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

Respondent.

FINAL BRIEF OF APPELLANTS

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Columbia, South Carolina

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STATEMENT OF THE CASE

Appellants Guadalupe and Sandra Colorado ("Appellants") have been next-door neighbors to Respondent Maurice Powers ("Respondent") in Laurens County since 2011. Respondent has been spray-painting vehicles on his property since 2012. In or about 2014, Appellants began to detect chemical smells emanating from Respondent's property. Appellants were unsure how to stop the chemical smells from entering their property and were concerned about the health effects of the same. Appellants reported Respondent's activities to various government agencies requesting help, including South Carolina's Department of Health and Environmental Control, the Laurens County Building Code Office, and the Laurens County Sheriff Department. However, these agencies either concluded that Respondent's activities were outside their jurisdiction or were within acceptable air quality limits. However, Appellants continued to suffer from the chemical smells entering their property and continued to seek a solution. After some research, Appellants discovered that Respondent's activities were in breach of the Restrictive Covenants on both Appellants and Respondent's properties.

On March 22, 2021, Appellants filed suit in Laurens County Court of Common Pleas alleging causes of action against Respondent for breach of restrictive covenants, nuisance, and an injunction ordering Respondent to cease conducting vehicle painting operations on his residential property. (R.pp. 19-26.) On May 12, 2021, Respondent answered Appellants' Complaint, admitting that he painted vehicles on his property but denying that he breached the Restrictive Covenants or caused a nuisance. (Answer, dated May 12, 2021.) On May 28, 2021, Appellants filed a Motion for Temporary Injunction requesting an order enjoining Respondent from any and all vehicle painting activities at

his residence. (R.pp. 526-532.) On July 23, 2021, Appellants filed a memorandum in support of the Motion for Temporary Injunction, attaching the Affidavits of Appellant Guadalupe Colorado and Appellant Sandra Colorado, as well as a copy of the Restrictive Covenants at issue in the case. (R.pp. 533-548.) On July 27, 2021, Respondent filed the Affidavit of Maurice Powers in opposition to the requested injunction. (R.pp. 549-553.) On August 6, 2021, the circuit court issued its Interim Restraining Order, enjoining Respondent from painting any automobiles on his property for 60 days, and setting a hearing to analyze the issue further. (R.pp. 1-3.) On October 8, 2021, the circuit court held a hearing on Appellants' Motion for Temporary Injunction and on October 25, 2021, issued its Order Denying Motion for Temporary Injunction but enjoining Respondent from painting vehicles he does not own at his property until the matter is resolved. (R.pp. 4-6.)

On February 2, 2022, Respondent moved to amend his Answer to include a counterclaim against Appellants for Intentional Infliction of Emotional Distress, claiming that through the process of discovery, Respondent had learned that Appellants had intentionally inflicted emotional distress on him by contacting local authorities regarding Respondent. (R.pp. 554-555.) After a period of briefing, the circuit court allowed Respondent to amend his Answer, which he did on April 15, 2022. (R.pp. 32-36.) Appellants filed their Reply to Respondent's Counterclaim on April 25, 2022. (R.pp. 37-41.)

On August 31, 2022, Appellants filed their Motion for Summary Judgment, requesting that judgment be entered in their favor on both their claims and Respondent's Counterclaim. (R.pp. 560-561.) On October 17, 2022, Appellants filed their Memorandum in Support of Summary Judgment, referencing the previously filed Affidavits of Appellants

and attaching Respondent's responses to Appellants' discovery requests, screenshots from Facebook posts referring to Respondent's car painting skills and availability, and a tax record from Respondent showing that he declared $1,156.00 in income from "Maurice Powers Body Shop" on his taxes. (R.pp. 562-589.)

