter of law.

Appellants claim that the Court based it's decision to deny the directed verdict as to the breach of restrictive covenants on the court's ruling that the Respondent was not operating a business, and the Court should have also considered whether the Respondent used his property for residential purposes only. Appellant's Initial Brief p.21. This is a distinction without a difference.

At trial, during Appellants directed verdict argument, they argued "I think the covenants actually restrict. It just says for residential use only. I don't think we even need to get to this issue of business, whether the painting cars is a business." Tr. Trans. at 129. The court responded that "there's enough issue of fact to send the case to the fact finder, which is me." Id. at 130. The Appellants argument is one of opinion when they flatly state: "the act of painting cars is a violation of the covenants because it is not a residential purpose…" Appellant's Initial Brief p. 21. They offer no support for this claim. This was the question for the fact finder, and because there was evidence that yielded more than one inference the trial court properly denied their motion.

Although the Appellants submitted evidence that they were annoyed by smells they claimed came from Respondent's home, the Respondent submitted more evidence that those smells did not exist, and even if they did, they odors did not come from him. Again, because the evidence submitted to the court could yield more than one inference, the court properly denied their directed verdict motion.

b. JUDGMENT NOTWITHSTANDING THE VERDICT

i. STANDARD OF REVIEW

A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). On appeal from the circuit court's denial of a motion for a directed verdict or a JNOV, we apply the same standard as the circuit court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). In considering a motion for JNOV, the trial court is required to view the evidence and the inferences that reasonably could be drawn therefrom in

the light most favorable to the non-moving party and to deny the motion when either the evidence yields more than one inference or its inferences are in doubt. Smith v. Safeco Life Ins. Co., 303 S.C. 131, 399 S.E.2d 427 (1990). "This rule is especially strong in South Carolina where the "scintilla of evidence rule" is applicable." Id. (citing Sweatt v. Normal, 283 S.C. 443, 322 S.E.2d 478 (Ct. App. 1984)).

ii. Appellants are not entitled to a Judgment Notwithstanding the Verdict on Respondents claim for Intentional Infliction of Emotional Distress because there was at least a scintilla of evidence supporting the Respondent's claim.

The appellants claim that the Respondent produced no evidence he suffered severe emotional distress, and that the Respondent produced no evidence the appellants conduct was extreme and outrageous. Appellant's Initial Brief p 23. The Respondent testified twice at trial. Once during the Appellants case in chief as to the Breach of Covenants, and then on Respondents case in chief as to the elements of Intentional Infliction of Emotional Distress and damages. Trial Trans. p. 56-116; Trial Trans. p. 234-246. Appellants attempt to use testimony of the Respondent while he was called as a witness by the Appellants, and questioned about covenants as evidence that he presented no evidence of severe emotional distress. Appellants fail to discuss the Respondents full testimony during his second time testifying, and they also fail to discuss the testimony of Respondents life partner, Michelle Vance.

In response to a question as to how the appellant's actions has affected him, Respondent stated "I haven't been able to sleep… it would feel like my heart was about to burst out of my chest. When I would try to get intimate with my wife, it wouldn't work." Trial Trans. p. 241. The Respondent also testified that the Appellant's actions caused him to have anxiety, and to lose weight. Id. The Respondent testified that he had so much going on in his mind after interactions with law enforcement, DHEC officials, building code officials, and DSS, that "I couldn't focus

because I couldn't help but think about everything… I wasn't right. I wasn't myself anymore." Id. at 242. The Respondent also testified that after law enforcement, DHEC, or local building authorities made contact with him, he had to take time off work so he could respond to the uncorroborated complaints of the appellants. Id. Further, the Respondent stated that he sought medical treatment for his erectile dysfunction. Id. at 243. The Respondent explained that he did not seek treatment for a while due to not having health insurance, and because he was embarrassed about the medical condition. Id.

To further substantiate the claims of severe emotional distress, Michelle Vance testified that she and the Respondent had been together for twenty years, have three children together, and hold themselves out as being married. Trial Trans. p. 252. Vance corroborated the Respondents claims of difficulty sleeping, missing work, and erectile dysfunction. Id. at 253.

