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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Alex Kinlaw, Jr. and Perry H. Gravely, Circuit Court Judges

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Case No. 2020-CP-39-00266
Appellate Case No. 2022-001499

Click Properties, LLC and Hyper Formance, LLC..... Respondents

v.

Thomas SC Properties, LLC and All-Tech Tire and Auto Repair, LLC..... Appellants

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RESPONDENTS' FINAL BRIEF

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COUNTERSTATEMENT OF THE ISSUES ON APPEAL

Rule 208 (b)(1)(B), SCACR provides that broad general statements may be disregarded by the Appellate Court. Appellants' Statement of Issues on Appeal are broad and general: all five list none of the issues, but only state the trial court erred in denying several motions. This vagueness would support this Court's dismissal of the appeal.[1]

COUNTERSTATEMENT OF THE CASE

Rule 208 (b)(1)(C), SCACR, provides that the Statement of the Case shall not contain contested matters. As the Supreme Court has instructed:

> Counsel is advised that the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review.

Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794 (1992).

There are five contested matters in Appellant's Statement of the Case, and three misstatements. First, it is highly contested that the gravel driveway allows both owners access to the upper portion of their properties[2], and as early as 1978 it has been used exclusively for the upper back building on the property owned by Hyper Formance, LLC (the Click Property).[3] Second, it is disputed that both parties used both the driveway and turnaround: it was only used by the owners of the Click Property.[4] Third, Hyper Formance's owner, Brent Click, denies that

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[1] As former Chief Justice Jean Hoefer Toal states in *Appellate Practice in South Carolina, Second Edition*:

> Ordinarily, no point will be considered that is not set forth in the statement of issues on appeal... In formulating the statement of issues, two extremes need to be avoided. One extreme is the tendency to present issues that are overly vague and general... The following examples illustrate what is meant by overly vague... "Did the circuit court err in granting summary judgment?"

pp. 209-210.

[2] R. p. 720, lines 15-23; R. p. 730, lines 2-3, R. p. 897, line 21- R. p. 898, line 22.

[3] R. p. 999, lines 23-25; R. p. 1001, line 25 -R. p. 1002, line 3; R. p. 1002, lines 14-23; R. p. 1005, lines 3-11.

[4] *Id.*

the turnaround and property are not his, and settling it once and forever was a significant purpose of the lawsuit.[5] Fourth, matters with Thomas did not deteriorate in 2016; they had already deteriorated when Thomas had a significantly negative reaction to Click's friendly offers of assistance in the beginning of 2014 when he took over the business from Mr. Grissinger.[6]

Fifth, the Jury did not fail to enter an amount of damages. Instead, in answer to Question One on the Jury Form, they failed to enter damages for the First Cause of Action, Nuisance *per se*. It was only this amount that was missing, and they returned to the Jury Room and allocated $28,000 from the verdict of $196,000 that they initially reached for the Second Cause of Action, Negligence, and filled out the verdict form for $28,000 for Nuisance *per se*, and $168,000 for Negligence.[7]

The first misstatement is that the property purchased by Thomas SC Properties, LLC (the Thomas Property) was never owned by Greg Grissinger as claimed on page seven of Appellants' Brief. The property was owned in 2013 by Jimmy and Diane Watkins[8] until sold to Respondent Thomas Properties, LLC in 2018.[9] Second, Brent erected carport awnings with concrete slabs in October 2014, not 2016.[10] The final misstatement regards the asserted testimony of Jimmy Watkins. On page nine, Appellants allege that Watkins testified at trial that if Brent Click did not

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[5] R. p. 742, lines 17-25.
[6] R. p. 735, lines 11-22.
[7] Jury Verdict Form, R. pp. 1820-1821; R. p. 1290, line 24- R. p. 1291, line 11; R. p. 1292, line 1 – R. p. 1293, line 6.
[8] Trial Exhibit D-20, R. pp. 1456-1457, Deed of Gregory A. Porter to Jimmy A. Watkins and Diane T. Watkins, 15 June 2004, Bk-822, Pg. 298.
[9] Trial Exhibit D-20, R. 1458-1459, Deed of Jimmy A. Watkins and Diane T. Watkins to Thomas SC Properties, LLC, 29 May 2018, Bk. 1958, Pg. 93.
[10] R. p. 726, line 22 - R. p. 727, line 1.

get along with Thomas, that Watkins would erect a fence along the property line. There is no testimony in the Record that Watkins so testified.[11]

STATEMENT OF FACTS

As often happens, the topography of the land served to create a natural boundary between the Click and Thomas properties that was recognized by the previous landowners for over 40 years.[12] This visual boundary was furthered by the placement of a driveway and turnaround that followed the contour of the properties and served only the Click Property, due to the steep slope.[13] A significant difference in elevation had existed between the Click and Thomas properties even before the negligent excavation in 2018.[14] The property line was treated in this manner without dispute.[15]

The Click Property was owned by Mark Smith in 2013 when Brent and Shelly rented the back building for their business.[16] The only access to the back building was the driveway and turnaround.[17] Brent and Shelly openly and exclusively used the driveway and turnaround without issue for the four years they rented.[18] Brent even built carport awnings with concrete slabs that extended into the turnaround in 2014 without objection.[19] Brent and Shelly purchased the property from Smith in early 2017[20] and continued exclusively using the driveway and turnaround.

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[11] *See* Watkins Direct and Cross Examination, R. pp. 1100-1111.
[12] R. p. 1000, lines 12-25; Trial Exhibit P-3, R. pp. 1309-1310
[13] R. p. 720, lines 15-23; Trial Exhibit P-1, R. p. 1304; Trial Exhibit P-2, R. pp. 1305-1308
[14] The terms Click and Thomas properties include the ownership of the properties by predecessors as well as the current owners.
[15] R. p. 993, line 20 - R. p. 994, line 21; R. p. 999, line 9 – R. p. 1000, line 11; R. p. 1022, lines 5-19; R. p. 1023, lines 3-6.
[16] R. p. 1023, lines 7-19; Trial Exhibit P-6, R. pp. 1318-1319.
[17] R. p. 719, lines 21-23; R. p. 720, lines 15-23.
[18] R. p. 866, line 25 – R. p. 867, line 4.
[19] R. p. 726, line 22 – R. p. 727, line 1; R. p. 737, line 12 – R. p. 738, line 16.
[20] R. p. 739, lines 16-19; Trial Exhibit P-4, R. pp. 1311-1314; Trial Exhibit P-5, R. pp. 1315-1317.

Just months after Appellant purchased the Thomas Property in 2018, Thomas embarked on a dangerous plan of severe alteration, involving excavation equipment and a 22-ton dump truck that came and went for days on end hauling away the lateral support to the driveway and turnaround serving the Click property.[21] Thomas did not use anyone experienced in excavation and did not even call such a company to obtain an estimate.[22] He left a severe 90° hill, creating a 36 foot cliff,[23] with absolutely no lateral support.[24]

The current owner of the Thomas Property, who had exhibited significant animus against Respondents since his purchase of the business[25], threatened to continue digging until the back building fell.[26] He also had been silent regarding Respondents use of the driveway and turnaround. Therefore, Respondents filed this action.[27]

A four-day trial was conducted, during which Respondents proved that Appellants' DIY negligent excavation of the Thomas property, by severely removing the lateral support to the steep hill, caused significant and continuing damage to the Click property and its back building.[28] The Jury not only found monetary damages for nuisance *per se* and negligence, but also found acquiescence and a prescriptive easement for the driveway and turnaround. Appellants are now attempting to reargue the same issues unsuccessfully raised before two Judges and a Jury.