A virtual hearing was held on October 18, 2022, on Appellants' Motion for Summary Judgment. (R.pp. 10-13.) Notably, Respondent declined to file a memorandum in opposition to Appellants' Motion and did not submit any affidavits or any other evidence for the circuit court's review, either prior to or during the virtual hearing. At the conclusion of the virtual hearing, the circuit court denied Appellants' Motion. (*Id.*)

This case came to trial on November 14-16, 2022. (R.p. 42.) The circuit court heard Appellants' claims for Breach of Restrictive Covenants and Permanent Injunction and a jury heard Respondents' Counterclaim for Intentional Infliction of Emotional Distress. (R.pp. 58-59.) Appellants and Respondent testified, as well as an official from South Carolina Department of Health and Environmental Control, two neighbors of Appellants and Respondent, a commercial building and residential inspector for Laurens County, and Respondent's partner. (R.p. 43.)

At the conclusion of evidence in their case, Appellants moved for a directed verdict on their claim for breach of restrictive covenants, arguing that there is no question that Respondent paints vehicles on his property, which is not a residential use of the property. (R.pp. 270-271.) The circuit court denied Appellants' motion for directed verdict. (R.p. 271.)

After the conclusion of evidence in Respondent's case, Appellants moved for a directed verdict on the basis that Appellants' conduct was merely to contact the authorities

about Respondent, which does not reach the level of extreme and outrageous to establish a claim for Intentional Infliction of Emotional Distress. (R.p. 299.) The circuit court denied Appellants' motion for directed verdict. (R.pp. 303-304.)

During closing arguments, Respondent requested $64,000.00 in damages measured by one thousand dollars per phone call made over a period of a decade to the authorities by Appellants plus the cost of a property that Respondent's counsel stated Respondent was forced to sell due to the litigation but evidence (or mention) of which was not presented to the jury. (R.pp. 318-319.)

On November 16, 2022, the jury returned a verdict for Respondent on his claim of Intentional Infliction of Emotional Distress and awarded Respondent $70,000.00 in actual damages. (R.p. 336.) On November 22, 2022, the circuit court issued its order finding for Respondent on Appellants' Breach of Restrictive Covenant and Injunction claims. (R.pp. 14-15.) This appeal follows.

I. SUMMARY JUDGMENT

a. FACTS BEFORE THE COURT AT THE TIME OF APPELLANTS' SUMMARY JUDGMENT MOTION

Appellants own and reside at 544 Bull Hill Road in Gray Court, South Carolina and own 520 Bull Hill Road in Gray Court, South Carolina. (R.p. 20.) Respondent lives next door at 566 Bull Hill Road, Gray Court, South Carolina. (R.pp. 20-21, 32, 549.) All three of these properties are subject to the Restrictive and Protective Covenants recorded September 29, 1993, in Deed Book 296 at Page 347 in the Laurens County Register of Deeds Office ("Restrictive Covenants") (R.pp. 27-30.) These Restrictive Covenants are enforceable by the individual lot owners by operation of the Restrictive Covenants. (R.pp. 22, 33.) The Restrictive Covenants provide, in pertinent part:

> (A) “The said lots shall be used for residential purposes only and no part of said lots shall be used for any business, commercial, mercantile, or industrial purpose.”
> (G) “There shall be no inoperative or junk vehicles or parts of same stored or placed on any lot at any time. Any motor vehicle for which a current license plate has not been obtained and displayed within sixty (60) days shall be considered inoperative or junk.”
> (H) “No rubbish, garbage, trash, abandoned, dismantled, inoperative equipment or other unsightly materials shall be permitted to remain or be stored on any lot and all trash, garbage or other waste shall be kept in an appropriate container and disposed of in a sanitary manner.”
> (I) “All garages, storage buildings or barns may be used incidential [sic] 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.”
> (N) “These Restrictions and Protective Covenants may be enforced by a proceeding in law or in equity by the owner or owners of lots in the subdivision against any person or persons violating or attempting to violate any of the Protective Covenants and Restrictions and such action may be to restrain a violation, remove a violation, or recover damages resulting from such a violation.”
> (P) “The failure to enforce any of the Restrictions and Protective Covenants herein contained, however long, shall not be deemed a waiver of the right to do so hereafter, as to the same breach or as to a breach occurring prior or subsequent thereto and shall not bar or affect its enforcement.”