Appellants compare the case at bar to Hansson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007). In Hansson, the plaintiff claimed his employer and coworkers used homophobic slurs directed at him, and this caused him to lose sleep. For Damages, Hansson only presented evidence that he was grinding his teeth at night. Hansson testified that he did not seek treatment from any other physician, did not lose time from work, and did not affect his relationship with his wife. Id. at 358. Further, Hansson admitted that he occasionally reciprocated his coworkers sexually oriented jokes. Id. at 359. Hansson is very much different from the Respondent's experience. The Respondent not only lost sleep, but could not perform his job sufficiently, and the Appellants behavior affected his relationship with his wife. Trial Trans. p. 241-243.The comparison to the instant case to Hansson is misplaced because the Respondent presented more severe injuries than was discussed in Hansson.

Appellants also claim that the Respondent failed to present any evidence as to the fourth prong of IIED, which states that the emotional distress suffered by plaintiff was so severe that no reasonable man could be expected to endure it. Appellant's Initial Brief p. 25. Appellants rely on Richardson v. Rent-Act. East, Inc., 2012 U.S. Dist. LEXIS 6617; C/A No.: 3-11-vc-1408-JFA (D.S.C., Jan. 20, 2012) which stated reporting information about a crime is not outrageous enough to create a jury question when the plaintiff had reason to believe the police would investigate the report before deciding to make an arrest. Again, this comparison is misplaced. If the Appellants had made one call to law enforcement, one call to DHEC, and one call to the building inspector concerning the Respondent operating a business, that could be reasonable. But they did not. They called continuously about the same complaint after being told in no uncertain terms that the Respondent did not operate a business, DHEC did not regulate smells, and there was no evidence of drug use. Def. Exh. 1, 2, 3, 4, and 6.

The appellants admitted they had no business calling these authorities. Trial Trans. p. 203-204. DHEC informed the appellants as far back as February of 2015 that they did not regulate odors, and there was no evidence of a business. Def. exh. 4. And then again in 2018 DHEC explicitly stated the respondent does not operate a business, and yet the Appellants called on two more occasions. Id.

Appellants argue the statute of limitations should prevent activities outside of the three year statute to be considered. However, again, the Appellants attempt to argue on appeal something that was not objected to and ruled upon by the trial court. Issue preservation rules are designed to give the [circuit] court a fair opportunity to rule on the issues, and thus provide the [appellate c]ourt with a platform for meaningful appellate review." Stevens & Wilkinson of S.C., Inc., v. City of Columbia, 409 S.C. 563, 567, 762 S..E.2d 693, 695 (2014) "At a minimum, issue

preservation requires that an issue be raised to and ruled upon by the [circuit] judge." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit] judge to be preserved for appellate review." Wilder Corp. v. Wilkie, 330 S.C. 71, 76 497 S.E.2d 731, 733 (1998). The Appellant failed to object at trial to the introduction of activities that fell outside of the statute of limitations, so they cannot now argue for the first time on appeal that those items should be excluded.

The Appellants did not "simply called relevant authorities," they called authorities without any supporting evidence, even after the authorities told them that they cannot help Appellants with their complaints. Appellants brought no witnesses to support claims of foul odors or a business being run from the house. The issue isn't that Appellants called once or twice, it's that they called repeatedly after they were told the authorities could not help them, and that the authorities found no evidence their calls were legitimate. For the foregoing reasons, the court correctly denied appellants Judgment Notwithstanding the Verdict motion.

c. NEW TRIAL ABSOLUTE

i. STANDARD OF REVIEW

A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). However, the jury's determination of damages is entitled to substantial deference. Id. The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. See Cock-n-Bull Steak House, Inc., v. Generali Ins., Co., __ S.C. __, 466 S.E.2d 727 (1996).

ii. Appellants are not entitled to a New Trial Absolute due to multiple errors regarding improper jury argument.

1. Statute of Limitations

Appellants, once again, argue the statute of limitations prevents the Respondent from presenting evidence that supports his intentional infliction of emotional distress claim beyond three years from the complaint. And, once again, they are making an argument that was not preserved for appeal. Respondent would point out that the Appellant too discussed matters outside the statute of limitation regarding their claim of breach of covenants. Appellants presented a tax record and social media posts of the Respondent that was outside the statute of limitations, however the Respondent did not object. There was no objection because counsel for both parties discussed the issue of statute of limitations, and both agreed to not make the object regarding statute of limitations issues since both parties had items they wanted to present to the jury that fell outside the statute of limitations. Unfortunately, counsel did not put this agreement on the record. Resp. Memorandum in Opposition to pltfs. Motion for Judgement Notwithstanding the Verdict. etc. pg 3. Nonetheless, for reasons previously mentioned, the appellants cannot bring up a matter for the first time on appeal, and the issue of statute of limitations was not ruled on by the trial Court, and therefore it cannot be argued on appeal.