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[21] R. p. 768, lines 21-25.
[22] R. p. 1034, lines 18-24; R. p. 1144, lines 6-16; R. p. 1145, lines 12-25.
[23] R. p. 770, lines 2-15
[24] R. p. 769, lines 12-17; R. p. 963, lines 1-15.
[25] R. p. 735, lines 11-22.
[26] R. p. 780, line 2 – R. p. 781, line 2.
[27] *Id.*
[28] R. p. 775, lines 7-9; R. p. 811, line 13 – R. p. 812, line 5; R. p. 812, line 21- R. p. 819, line 14.

STANDARD OF REVIEW

In actions at law, when a case is tried by a jury, "the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings." *Wright v. Craft*, 372 S.C.1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006).

When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, an appellate court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012). If the evidence at trial yields more than one reasonable inference or its inferences is in doubt, the circuit court must deny the motion for directed verdict or JNOV. *Id.*, 399 S.C. at 332, 732 S.E.2d at 171. "[If] the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied. *Parrish v. Allison,* 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). "An appellate court will reverse the [circuit] court's ruling only if no evidence supports the ruling below." *RFT Mgmt.* 399 S.C. at 332, 732 S.E.2d at 171. "When considering [motions], neither the [circuit] court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Parrish*, 376 S C. at 319, 656 S.E. 2d at 388.

The allowance of an amendment to pleadings is addressed to the sound discretion of the trial judge and his actions will not be disturbed on appeal absent an abuse of discretion. *Porter Bros., Inc. v. Specialty Welding Co.*, 286 S.C. 39, 331 S.E.2d 783 (Ct. App. 1985); *Crowley v. Spivey*, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985).

In an action in equity, tried by the judge alone, the Appellate Court can review the record and make findings of fact in accordance with its views of the preponderance of the evidence. *Townes Associates, LTD. V. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, the Appellate Court is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000).

The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. *Gilley v. Gilley*, 327 S.C. 8, 11-12, 488 S.E.2d 310, 312 (1997); *MailSource, L.L.C. v. M.A. Bailey & Assocs.*, 356 S.C. 363, 367, 588 S.E.2d 635, 637-38 (Ct.App.2003). An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law. *Ledford v. Pa. Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976); *County of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct.App.2002).

ARGUMENT

I. INTRODUCTION

Appellants' appeal not only from the Jury verdict in favor of Respondents, but also the denial of several pre and post-trial Motions which contain many of the same issues. Respondents will respond to the issues themselves rather than repeat them in separate subsections.

II. THE JURY'S FINDING OF NUISANCE *PER SE* IS REASONABLY SUPPORTED BY THE EVIDENCE

The Jury found in Respondents' favor for nuisance *per se* after a four-day trial, awarding $28,000 in damages. In order to disturb this award, Appellants must show there is no evidence which reasonably supports the verdict. Not only did Respondents provide some evidence, they provided ample evidence.

A. There is Evidence of Nuisance *per se*

The test for nuisance *per se* is whether or not the nuisance issue had become dangerous at all times and under all circumstances to the adjoining property. *Suddeth v. Knight*, 280 S.C. 540, 545, 314 S.E.2d 11, 14 (Ct. App. 1984).[29] Appellants cite the case of *Suddeth,* but fail to disclose its principal holding: that the question of whether a nuisance had become dangerous to the land was for the jury. *Id.* 280 S.C. at 45-46, 314 S.E.2d at 15. In *Suddeth*, the Court of Appeals relied upon *Deason v. Southern Ry. Co.*, 142 S.C. 328, 140 S.E. 575 (1927) and held:

> *Deason* involved a factual situation where the Railroad Company closed a ditch and raised an embankment which caused water to pond on an uphill landowner's land. The Court, in affirming a jury verdict for the landowner, said that the question of whether or not the nuisance had become dangerous at all times and under all circumstances to life, health or property was for the jury.

Suddeth, 280 S.C. at 545, 314 S.E.2d at 14.

The South Carolina Supreme Court in *Deason* noted that questions regarding nuisance *per se* were "peculiarly a question for the jury." *Deason*, 142 S.C. at 337, 140 S.E. at 578.

South Carolina Courts have not required the injury to be constantly present to find reasonable evidence of nuisance *per se*. In *Deason*, the jury found perpetual danger as a result of the probability of ponds overflowing at every rain, and of drying up and creating mosquitoes during every dry spell. *Deason*, supra. Similarly, in *Suddeth,* ponding was the result of periodic rain. *Suddeth, supra.*

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[29] In South Carolina, "[a] nuisance is anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property." *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 253, 125 S.E.2d 628, 632, (1962). "If a lawful business is operated in an unlawful or unreasonable manner so as to produce material injury or great annoyance to others or unreasonably interferes with the lawful use and enjoyment of the property of others, it will constitute a nuisance." *LeFurgy v. Long Cone Club Owners Ass'n, Inc.*, 313 S.C. 555, 558, 443 S.E.2d 577, 579 (Ct. App. 1994).

If the ponding of water is sufficient to create a question of fact of a nuisance becoming "dangerous at all times and under all circumstances to . . . property," then the testimony of Respondents' expert that a continuing failure is created in removing the lateral support by digging a 90°, 36-foot steep drop off and thereby endangering a neighbor's home and business is as well.[30]

B. There is Reasonable Evidence the Excavation Created a Nuisance *per se*

Appellants make the surprising claim that nuisance *per se* is wholly inapplicable to excavation that allegedly caused erosion and damage to structures on the Respondents' property. Appellants' Brief p. 18. First, Respondents are claiming damage to the adjoining property along with damage to the back building. Second, the case cited by Appellants, *Contos v. Jamison*, 81 S.C. 488, 62 S.E. 867 (1908) is only a negligence case, not a nuisance case. Therefore, it states the law regarding negligence, and does not address nuisance.

Finally, there are many reported appellate nuisance cases in South Carolina where an adjoining landowner sues due to the negative impact on their land caused by the actions of the adjoining landowner. *See Deason v. Southern Railroad Co.*, 142 S.C. 328, 140 S.E. 575 (1927) (adjoining landowner erects an embankment causing water damage to the plaintiff's property); *Davis v. Palmetto Quarries Co.*, 212 S.C. 496, 48 S.E.2d 329 (1948) (adjoining land owner operates a quarry causing damage to plaintiff's property); *Suddeth v. Knight*, 280 S.C. 540, 314 S.E.2d 11 (Ct. App. 1984) (trial court's nonsuit reversed for a jury trial when adjoining landowner

[30] Appellants miscite on p. 22 of their Brief Brad Wyche's Law Review article from 1994. First, Wyche was only discussing the unique factual case of surface water claims; and second, Wyche mentions the Appellate Court's reversal for a jury trial of *Suddeth*. 45 S.C. Law Review 349-350. The Supreme Court reversed the lower court's dismissal of a nuisance case in *Davis v. Palmetto Quarries Co.*, 212 S.C. 496, 48 S.E.2d 329 (1948). Also, the Supreme Court reversed the Court of Appeals dismissal of a nuisance *per se* case, holding it was a question for the jury in *Lucas v. Rawl Family Ltd. Partnership*, 359 S.C. 505, 598 S.E.2d 712 (2004). Therefore, Appellants are incorrect in suggesting there has been no reported cases for nearly 30 years dealing with nuisance *per se*, as *Lucas* was decided in 2004.

constructed a ditch and drainage system causing water damage to the plaintiff's property); *Lucas v. Raul Family Ltd. Partnership,* 359 S.C. 505, 598 S.E.2d 712 (2004) (adjoining landowner clears land causing damage to plaintiff's property). Nuisance *per se* applies equally to this case.