(R.pp. 27-30.)

Respondent purchased his property by way of a deed filed July 5, 2011. (R.pp. 21, 33.) Beginning in 2011, Respondent painted cars on his 566 Bull Hill Road property for friends and family. (R.p. 549.) Respondent painted his own vehicles and approximately 8-10 vehicles for friends and family as of the date of his response to Appellants’ First Set of Interrogatories. (R.p. 577.) Friends and family of Respondent paid approximately $2500 to Respondent for the vehicles he has painted on his residential property. (R.p. 583.) Respondent posted a photo of a painted vehicle on his personal Facebook page stating “Couple jobs that I did recently. If you want that glass look for an affordable price, hit me up.” (R.p. 588.)

b. SUMMARY JUDGMENT STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). “When a motion for summary judgment is made and supported as provided [Rule 56, SCRCP], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” Rule 56(e), SCRCP.

When reviewing the denial of a summary judgment motion, the appellate court applies the same standard which governs the circuit court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

c. SUMMARY JUDGMENT ARGUMENT

Appellants moved for summary judgment on their claims for Breach of Restrictive Covenants, Nuisance, and Injunction as well as Respondent’s counterclaim for intentional infliction of emotional distress. (R.p. 560.) For the reasons set forth below, Appellants were and are entitled to summary judgment on both their claims and Respondent’s counterclaim.

i. Appellants are entitled to summary judgment on their claims for Breach of Restrictive Covenants, Nuisance, and Injunction.

1. Breach of Restrictive Covenants

Appellants are entitled to summary judgment on their claim for Breach of Restrictive Covenant because they produced sufficient evidence to establish their claim and Respondent produced no evidence in opposition.

The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). It is well-settled that real covenants are defined as agreements to do, or refrain from doing, certain things with respect to real property. *See Queens Grant II Horiz. Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006). "Therefore, covenants, 'in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract.'" *Seabrook Island Prop. Owners Assoc. v. Pelzer*, 292 S.C. 343, 356 S.E.2d 411 (Ct. App. 1987). Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. *Queens Grant II Horiz. Prop. Regime*, 368 S.C. at 361, 628 S.E.2d at 913. Restrictive covenants differ from contracts in that they "run with the land," which means they are enforceable by and against later grantees. *Id.* Restrictive covenants will be enforced unless they are indefinite or contravene public policy. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987).

Here, it is undisputed that Respondent's property at 566 Bull Hill Road in Gray Court, South Carolina is subject to the Restrictive Covenants set forth in Exhibit A to the Complaint. (R.pp. 21, 33.) It is undisputed that the covenants restrict the use of Respondent's lot to "residential purposes only and no part of said lots shall be used for

any business, commercial, mercantile, or industrial purpose." (R.p. 27.) It is undisputed that the covenants require that "[n]o 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." (R.p. 28.) It is also undisputed that the Restrictive Covenants themselves "may be enforced by a proceeding in law or in equity by the owner or owners of lots in the subdivision against any person or persons violating or attempting to violate any of the Protective Covenants and Restrictions and such action may be to restrain a violation, remove a violation, or recover damages resulting from such a violation." (R.p. 29.) Therefore, it is undisputed that the Restrictive Covenants exist and bind Respondent's property at 566 Bull Hill Road as well as allow Appellants to file suit to enforce them against Respondent and his property.

Also undisputed is that Respondent has breached the Restrictive Covenants on the subject property and used his lot for spray-painting vehicles for money, a decidedly non-residential purpose. Respondent admitted in his Responses to Appellants' First Set of Interrogatories that "he has painted approximately 8-10 vehicles for friends and family since living at his residence on Bull Hill Road." (R.p. 577.) Respondent admitted that, on at least three occasions, he was paid for his labor to paint vehicles at the subject property. (R.p. 583.) Respondent also declared income on his taxes from painting vehicles at the subject property. (R.p. 589.) Respondent even advertised his car painting services on his personal Facebook page, coupling a photograph of a vehicle with "Couple jobs that Iv [sic] did recently if u want that glass look for a affordable price hit me up." (R.p. 588.)