2. Respondent's discussion of rental property in closing

Appellants make another argument for the first time on appeal regarding the Respondent's rental property. At trial, the Respondent testified that he had several rental properties. Trial Trans. P. 83. During closing arguments, Appellant failed to object to the mentioning of rental properties, and failed to object to the manner in which Respondent suggested the jury calculate damages. Given this lack of objection, the appellant cannot make their argument for the first time on appeal.

3. Respondent did not use acts attributed to other parties to show liability.

Appellants present as their third argument for a New Trail Absolute another claim that was not objected to and ruled up on by the trial court, and therefore cannot be raised for the first time on appeal. Appellant's take umbrage with Respondent's counsel's reply closing remark, "they made a claim Mr. powers had a gun, law enforcement came out and there was no gun." This argument was in reply to Appellants counsel who stated: "you know what's utterly atrocious and horrible in this society? Pointing a gun. You heard the Colorados' son pointed and presented a gun. You also have where Mr. Powers presented a gun at someone. Its in the police records that you're going to have." Trial Trans. part 2 pg. 16. However, Appellant's counsel did exactly what they are accusing Respondent's counsel of doing. There's no evidence that Mr. Powers presented a gun, however Appellant's counsel flatly stated that there was. Respondent's counsel made a response to an ancillary argument from the Appellant. The statement "they made a claim Mr. Powers had a gun," "they" was referring to Appellant's trial counsel and Appellant's as one. In reviewing the transcript, the statement is true because Appellant's trial counsel did make the claim that Mr. Powers had a gun. And law enforcement did respond, searched his home, and found he had no gun. It was merely a claim.

Plaintiffs attempt to evade the contemporaneous objection requirement by pointing to Toyota of Florence, Inc. v. Lynch, 314 SC 257 (1994), which held that courts may issue a new trial even without a contemporaneous objection if counsel use uses vicious, inflammatory arguments, and result in a clear prejudice to opposing party. However, a review of the facts of Toyota of Florence reveals the level of inflammatory comments that are required to warrant a new trial, and are in stark contrast to the case before the Court. Lynch was a nominal defendant in a lawsuit between a regional distributor of Toyota (SET), and a local dealer, Toyota of Florence (TOF). Prior to closing arguments, Lynch agreed to

receive portions of any judgment TOF received. Importantly, the trial judge instructed Lynch not to request damages in his closing. In closing arguments, Lynch presented hand drawn posters that showed the following: SET as Asian stereotypes; mushroom clouds over states they operate in; paying off an SET witness and giving him answers to questions; offering money to a blindfolded man; and feeding documents into a shredder. Further, Lynch requested damages after specifically being ordered not to. It was apparent Lynch attempted to identify SET as Asian, attempting to play on potential prejudices of a juror. The Supreme Court stated these flagrant, vicious comments were inflammatory and resulted in clear prejudice.

At the outset, as mentioned numerous times, these arguments should not even be entertained because of their lack of contemporaneous objection. Requesting damages beyond a statute of limitations, which was agreed upon by trial counsel, discussing the sale of rental property that was not testified to, and discussing ancillary disputes between the Respondent and third parties pale in comparison to the type of behavior discussed in Lynch. The attorney in Lynch, most importantly, deliberately defied the trial court's instruction, and on top of that, used racially disparaging diagrams and innuendos as argument. It is clear that arguments were not prejudicial enough to overcome the contemporaneous objection rule, and therefore these arguments cannot be considered. However, even if the arguments are considered, the verdict is by no means so excessive as to shock the conscience of the court. There is no indication the verdict was reached as a result of passions. It was reached because the jury found the Appellants behavior to be that appalling.

iii. New Trial Pursuant to the Thirteenth Juror Doctrine

The thirteenth juror doctrine gives the trial judge the vetoe power to the Nth degree, and, it must be presumed, recognized and appreciate his responsibility, and exercise the discretion vested in him with fairness and impartiality. Worrell v. South Caroilina Power Co., 186 S.C. 306, 195 S.E. 638

(1938). The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds the evidence does not justify the verdict. Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990). Upon review a trial judges order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. Id. at 254-55, (citing South Carolina Sate Highway Dep't v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976)).