C. There is Reasonable Evidence of Property Damage

Respondents presented evidence of property damage to support the Jury's reasonable conclusions, including:

1. Brent Click's testimony that his back building is suffering severe cracks and uneven floors since the negligent removal of the lateral support for the hill;[31]
2. Chris Danner's testimony that the door to the paint booth started sticking and Brent Click stopped using dollies to move cars around due to the uneven floors after the digging.[32]
3. Chris Danner's testimony that he stopped parking on the side of the building due to the land "eroding out." [33]
4. Chris Danner's testimony that the ground had dropped 12 inches.[34]
5. Chris Danner's testimony of how the cabinets inside the shop have become uneven since the digging.[35]
6. Bradley Dobson's testimony of how uneven the floors became.[36]

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[31] R. p. 798, lines 7-22; R. p. 814, lines 1-9. Multiple photos showing cracks were submitted into evidence, Trial Exhibit P-24, R. p. 1338; Trial Exhibit P-28, R. pp. 1352-1358; Trial Exhibit P-32, R. pp. 1367-1370.
[32] R. p. 885, line. 16 – R. p. 886, line 12; Trial Exhibit P-25, R. pp. 1339-1342.
[33] R. p. 882, lines 5-15.
[34] R. p. 883, lines 16-25.
[35] R. p. 886, line 13 – R. p. 887, line 11.
[36] R. p. 1006, lines 3-11.

7. Mark Smith's testimony of how the floor was fine when he owned the building from 2005 until 2014.[37]
8. Shelly Click's testimony regarding the changes in the floor.[38]
9. Expert David Hall's testimony of the wide cracks in the floor.[39]
10. Expert David Hall's testimony of the dangerous condition to the driveway (with physical evidence of failure), leaving it in an unsafe condition of imminent failure caused by the negligent removal of the lateral support to the hill.[40]
11. Expert David Hall's testimony of Appellants' leaving embankments of significant steepness without some sort of mitigation to replace the weight of the material that was removed.[41]

The evidence submitted to the Jury, without objection, reasonably supports their conclusion that the removal of the lateral support created a nuisance and caused it to be dangerous at all times and under all circumstances to the Click property. Therefore, this Court should deny Appellants' request to overturn the Jury's finding of nuisance.

D. The Trial Court Properly Denied Appellants' Motion for Directed Verdict and JNOV as to Nuisance

Appellant overlooks the fact that if the evidence at trial yields more than one reasonable inference or its inferences are in doubt, the trial court must deny the Motion for Directed Verdict

[37] R. p. 1026, lines 9-25.
[38] R. p. 925, line 20 – R. p. 927, line 6; Trial Exhibit P-11, R. pp. 1330-1331; Trial Exhibit P-30, R. pp. 1365-1366.
[39] R. p. 971, line 19- R. p. 972, line 6; Trial Exhibit P-29, R. pp. 1359-1364.
[40] R. p. 961, line 19 – R. p. 962, line 20; R. p. 982, lines 6-13; Trial Exhibit P-41, R. p. 1371; Trial Exhibit P-44, R. pp. 1375-1376.
[41] R. p. 962, line 22 – R. p. 963, line 15.

or JNOV. *RFT Mgmt.* 399 S.C. at 332, 732 S.E.2d at 171. An appellate court will reverse the [circuit] court's ruling only if no evidence supports the ruling below. *Id.*

Appellants argue that Respondents' expert agreed that the "cone of influence," meaning the soil material that would be affected by the failure of the slope, does not affect the back building. They then further argue that this means there is no evidence of damage as a result of the excavation. This argument ignores Hall's testimony that the observed cracks in the exterior wall and interior floor of the back building show shifting in the ground in the direction of the excavation.[42] Hall testified the failure condition of the soil had already begun and there is a continual loss of material.[43] The Jury could reasonably infer from this testimony that Appellants' excavation created a continuing, dangerous condition and caused the damage to the Click Property presented by the Respondents. It was therefore proper for the trial court to deny Appellants' Motion for Directed Verdict and JNOV.

E. The Trial Court Properly Denied Appellants' Motion for a New Trial

Appellants abandoned this issue by failing to cite to any law or authority in support of their argument. *See D.R. Horton, Inc. v. Wescott Land Co.*, LLC, 398 S.C. 528, 548-49, 730 S.E.2d 340, 350-51 (Ct. App. 2012) (holding an appellant abandoned an issue by failing to cite any law or authority in support of their argument and making only conclusory arguments).

[42] R. p. 971, line 19 – R. p. 972, line 6.
[43] R. p. 982, lines 6-13.

III. THE JURY'S FINDING THAT APPELLANTS' NEGLIGENT REMOVAL OF THE LATERAL SUPPORT TO RESPONDENTS' PROPERTY RESULTED IN DAMAGE IS REASONABLY SUPPORTED BY THE EVIDENCE

A. Evidence Supporting Damages

Respondents' civil engineering expert, David Hall, P.E., made it clear that Appellants' negligent DIY excavation was at a dangerously unsafe angle that removed the lateral support previously enjoyed by the Click property. Hall testified under cross-examination of how damage was already occurring:

> A. It's in the condition of imminent failure, meaning there is evidence that there is failure that is beginning. There's material movement on top of the embankment. there's been a loss of material that Mr. Thomas has had to get his bobcat out and scoop up and move someplace else. I've seen those pictures. So there's a continual loss of material, which is a condition of failure. And I think it's likely that we will have a significant failure.[44]

Respondents presented evidence of Geotechnical testing which showed the excavation created a dangerous instability on the Click Property.[45] Hall testified that travel up the hill over that area with heavy equipment is not safe,[46] agreeing with Brent's conclusion it was now too dangerous for heavy trucks.[47]

As set forth in Section II. C above, ample testimony was presented supporting Respondents' damages suffered as a result of the negligent digging. Chris Danner, Shelly Click, and Brent Click all testified that the back building has continued to show evidence of damage from the excavation performed by Thomas.[48] The floor has measurably shifted since the excavation,

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[44] *Id.*
[45] R. p. 956, line 21- R. p. 957, line 4; R. p. 961, line 21 – R. p. 962, line 21.
[46] R. p. 972, line 14– R. p. 973, line 3.
[47] *Id.*; R. p. 826, lines 10-12.
[48] R. p. 882, lines 5-12; R. p. 885, line 16 – R. p. 886, line 2; R. p. 886, line 13 – R. p. 887, line 11; R. p. 925, line 20 – R. p. 927, line 6; R. p. 798 lines 7-22; R. p. 814, lines 1-9; Trial Exhibit P-22, R. pp. 1332-1337.

with hairline cracks that were consistent with the age and use of the building dramatically and continually increasing. [49]

Respondents have become limited in the work they can perform because the property cannot safely support large vehicles on the driveway and turn-around.[50] Following the excavation, Respondents also have experienced utility problems.[51] Eventually, Brent and Shelly will lose access to the back building due to the damage caused by Thomas.[52] This will further damage their business.[53] The apartment where they live is also in the back building.[54]

Appellants make the point[55] that the slab Brent poured for the carport was not cracked, thus negating the testimony of the Clicks. However, Brent Click explained in his testimony that this slab was far thicker than the floor of the back building and it was reasonable for a jury to find the absence of cracks in the newer, thicker slab did not negate the presence of other evidence of damage in the back building following the excavation.[56]

B. The Trial Court Properly Denied Appellants' Motion for Directed Verdict, JNOV, and New Trial as to Negligence

Appellants make the same arguments regarding Respondents cause of action for negligence as they did for the nuisance cause of action. Respondents incorporate their responses in Sections II and III above.