Finally, it is undisputed that Appellants suffered damages due to Respondent's breach of the Restrictive Covenants. Appellant Sandra Colorado testified via Affidavit that

she has been experiencing sinus infections and allergic reactions due to the fumes from Respondent's painting operation. (R.p. 542.) Appellant Sandra Colorado also testified via Affidavit that she has anxiety over her inability to control her allergies due to Respondent's refusal to cease painting vehicles on his property. (*Id*.) Appellant Guadalupe Colorado testified to his wife's health problems attributed to the fumes caused by Respondent. (R.p. 543.) Appellant Guadalupe Colorado also testified that Appellants have lost their ability to use their backyard freely due to the fumes emanating from Respondent's vehicle-painting on his property. (*Id*.) Again, Respondent failed to produce any evidence of any kind to counter Appellants' Affidavits and documentary evidence.

Because Appellants provided undisputed facts to support each element of their cause of action for Breach of Restrictive Covenants, and because Respondent produced no evidence of any kind to contradict any of Appellants' facts, Appellants are and were entitled to summary judgment in their favor on this claim.

2. Nuisance

Appellants are entitled to summary judgment on their claim for Nuisance because they produced sufficient evidence to establish their claim and Respondent produced no evidence in opposition.

A nuisance provides a remedy for invasions of a property owner's right to the use and enjoyment of his property. *Clark v. Greenville Cnty.*, 313 S.C. 205, 209, 437 S.E.2d 117, 119 (1993) ("Nuisance law is based on the premise that '[e]very citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property.'" (quoting *Peden v. Furman Univ.*, 155 S.C. 1, 16, 151 S.E. 907, 912 (1930)). "In order to constitute an actionable nuisance, a wrongful

act of the defendant must be shown and the maintenance of the nuisance must be the natural and proximate cause of the injury suffered by the plaintiff." *Home Sales, Inc. v. North Myrtle Beach*, 299 S.C. 70, 82. (Ct. App. 1989).

Appellants established that Respondent acted wrongfully when he breached the Restrictive Covenants on his property, as described above. Appellants also established that they suffered injuries in the form of reduced enjoyment of their property and medical problems that their injuries, described above, were the natural and proximate cause of the injury suffered by Appellants. Both Appellants testified that Appellant Sandra Colorado had no health problems prior to Respondent's wrongful conduct and that she now suffers from significant respiratory issues and anxiety attributed to Respondent's use of his property to spray-paint vehicles. (R.pp . 541-544.) Therefore, Appellants are entitled to summary judgment on their claim for nuisance.

3. Injunction

As stated above, the Restrictive Covenants over Respondent's property allow that the Covenants may be enforced by private action and "such action may be to restrain a violation, remove a violation, or recover damages resulting from such a violation." (R.p. 29.) Because Appellants have established that there is no genuine dispute of material fact as to the fact that Respondent breached the covenants on his property, Appellants have also established their right to a permanent order to enjoin any further vehicle painting on Respondent's property.

ii. Appellants are entitled to summary judgment in their favor on Respondent's Counterclaim for Intentional Infliction of Emotional Distress.

Respondent claims that Appellants intentionally inflicted severe emotional distress on him when they made complaints to government agencies regarding Respondent's conduct. (R.p. 58.) Respondent alleges that as a result of this conduct, he has been damaged and suffered severe emotional distress. (R.pp. 58-59.) However, Respondent failed to produce any evidence of any kind to the circuit court support his Counterclaim and therefore, Appellants were entitled to summary judgment on Respondent's Counterclaim.