In Youmans v. S.C. DOT, 380 S.C. 263, 670 S.E.2d 1 (2008), the Court overturned the trial court's granting of a new trial pursuant to the thirteenth jury doctrine. The trial court noted that no evidence supported the jury's decision that one of the party's was free of negligence, and therefore he granted a new trial based on the thirteenth juror. However, the Court of Appeals found that the party did presented testimony for the jury's consideration. Given the trial court's error, the granting of the thirteenth juror was reversed.

Here, there was much more evidence submitted to the jury by the Respondent in comparison to the party in question in Youmans. It appears only the party testified in Youmans and presented no other witnesses. The Respondent brought five additional witnesses and seven exhibits to support his claims. There is more than enough evidence presented to the jury to support respondents claim, and that is why the trial denied the Appellants motion for a new trial based on the thirteenth juror doctrine.

d. NEW TRIAL *NISI* REMITTITUR

i. STANDARD OF REVIEW

The trial court must provide compelling reasons to warrant invading the jury providence by granting a new trial *nisi*. Mills v. S.C. State Ports Auth., 435 S.C. 213, 865 S.E.2d 910 (Ct. App. 2021) citing (Curtis v. Blake, 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011)). The trial court's decision will not be disturbed on appeal unless it findings are wholly unsupported by the evince or the conclusions

reached are controlled by error of law. Brinkley v. S.C. Dep't Corr., 386 S.C. 182, 185 687 S.E.2d 54, 56 (Ct. App. 2009). When considering the trial court's ruling on motions for a new trial or new trial *nisi* remittitur, this court employs a highly deferential standard or review. Burke v. AnMed Health, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011). A trial court "who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this [c]ourt" and therefore this court gives "great deference" to the trial court, "especially in the area of intangible elements of damages." Rush v. Blanchard, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993).

ii. Appellants are not entitled toa New trial *Nisi* Remittitur

Appellants argue as if they were in the jury deliberation room. They have no idea what was discussed by the jury. They also, once again, argue regarding a statute of limitations violation that was no objected to at trial, and therefore cannot be raised on appeal.

Because the trial court is given a great deference in their decision regarding a new trial *Nisi* Remittitur, it's best to review the evidence which the trial court had at the time of his decision. At the time the trial courts decision, all calls were in evidence because the Appellant failed to object to the statute of limitations. Defense exhibit #6 best describes calls by the appellants. Testimony of four non party witnesses who all supported the respondents claims, and testimony of the Respondent and his girlfriend as to his damages support his claim. The trial court had ample evidence to deny the Appellant's motion for a New trial *Nisi* Remittitur.

CONCLUSION

Appellants failed to make contemporaneous objections throughout the trial, and now seek to base an entire appeal on arguments that were not properly preserved. Appellants also fail to show any arguments made by Respondents counsel rise to the level of vicious and inflammatory to overcome the contemporaneous objection standard. The lower court correctly denied summary judgment, directed

verdict, and all post trial motions, and appellants have not presented any evidence that the trial court abused it's discretion or any or reason for those rulings to be overturned. The case presented to the jury and the court was one of the Appellants using local and state authorities to harass and undermine the Respondents, even after being told by the same authorities that their complaints were unwarranted and the authority they contacted cannot help them with their claim. The jury, rightly, found this behavior to be beyond the pale, and that the Appellant's behavior caused the Respondents injuries.

For these reasons, the respondents respectfully submit that the lower court rulings should be affirmed.

Respectfully Submitted,

Christopher L. Jones, Attorney at Law, LLC

_s/Christophe L. Jones_____
Christopher L. Jones, S.C. Bar No.: 78892
650 E. Washington Street
Greenville, S.C. 29607
864-625-2523 (phone)
864-672-1406 (fax)
chris@chrisLjoneslaw.com

ATTORNEY FOR RESPONDENT

September 5, 2023
Greenville, South Carolina