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[49] R. p. 724, lines 9-10; R. p. 803, line 6 - R. p. 804, line 21; Trial Exhibit P-27, R. pp. 1343-1351; R. p. 856, lines 6-17; R. p. 878, line 14 - R. p. 879, line 15; R. p. 885, lines 16-22; R. p. 923, line 2 – R. p. 926, line 7; R. p. 971, line 19 – R. p. 972, line 6; R. p. 1004, lines 7-16, R. p. 1005, line 23- R. p. 1006, line 1; R. p. 1012, line 18- R. p. 1013, line 6, R. p. 1026, lines 9-22.
[50] R. p. 825, line 23 – R. p. 827, line 15.
[51] R. p. 833, line 6 – R. p. 835, line 20.
[52] R. p. 973, lines 4-8.
[53] R. p. 843, lines 2-10.
[54] R. p. 752, lines 14-19.
[55] Appellants' Brief, pp. 24-25.
[56] R. p. 728, lines 2-21 (slab 4 to 8 inches thicker with rebar and special concrete).

IV. THE JURY'S FINDING THAT APPELLANTS' AND THEIR PREDECESSORS IN TITLE ACQUIESCED TO THE BOUNDARY WAS REASONABLY SUPPORTED BY THE EVIDENCE

A. Evidence Supporting Acquiescence

Respondents' witnesses who previously owned the Click Property, Bradley Dobson and Mark Smith, testified in detail about their use of the driveway and turnaround area as though they owned them.[57] Dobson had personal knowledge of the same use by his predecessors, the Rameys (going back to the 70s), as he visited them prior to buying the property. *Id.*

Appellants seem to assert there must be an explicit agreement between the landowners that they will recognize and accept a new property line for acquiescence to exist. However, the conduct of the prior owners, consistent over the years, was sufficient to reasonably support the Jury's verdict that a different boundary line had been established.

> [I]f a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interest[s] are affected. *His silence is acquiescence and it estops him.*

Jordan v. Judy, 413 S.C. 341, 348-349, 776 S.E.2d 96, 101 (Ct. App. 2015) (quoting *McClintic v. Davis*, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955) (emphasis added).

The prior owners of the adjoining Thomas Property, Merck, Porter, and Watkins, never prohibited Bradley Dobson from treating the driveway and turnaround as if it were his own.[58] Neither Watkins nor his renters ever used the driveway and turnaround from 2013 to 2017.[59] Owners Porter and Watkins saw the slabs and awnings Brent Click erected in 2014 and said

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[57] R. p. 998, line 23 – R. p. 1000, line 6; R. p. 999, line 2 – R. p. 1000, line 11; R. p. 1022, lines 5-19.
[58] R. p. 999, line 19 – R. p. 1000, line 6; R. p. 1002, lines 4-23. Dobson owned the Click property from 1996 to 2005.
[59] R. p. 898, lines 15-22.

nothing.[60] Watkins admitted he did not object to Brent's use.[61] The poured concrete slabs and awnings that encroached upon the Thomas Property were not commented on.

Porter's and Watkins' silence in 2015 encouraged Brent Click to purchase the property in 2017 and to treat the driveway and turnaround as part of his property. Their silence over the many years was acquiescence to the inclusion of the entire driveway and turnaround in the Click Property:

> If adjoining landowners occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in for a long period of time, they are precluded from claiming the boundary line thus recognized and acquiesced in is not the true one.

Gardner v. Mozingo, 293 S.C. 23, 26, 358 S.E.2d 390, 392 (1987) quoting *Klapman v. Hook*, 206 S.C. 51, 32 S.E.2d 882 (1945);[62] *Kirkland v. Gross*, 286 S.C. 193, 332 S.E.2d 546 (Ct. App. 1985).

The fact that Smith and Dobson both knew where the boundary line was drawn on the Ramey survey is irrelevant. The acquiescence cause of action is not founded on whether prior owners were ignorant about where the boundary was drawn on the plat, but on the consistent course of conduct over time by the prior and present owners.

Finally, there was consistent testimony and documentary evidence defining the new boundary that was acquiesced to between the properties. Respondents' witnesses described their use of the driveway and turnaround.[63] The 1996 Ramey Survey (Trial Exhibit P-8, R. 1323)

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[60] R. p. 736, line 5 – R. p. 738, line 16.

[61] R. p. 1106, line 20 – R. p. 1107, line 2; R. p. 1108, lines 18-24.

[62] Appellants cited the case of *Croft v. Sanders*, 283 S.C. 507, 323 S.E.2d 791 (Ct. App. 1984) that relied upon *Klapman v. Hook*, 283 S.C. at 509; 323 S.E.2d 792. *Croft* is distinguishable as there was evidence Croft erected a fence on his property to secure a farm loan and not to mark the boundary of the property. There was sufficient evidence in the present case to support the reasonable conclusion of both the Jury and Judge Gravely that both parties recognized the true property line. Appellants' cited case of *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005) is not even an acquiescence case, but rather a prescriptive easement case. There, the initial owner interrupted the other's use; there was no evidence that the Thomas property owners ever interrupted the use.

[63] R. p. 719, lines 21-23; R. p. 720, lines 15-23; R. p. 898, lines 8-22; R. p. 999, lines 16-25; R. p. 1022, lines 5-19.

actually outlined the area of use that the Rameys had enjoyed and that subsequent owners Dobson, Smith and Click continued to use for access to the back building. The area, as it presently exists, is documented by David Hall's "S-1" drawing (Trial Exhibit P-42, R. p.1372). Therefore, this Court should affirm the jury's finding of acquiescence.

B. The Trial Court Properly Denied Appellants' Motion for Directed Verdict, JNOV, and New Trial as to Acquiescence

As set forth above, Respondents presented evidence that Appellants and their predecessors acquiesced to the boundary line created by the driveway and turnaround that followed the natural topography of the land. The owners of both parcels treated the boundary as that created by the slope of the land and as shown as the driveway and turnaround area depicted on the 1996 Ramey Boundary Survey. There was consistent testimony and documentary evidence defining the new boundary that was acquiesced to between the properties. Respondents' witnesses described their use of the driveway and turnaround.[64] The 1996 Ramey Boundary Survey (Trial Exhibit P-8, R. 1323) also outlined the area of use that the Rameys had enjoyed and that subsequent owners Dobson, Smith and Click continued to use for access to the back building. The area, as it presently exists, is documented by David Hall's "S-1" drawing (Trial Exhibit P-42, R. p. 1372). Taking the evidence and testimony in the light most favorable to the Respondents, the trial court properly denied Appellants' Motion for Directed Verdict or JNOV.

Appellants have abandoned any argument that they are entitled to a new trial on the issue of acquiescence.

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[64] See note 63, supra.

V. THE JURY'S FINDING OF A PRESCRIPTIVE EASEMENT IS REASONABLY SUPPORTED BY THE EVIDENCE

A. Evidence Supporting Prescriptive Easement

The Jury (and Judge Gravely) accepted the testimony of Respondents' predecessor owners and the Clicks, by clear and convincing evidence, that they did not seek or receive permission to use the driveway and turnaround, and these areas were adversely used.[65]

"To establish a prescriptive easement, one must show: (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse[,] or under claim of right." *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169-170 (2015). The years of use by Dobson, Smith, and Click are allowed to be "tacked" together in order to satisfy the 20-year requirement. *See Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997); *Carolina Ctr. Bldg. Corp. v. Enmark Stations, Inc.*, 433 S.C. 144, 857 S.E.2d 16 (Ct. App. 2021).