The four elements which a plaintiff must establish in order to recover under a theory of intentional infliction of emotional distress are: (1) The defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result 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 actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it. *Ford v. Huston*, 276 S.C. 157, 162, 276 S.E.2d 776, 778. (1981).

Appellants filed their Motion for Summary Judgment on this claim on August 31, 2022. (R.p. 560-561.) In support of their Motion, Appellants attached Respondent's Answers to Appellants' First and Second Sets of Interrogatories, along with other documentary evidence to demonstrate that there is an absence of a genuine dispute of material fact regarding Respondent's claim for intentional infliction of emotional distress.

(R.pp. 570-589.) In response to Appellants' Motion for Summary Judgment, Respondent produced no evidence to support his claim for intentional infliction of emotional distress.[1] Therefore, per the plain language of the South Carolina Rules of Civil Procedure, Appellants were entitled to summary judgment on Respondent's counterclaim.

In their Second Set of Interrogatories, Appellants requested that Respondent provide each and every fact, witness, document, or other information he has which supports each paragraph of his counterclaim, including information regarding damages. (R.pp. 572-574.) In response to each request, Respondent stated the same thing:

> The [Respondent] has previously produced documents from law enforcement, and DHEC which substantiate their claims, as well as all fact witnesses which further substantiate their claims. See accompanying documents from Laurens Fire Department.

(*Id*.)

Notably, the documents referenced solely contain information regarding Appellants' actions, and fail to contain any facts regarding how Appellants' actions harmed Respondent. Further, Respondent did not produce any of these documents in defense of summary judgment to be considered by the circuit court.

Because Respondent produced no information to support two out of four elements of the tort of intentional infliction of emotional distress, he was not entitled to a trial on his claim and summary judgment should have been entered against him. Rule 56(e), SCRCP.

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[1] Respondent's Affidavit, which was not produced to the circuit court at summary judgment but which is in the trial court's pre-summary judgment record, does not make any mention of emotional or any other type of distress, let alone an allegation that Appellants intentionally inflicted severe emotional distress on Respondent when they made reports to law enforcement. (R.pp. 549-550.)

Even if Respondent had provided evidence to support his contention that he suffered severe emotional distress and that Appellants caused the same, he did not provide evidence to support the first or second elements of the tort, that the defendant intentionally or recklessly inflicted severe emotional distress, and that the conduct was so extreme and outrageous as to exceed all possible bounds of decency.

Respondent alleges in his Counterclaim that Appellants "repeatedly contacted various authorities, including law enforcement, DSS, DHEC, and county officials, and made unfounded, and outrageous allegations concerning [Respondent]." (R.p. 35.) However, just as Respondent produced no evidence to support the other elements of a claim for intentional infliction of emotional distress, Respondent produced no evidence which could show that Appellants' conduct in contacting the authorities regarding Respondent was "unfounded" or "outrageous" at all.

Respondent provided two examples of the "unfounded" law enforcement reports as attachments to Respondent's Affidavit, (which again was not presented to the circuit court for consideration of summary judgment). (R.pp. 551-553.) However, the two reports are reports which have a foundation in fact. First, Respondent, supported by a police report, testifies that on November 18, 2019, Appellants contacted law enforcement regarding a "suspicious smelling fire coming from a neighbors [sic] house." (R.pp. 551-552.) The police report shows that the deputy responding to the call "did observe a smokey haze in the air and a smell of chemical burn" and that after clearing the scene, the deputy located the source of the smoke and smell and found that they were emitting from a different neighbor's property. (*Id.*) Second, Respondent cites an occasion on July 30, 2019 when Appellants called law enforcement because Respondent had cut limbs

from a tree belonging to Appellant. (R.p. 553.) In that case, the deputy determined that the tree limbs which had indeed been cut by Respondent were in fact hanging onto Respondent's property when they were cut. (*Id.*) Again, this is not an "unfounded" report, this is a report of a problem Appellants reported to the authorities and where the authorities found that while the problems existed, they were either attributed to another neighbor or legally permissible. Because on their face, the "unfounded" reports Appellants made to law enforcement regarding Respondent were not unfounded or outrageous but were founded in fact, these reports cannot support a finding that Appellants intentionally or recklessly inflicted severe emotional distress on Respondent or that their conduct was so extreme and outrageous as to exceed all possible bounds of decency. Therefore, Appellants are entitled to summary judgment on Respondent's counterclaim for intentional infliction of emotional distress.