Bradley Dobson's testimony established his ownership and use of the Click property since 1996.[66] This was 24 years before this lawsuit was filed, and he also had personal knowledge of and testified about the similar use by the Rameys since the 70s,[67] his predecessor in title. His use was without permission[68] and thus adverse to the ownership of the Thomas property.

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[65] R. p. 726, lines 12-19; R. p. 909, lines 24 – R. p. 910, line 1; R. p. 1000, line 1 – R. p. 1001, line 6; R. p. 1022, lines 5-14.
[66] R. p. 998, line 19 – R. p. 999, line 25; Trial Exhibit P-7, R. pp. 1320-1322.
[67] R. p. 993, line 14 – R. p. 994, line 23.
[68] R. p. 1001, lines 1-6.

Dobson sold the Click property to Mark Smith in 2005.[69] Smith's use was also without permission and was adverse, as he testified.[70] Smith sold the property to Brent Click in 2017[71] (who titled the property in the name of his business, Click Properties LLC), who continued to use the driveway and turnaround in an adverse manner.[72]

"[W]hen it appears that claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse." *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 229, 797 S.E.2d 387, 390 (2016) quoting *Williamson v. Abbott*, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917). Once the presumption applies, the servient owner bears the burden of rebutting the presumption, which can be done by showing permissive use. *Carolina Ctr. Bldg. Corp. v. Enmark Stations, Inc.*, 433 S.C. 144, 154, 857 S.E.2d 16, 22 (Ct. App. 2021).

While Appellants continue to argue the use of the area was permissive, the Jury weighed this claim and rejected it. They believed the testimony of Dobson, Smith, and the Clicks. The issue of credibility is for the jury alone. *Parsons v. Georgetown Steel*, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995). The testimony presented by Click and his predecessors was that they openly treated the entire driveway and turnaround as exclusively belonging to the Click Property.

The proper standard to find a prescriptive easement is not "hostility," as Appellants claim, but rather open, notorious, continuous, and uninterrupted use. "Notorious" generally means that the use is actually known to the owner or is widely known in the neighborhood. *Simmons v. Berkeley Elec. Corp. Inc.*, 419 S.C. 223, 234, 797 S.E.2d 387, 392 (2016). *See Morrow v. Dyches*,

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[69] R. p. 1017, lines 2-4.
[70] R. p. 1022, lines 13-19.
[71] R. p. 1025, lines 2-5.
[72] R. p. 867, line 13 – R. p. 868, line 24.

328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997). Respondents and their predecessors openly used the driveway and turnaround as if they were the owners. Brent Click further exerted open signs of use by pouring permanent concrete slabs and adding three awnings at different times to the turnaround area, with no objections from Watkins, Porter, or Thomas.

Respondents met their burden (by clear and convincing evidence) that the use was open, notorious, continuous, and uninterrupted. The burden then shifted to Appellants to rebut the presumption. The Jury rightly concluded that Appellants failed to rebut the presumption. *See Poole v. Edwards*, 197 S.C. 280, 15 S.E.2d 349 (1941).

B. The Trial Court Properly Denied Appellants' Motion for Directed Verdict and JNOV as to Prescriptive Easement

The trial court properly denied Appellants' motions for directed verdict and JNOV because the evidence presented by the Respondents, as a whole, was susceptible of more than one reasonable inference. *Parrish v. Allison,* 376 S.C. 308, 319, 656 S.E. 2d 382, 388 (Ct. App. 2007). Appellants claim that they presented evidence that they gave permission to Respondents and their predecessors to use the disputed property; however, Appellants only presented testimony of an "unspoken understanding"[73] while Respondents presented testimony that neither they nor their predecessors sought nor received permission. Therefore, the Motions were properly denied as to prescriptive easement.

[73] R. p. 1102, lines 8-10.

VI. ACQUIESCENCE AND PRESCRIPTIVE EASEMENT ARE NOT INCONSISTENT

Appellants' assertion that the verdicts of acquiescence and prescriptive easement are inconsistent is incorrect. The law of prescriptive easement and acquiescence are not at odds with one another. Although these theories have different effects, they share common elements of proof.

Each requires that Respondents openly enjoyed the property at issue and each can be satisfied by the tacit agreement of the Appellants. *See e.g. Kelley v. Westover*, 938 S.W.2d 235, 236 (Ark. App. 1997) ("The foundation of a right by prescription is acquiescence of the owner of the servient tenement in the acts relied on to establish the easement by prescription. Acquiescence is here used in its ordinary sense; it does not mean license or permission in the active sense, but means passive assent or submission, quiescence, or consent by silence.") As noted by one court, "[i]n the very nature of [prescriptive easement] case[s] . . . . every such user is by permission of the owner of the servient tenement in the sense that he permits it to continue without exercising his right to terminate it. A permissive user therefore as distinguished from one exercised under a claim of right is not to be inferred from mere passive acquiescence." *Gallo-Mure v. Tomchik*, 829 A.2d 8 (Conn. App. 2003) citing *Phillips v. Bonadies*, 105 Conn. 722, 726, 136 A. 684, 685 (1927). Other courts have similarly held that the law of adverse possession is not at odds with the law of acquiescence. *See Houston v. Mint Group, LLC*, 968 N.W.2d 9 (Mich. Ct. App. 2021). Adverse possession is akin to "adverse easement," or prescriptive easement.

Both causes of action begin with the premise that although real property belongs to one party according to legal title, the open actions of another party in openly and adversely using the property for a certain period of time, creates equitable title in the other party. The primary

difference in the two causes of action is whether the Respondents acquired ownership up to a new boundary-line or a permanent right to use the property in dispute.

This Court must uphold a jury verdict if it is possible to reconcile its various features. *Camden v. Hilton*, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct.App.2004). A jury verdict is not overturned simply because alternative causes of action have been alleged. In the present case the Jury found Respondents are entitled to the property in question. Respondents obviously elect to set the boundary line as acquiesced to, if a formal election is required.

Prescriptive easement focuses primarily on the actions of the party seeking to establish the easement. *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169-170 (2015). The only consideration to be given to the actions of Appellants is whether permission has been given. Respondents and their predecessors in title testified that they had neither requested nor received permission to use the contested area. There was no testimony from the Appellants or their predecessors to the contrary.

Under South Carolina law, property owners may acquiesce to a new property boundary. "A disputed boundary line can be established by acquiescence of the parties." *Kirkland v. Gross*, 286 S.C. 193, 197, 332 S.E.2d 546, 548-49 (Ct.App.1985). Respondents presented evidence that the property at issue was recognized as a result of the topography of the land. The only testimony was that the owners of both parcels treated the boundary of the property as that created by the slope of the land and as shown as the driveway and turnaround area depicted on the 1996 Ramey Boundary Survey.

The element of "mutual agreement" that must be shown to establish acquiescence does not require an explicitly voiced agreement of where on a plat the boundary line is shown.[74] In acquiescence cases, the boundary line in a plat or deed (unless erroneously rendered in such instruments) is going to differ from the boundary acquiesced to over a period of time by mutual conduct. Respondents presented sufficient evidence to allow the Jury to conclude that the Appellants' silence and treatment of the now disputed area as part of the Click Property constituted acquiescence. *See Jordan v. Judy, supra,* 413 S.C. 341, 348-349, 776 S.E.2d 96, 101 (Ct. App. 2015).

The Jury's finding as to prescriptive easement and acquiescence are therefore consistent. The Jury found that Respondents were entitled to the disputed property, whether by way of prescriptive easement or acquiescence.

VII. RESPONDENTS ARE ENTITLED TO AN INJUNCTION

A. Evidence Supporting an Injunction

Respondents received a unanimous jury verdict over a year ago, finding Appellants liable for nuisance *per se* and negligence arising out of Appellants' DIY excavation of the Thomas Property in August 2018. Appellants' owner, Jonathan Thomas, performed his own "self help" excavation, rather than hiring a qualified, professional excavator.[75] Appellants' excavation caused significant damage to Respondents' driveway, turnaround, and back building, which is ongoing to this day. As set forth above, Respondents presented evidence at trial to reasonably support the Jury's finding of nuisance.

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[74] The location of the driveway and turnaround as used by the Rameys was depicted on the 1996 plat with dotted lines. Trial Exhibit P-8, R. p. 1323.

[75] R. p. 1034, lines 18-24; R. p. 1144, lines 6-16; R. p. 1145, lines 12-25.

As the South Carolina Supreme Court has held:

> It has been too frequently held by this Court to require further discussion that, when the existence of a nuisance has been established by the verdict of the jury, the party injured is entitled as a matter of right to an injunction to prevent its continuance.

Dill v. Dance Freight Lines, 247 S.C. 159, 146 S.E.2d 574, 575 (1966), citing *Williams v. Haile Gold Mining Co.*, 85 S.C. 1, 66 S.E. 117 (1909).

In *Dill,* the plaintiff obtained a verdict for both actual damages and a finding of nuisance against the defendant who, in operating his trucking business, caused red dust to continuously blanket plaintiff's property. Likewise, the Jury in this case found actual damages and that Respondents established a nuisance as a result of Appellants' DIY digging.

Testimony was presented by Respondents' expert witness, David Hall, P.E. that erosion was continuing on the Click property.[76] Lay testimony by Mr. and Mrs. Click, Chris Eleazer, Chris Danner, and photographic evidence was presented that continuing erosion was occurring on the property and there was continuing impact on the building based on enlarged and new cracks and the dropping of the ground in the grassy area beside the building.[77]

The lower court in *Dill* issued an order, affirmed by the Supreme Court, that "enjoins the defendant from operating its terminal in such a manner as to continually and frequently cause the dust complained of to be cast upon the property of the plaintiff." The Supreme Court also held that the defendant was ". . . free to devise its own means to prevent damaging the plaintiff in the future."[78] In *Dill,* the court issued an injunction, but it was up to the party to determine how to

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[76] See notes 39, 40, and 43, *supra.*
[77] See notes 31, 48, and 49 *supra.*
[78] 247 S.C. at 163; 146 S.E.2d at 575.

comply with the Order. Judge Gravely similarly ruled that Appellants were free to devise their own means to prevent continuing damage.

Judge Gravely's ruling is entirely consistent with South Carolina law and not an abuse of discretion. *Dill* is directly on point. Judge Gravely did not add to the Jury's verdict, he only implemented it in compliance with *Dill*. *Dill* awarded plaintiff both actual damages and an injunction. Respondents respectfully request his Order to be affirmed.

B. The Trial Court Properly Denied Appellants' Motion for Directed Verdict as to Injunctive Relief

Because the Respondents presented evidence from which the Jury could infer a continuing nuisance, the trial court properly denied Appellants' motions for directed verdict and JNOV. Additionally, Appellants have abandoned the issue of a new trial as to an injunction.

VIII. THE TRIAL COURT PROPERLY ADDRESSED THE INCONSISTENT VERDICT ISSUE

The Jury initially returned a verdict on nuisance *per se* in favor of the Respondents but awarded zero dollars in damages. As the Court of Appeals summarized in *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996):

> A trial court is vested with very limited power to correct a jury verdict which is defective in form, but which in substance clearly and definitely expresses the jury's intentions. . . .
>
> "The law rather forbids this court assuming to take upon itself the powers, duties, rights, and privileges of a jury." [internal citations omitted]. . . .
>
> The quintessential case presenting the issue of reformation of the jury verdict is a jury verdict for "no dollars." The court cannot lawfully enter judgment on an inconsistent or incomplete verdict. *Johnson v. Phillips* 315 S.C. 407, 433 S.E.2d 895 (Ct. App. 1993) rev'd in part on other grounds 318 S.C. 453, 458 S.E.2d 427 (1995) . . . .

> When the jury returns a verdict of "no damages" for the plaintiff, the judge should inform the jury that he cannot legally accept the verdict, and should return the case to them with instructions explaining nominal and compensatory damages and charging them either to assess a definite dollar amount in damages (nominal or actual) for the plaintiff or to return a verdict for the defendant.
>
> *Vinson, supra*, 477 S.E.2d at 724-726.

This is what Judge Gravely did: he explained to the Jury the necessity to return to the Jury Room and to solve the problem. It is of no relevance that the Jury was able to quickly determine the damages attributable to the nuisance created by Appellants. As a general rule, the shortness of time taken by a jury in reaching its verdict has no effect upon the validity of the verdict. *Youmans v. Dept. of Transp.*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008) South Carolina law requires the jury to be the sole judge of issues of fact, including the issue of damages. *Johnson, supra*, 315 S.C. at 416-17, n. 7, 433 S.E.2d at 901, n. 7. Therefore, there is no basis for reversal since this matter was handled as the Appellate Courts have instructed the trial court to do.

Appellants claim in their Brief on p. 39 that Judge Gravely's instructions to the Jury were error. No objection was made to the instructions at the time,[79] and therefore, the matter is not preserved:

> It is firmly established law that, ordinarily, an issue must be presented to the trial court or it is not preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693- 94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court.").

State v. Dial, 429 S.C. 128, 132, 38 S.E.2d 501, 503 (2020).

[79] R. p. 1290, line 24 – R. p. 1291, line 24.

IX. THE TRIAL COURT PROPERLY REFUSED TO GRANT A NEW TRIAL FOLLOWING THE JURY'S CORRECTION OF ITS INCONSISTENT VERDICT

Appellants argue the Thirteenth Juror doctrine should apply to the issue of the corrected Jury Verdict. This doctrine entitles the trial judge to act as the thirteenth juror when he finds "the evidence does not justify the verdict," and then to grant a new trial based solely "upon the facts." *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990).

Upon review, a trial judge's 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." *Folkens*, 300 S.C. at 254-55, 387 S.E.2d at 267 (citing *South Carolina State Highway Dep't v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976)). This Court's "review is limited to consideration of whether evidence exists to support the trial court's order." *Id.* at 255, 387 S.E.2d at 267.

Brent testified that the Click Property had lost approximately one-third of its value, or $83,000, as a result of the excavation.[80] As the property owner, Brent is qualified to give this testimony.[81] This testimony alone would support the Jury's finding of $28,000 in damages for nuisance.

The trial court gave a curative instruction to the jury. A curative instruction is generally deemed to have cured any alleged error. *State v. White*, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct.App.2006). The Jury did not need to be re-instructed on the law as they already had copies of the Judge's written instructions to refer to and the verdict form itself was explicit as to the options

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[80] R. p. 843, lines 2-18.

[81] *Seaboard Coast Line R. R. v. Harrelson,* 262 S.C. 43, 202 S.E.2d 4 (1974).

for decisions that could be made. A trial court may, in its discretion, submit its instructions on the law to the jury in writing. *State v. Turner*, 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007).

Therefore, the trial court properly denied Appellants' motion for a new trial.

X. JUDGE KINLAW DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANTS' MOTION TO AMEND

The allowance of an amendment to pleadings is addressed to the sound discretion of the trial judge and his actions will not be disturbed on appeal absent an abuse of discretion. *Porter Bros., Inc. v. Specialty Welding Co.*, 286 S.C. 39, 331 S.E.2d 783 (Ct. App. 1985); *Crowley v. Spivey*, 288 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985).

Rule 15(a), SCRCP, sets forth the standard for granting motions to amend. It provides:

> A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.

This case had been pending for two years and was scheduled to be tried during the May 23, 2022 Term when Appellants filed their Motion to Amend. Judge Kinlaw found that a counterclaim at that late stage of litigation would be prejudicial to Respondents. (R. 13). He also found that such an amendment would be futile in that it would prolong litigation and would not serve the ends of justice, especially considering that Respondents' Third Cause of Action already requested a Declaratory Judgment to Quiet Title as to the common property line of the parties. (R. 13). *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' ... it may be denied where the proposed amendment would be futile."), rev'd on other grounds, 401 S.C. 1, 736 S.E.2d 242 (2012).

Rule 7(b)(1), SCRCP, is substantially similar to its federal counterpart, Rule 7(b)(1), FRCP. *See Camp v. Camp,* 378 S.C. 237, 662 S.E.2d 458 (Ct. App. 2008). "[A] motion that fails to state any grounds for relief . . . is insufficient under Rule 7(b)(1)." *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1240 (10th Cir. 2006). Appellants' own Motion and Memorandum established that the Counterclaim added nothing to the case and was unnecessary because "the issues set forth in Defendants' Counterclaim are already set to be adjudicated as part of Plaintiffs' claims."[82]

There were no grounds stated that showed with "particularity" why amendment at such a late stage should be granted. The particularity requirement "is to be read flexibly in recognition of the peculiar circumstances of the case." *Lucey v. Meyer*, 401 S.C. 122, 131, 736 S.E.2d 274, 279 (Ct. App. 2012) quoting *Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752, 760 (1st Cir.1996). Judge Kinlaw did not abuse his discretion in denying the Motion.

Even if this Court were to find the lower court erred, it is harmless because Appellants have not demonstrated prejudice. The issues that Appellants claim they wanted to raise in their Amended Answer and Counterclaim, were the very issues presented by both parties at trial. Therefore, a new trial or any further proceedings are not warranted. *McKissick v. J.F. Cleckley & Co.*, 479 S.E.2d 67, 325 S.C. 327 (Ct. App. 1996) citing *State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985) (errors are harmless where they could not have reasonably affected the trial).

XI. THE LOWER COURT PROPERLY DENIED APPELLANTS' MOTION TO DISMISS THE COMPLAINT

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in

[82] Defendants' Motion to Amend Answer to add Counterclaim, p. 2, ¶ 6; filed February 23, 2022. R. p. 133.

the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

A. Respondents Properly Pled Nuisance

Respondents properly pled a cause of action for nuisance. Appellants claim on p. 18 of their Brief that Respondents' Complaint fails to articulate how the alleged nuisance interferes with Respondents' use and enjoyment of their land. Paragraph 24 of the Complaint provides:

> 24. Defendants excavated the Thomas Property in such a manner as to damage the stability of the soil on Plaintiffs' property. This excavation was unreasonable, intentional and/or reckless, and continues to interfere with Plaintiffs' use and enjoyment of their property.

(R. p. 50.)

As Rule 8, SCRCP, requires:

> A pleading which sets forth a cause of action . . . shall contain . . . a short and plain statement of the facts showing that the pleader is entitled to relief . . . . .

This is what paragraph 24 is: a short and plain statement of the facts showing that Respondents were entitled to relief.

"The purpose of a pleading is fair notice to the opponent and the court." *Watts v. Metro Sec. Agency,* 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001). General damages, that is, those which naturally, logically, and necessarily result from the injury, do not have to be specially

pleaded, but may be proved under a general allegation of damages. *Kline Iron & Steel Co. v. Superior Trucking Co., Inc.*, 261 S.C. 542, 201 S.E.2d 388 (1973). Respondents' pleadings provided fair notice to Appellants of its allegations and the trial court was correct in denying the Motion to Dismiss.

B. Respondents Properly Pled Negligence

Respondents properly pled negligence. Respondents alleged Appellants owed them a duty not to excavate their own property in such a manner as to cause damage to Respondents' property. (Complaint ¶ 29, R. p. 50). It has long been held in South Carolina that a landowner owes a duty to adjoining landowners not to excavate his own property in such a manner that it damages either the soil on adjacent property or structures upon that property. *See Bailey v. Gray*, 53 S.C. 518, 31 S.E. 354 (1898).[83] Respondents have alleged this duty of care and that it was breached by Appellants. (Complaint ¶15, R. pp. 48-49).[84]

Respondents are not required to establish the "nature, degree, or specific location of the damage" as argued by Appellants. Rule 8(a), SCRCP only requires:

> A pleading which sets forth a cause of action . . . shall contain . . . a short and plain statement of the facts showing that the pleader is entitled to relief . . . . .

[83] Appellants admit on page 18 of their Brief, citing *Contos v. Jamison*, 81 S.C. 488, 62 S.E. 867 (1908), that "...the general law is well settled that a proprietor excavating on his own premises is liable for damage done to the adjacent owner's soil..."

[84] Respondents' pleadings are not inconsistent. Paragraph 15 (R. 48-49) sets forth the fact that Appellants' excavation on its own property has caused erosion which has undermined the stability of the soil on Respondents' property. Paragraph 31 (R. p. 51) alleges that the erosion will continue until it cuts off access to a portion of the Click Property.

See also Kline Iron & Steel Co. v. Superior Trucking Co., Inc., 261 S.C. 542, 201 S.E.2d 388 (1973).[85] Respondents' pleadings provided fair notice to Appellants of its allegations and the trial court was correct in denying the Motion to Dismiss.

C. Respondents Properly Pled Acquiescence and Prescriptive Easement

As set forth above, Appellants misconstrue the requirements for acquiescence and prescriptive easement. Appellants also ignore the fact that causes of action may be pled in the alternative. See Rule 8(a), SCRCP (Relief in the alternative or of several different types may be demanded). Respondents properly pled the elements of both causes of action and the trial court properly denied Appellants' motion to dismiss.

XII. THE LOWER COURT PROPERLY RULED ON APPELLANTS' SUMMARY JUDGMENT MOTION

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009).

In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Id.* At 330, 673 S.E.2d at 803. In cases requiring a heightened burden of proof, the

[85] Appellants reference to *Chestnut v. AVX Corp.*, 413 S.C. 224, 776 S.E.2d 82, (2015) is misplaced. In that case, the plaintiff alleged only that adjoining property had been contaminated. In the present case, Respondents clearly pled that Appellants' excavation had undermined the stability of the soil on the Click Property, causing damage.

non-moving party must submit more than a mere scintilla of evidence. *Id.* at 330–31, 673 S.E.2d at 803.

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." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112 410 S.E.2d 537, 543 (1990) quoting *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C.1975).

A. Nuisance *per se*

As set forth above, Appellants misconstrue what is required to show a nuisance *per se*. Respondents incorporate the arguments set forth in Section II.

Additionally, Appellants argue that the only evidence presented was of a "anticipatory" nuisance. This is a misstatement of the evidence that was presented in opposition to Appellants' Summary Judgment Motion. Respondents' presented testimony from their civil engineering expert, David Hall, that Appellants excavated the Thomas Property at a dangerously unsafe angle that removed the lateral support previously enjoyed by the Click property. (Ex. B, Hall Deposition, R. 397, lines 7-18). Respondents submitted evidence regarding Geotechnical testing substantiating that the excavation near the area towards the top of the Click driveway created a dangerous instability. (Ex. A, May 4, 2022 Affidavit of David Hall, ¶6, R. 390). Hall testified that travel up the hill over that area is not safe. (Ex. B, Hall Deposition, R. 396, lines 3-15). Rule 703, SCRE, allows an expert giving an opinion to rely on facts or data that are not admitted in evidence or even admissible into evidence. *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 523, 698 S.E.2d 822, 832 (Ct. App. 2010) (citing *Jones v. Doe*, 372 S.C. 53, 62, 640 S.E.2d 514, 519 (Ct. App. 2006)).

In their opposition to Appellants' motion for summary judgment, Respondents also presented the testimony of Chris Danner (Ex. D, Affidavit of Chris Danner, R. pp. 414-417), Shelly Click (Ex. C, Shelly Click Deposition, R. p. 402, line 20- R. p. 412, line 18), and Brent Click (Ex. E, Brent Click Deposition, R. p. 427, line 4 - R. p. 432, line 2; Ex. F, May 13, 2022 Affidavit of Brent Click, R. pp. 434-456) that the back building on the Click Property has continued to show evidence of negative impact from the excavation performed by Thomas. Brent Click testified that Hyper Formance has become limited in the work it can perform because the property cannot safely support large vehicles at the gravel turn-around. Respondents presented evidence they have experienced plumbing problems and cracking in the back building. (Ex. E, Brent Click Deposition, R. p. 427, line 4 - R. p. 432, line 2; Ex. F, May 13, 2022 Affidavit of Brent Click, R. pp. 434-456). This is not an anticipatory nuisance but rather a present condition that is continuing and worsening in nature. (Ex. B, Hall Deposition, R. p. 394, line 16 - R. p. 395, line 12). Taking the evidence in the light most favorable to the Respondents, the lower court properly denied Summary Judgment.

B. Negligence

Appellants erroneously claim that Respondents failed to present any evidence of damages resulting from the excavation work in response to their Motion for Summary Judgment.

Appellants falsely suggest that the only evidence in response to their Summary Judgment Motion was an affidavit from Brent Click, which they characterize as self-serving. As set forth above, Respondents presented testimony from their expert witness that the excavation on the Thomas Property had de-stabilized the soil on the Click Property, causing continuing problems. Respondents also submitted the affidavit of Chris Danner regarding damage he had observed on the Click Property since the excavation.

As the owner of the property, Brent is competent to testify as to its value and as to his loss. *See Seaboard Coast Line R. R. v. Harrelson,* 262 S.C. 43, 202 S.E.2d 4 (1974) (a landowner, who is familiar with his property and its value, is allowed to give his estimate as to the value of the land and damages thereto, even though he is not an expert*); State v. Brown*, 402 S.C. 119, 131, 740 S.E.2d 493, 499 (2013) ("Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not qualify him as a witness were he not the owner.")

Finally, Appellants argument that a 2014 video showing small cracks on the concrete floor means Respondents' causes of action for nuisance or negligence fail as a matter of law is without merit. The smooth cracks that were present in the floor before the excavation were of the type expected for a building of that age and construction. Evidence was presented that cracks have increased significantly since the excavation. (Ex. C, Shelly Click Deposition, R. p. 406, line 4 - R. p. 407, line 7; Ex. F, May 13, 2022 Affidavit of Brent Click, ¶5, R. p. 435). Viewing the evidence in the light most favorable to Respondents, the lower court properly found an issue of material fact existed for a jury as to negligence.

C. Acquiescence

Again, Appellants seem to assert there must be an explicit agreement between the landowners that they will recognize and accept a new property line for acquiescence to exist, ignoring that silence can constitute acquiescence. *Jordan v. Judy*, 413 S.C. 341, 348-349, 776 S.E.2d 96, 101 (Ct. App. 2015) (quoting *McClintic v. Davis*, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955) (emphasis added). Respondents presented evidence of such acquiescence, creating an issue for the jury. (Ex. G, March 8, 2022 Affidavit of Bradley Dobson, R. pp. 458-461; Ex. I,

Mark Smith Affidavit, R. pp. 468-472; Ex. E, Brent Click Deposition, R. p. 420, ll. 17-25; R. p. 421, ll. 14-19).

D. Prescriptive Easement

Appellants argue summary judgment should have been granted as to prescriptive easement because Respondents were granted permission to use the property in question. Appellants ignore the fact that Respondents presented testimony that neither they, nor their predecessors, sought or received permission to use the property. (Ex. G, March 8, 2022 Affidavit of Bradley Dobson, R. pp. 458-461; Ex. I, Mark Smith Affidavit, R. pp. 468-472; Ex. J, February 26, 2020 Affidavit of Brent Click, R. pp. 474-479). This created a question of fact for the jury to decide.[86]

E. Injunction

Respondents presented a genuine issue of material fact as to a continuing nuisance as well as acquiescence and prescriptive easement. Therefore, the lower court properly denied summary judgment as to any injunctive relief.

CONCLUSION

The lower court judges properly handled the inconsistent jury verdict issue, properly denied Appellants' Motion to Amend its Answer, and properly ruled that Appellants are to abate the nuisance.

Respondents provided sufficient evidence to support the Jury's finding of nuisance *per se* and negligence, that Respondents' predecessors acquiesced to the boundary between the Click and Thomas properties, for prescriptive easement, and an award of damages.

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[86] *Carolina Ctr. Bldg. Corp. v. Enmark Stations, Inc.*, 433 S.C. 144, 161-162, 857 S.E.2d 16, 26 (Ct. App. 2021) (finding conflicting testimony at trial regarding permissive use creates a question of fact to be decided by the decision maker.)

Therefore, Respondents respectfully request this Court uphold the award of the Jury and the proper rulings of both Judge Gravely and Judge Kinlaw.

Respectfully submitted,

October 30, 2023

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CERTIFICATE OF COUNSEL

The undersigned, attorney for Respondents, hereby certifies that this Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Alex Kinlaw, Jr. and Perry H. Gravely, Circuit Court Judges

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Case No. 2020-CP-39-00266
Appellate Case No. 2022-001499

Click Properties, LLC and Hyper Formance, LLC ..... Respondents

v.

Thomas SC Properties, LLC and All-Tech Tire and Auto Repair, LLC ..... Appellants

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PROOF OF SERVICE

I, Peggy McComb, Legal Assistant to attorneys for Respondents, Click Properties, LLC and Hyper Formance, LLC, certify that I have served a copy of Respondents' Final Brief *via email* and by depositing a copy in the U.S. Mail, sufficient first class postage prepaid, on October 30, 2023, addressed to:

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October 30, 2023

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Re: *Click Properties, LLC and Hyper Formance, LLC v. Thomas SC Properties, LLC and All-Tech Tire and Auto Repair, LLC*
C.A. No. 2020-CP-39-00266
Appellate Case No. 2022-001499

Dear Ms. Kitchings:

Attached for filing is Respondents' Final Brief and a Proof of Service in the above captioned matter.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Laura W. H. Teer

/pm
Enclosures
cc: Counsel of Record