II. TRIAL AND POST-TRIAL MOTIONS

This matter came to trial over three days in November 14-16, 2022. (R.pp. 42-525.) Appellants, Respondent, and Respondent's girlfriend Michelle Vance testified along with Samuel Madden of South Carolina Department of Health and Environmental Control, Appellants' and Respondent's neighbor Bryan Noone, and Mac Brown, Commercial Building and Residential Building Inspector for Laurens County. (R.p. 43.) The court and the jury reviewed exhibits including the Restrictive Covenants, call logs from Laurens County Sheriff's Department and Fire Service, social media posts, and photographs of the neighborhood in which Appellants and Respondent reside. (R.pp. 341-525.)

As stated above, Appellants moved for a directed verdict at the conclusion of both their case and Respondent's. (R.pp. 270-271, 299.) The circuit court denied both motions,

allowing Appellants' claims to proceed to consideration by the court, and Respondent's claim to be presented to the jury. (R.pp. 271, 303-304.)

During closing arguments, Respondent's counsel told the jury when discussing damages: "There were, at least, 40 times that there were calls that we know of." (R.p. 319.) Respondent's counsel failed to mention that only 12 of those calls occurred within the statute of limitations.

Respondent's counsel went on to tell the jury that Respondent "[t]estified as to a home that he had to sell that he sold for $24,000." (*Id.*) Notably, this was untrue. Respondent did not testify regarding a home he had to sell due to Appellants' conduct at all, let alone, the cost of the home or how Appellants' conduct caused him to have to sell the home.

Respondent's counsel ultimately requested damages of $64,000, representing "$1,000 per absurd phone call, plus the money for [Respondent's] home that he had to sell." (R.pp. 318-319.) Finally, Respondent's counsel suggested to the jury that they "send a message" to Appellants "that their behavior was unacceptable." (R.p. 319.)

After Appellants' counsel presented his closing argument, Respondent's counsel stated in rebuttal "They made a claim [Respondent] had a gun, law enforcement came out and there was no gun." (R.p. 325.) Notably, the evidence and testimony on the issue of a report that Respondent had brandished a gun conclusively showed that Appellants did not make that call, as Respondent himself testified that it was actually "the sister and sister's husband" who called the police and stated that he pulled a gun on them. (R.p. 119.)

Ultimately, the jury returned a verdict for Respondent on his claim of Intentional Infliction of Emotional Distress and awarded Respondent $70,000.00 in actual damages. (R.p. 336.) On November 23, 2023, Appellants filed their Motions for Judgment Notwithstanding the Verdict, New Trial Absolute, New Trial Pursuant to the Thirteenth Juror Doctrine, or New Trial *Nisi* Remittitur. (R.pp. 607-612.)

On November 28, 2022, the circuit court issued its Order finding for Respondent on Appellants' claims for Breach of Restrictive Covenant and Injunction. (R.p. 14-16.) On December 2, 2022, Appellants filed their Motion to Alter or Amend Judgment or for Reconsideration. (R.pp. 602-606.) On December 16, 2022, the circuit court issued its Order denying Appellants' Motions for Judgment Notwithstanding the Verdict, New Trial Absolute, New Trial Pursuant to the Thirteenth Juror Doctrine, New Trial *Nisi* Remittitur, and Appellants Motion to Alter or Amend Judgment. (R.p. 17.)

a. MOTION FOR DIRECTED VERDICT ON APPELLANTS' CLAIMS

i. STANDARD OF REVIEW

When reviewing the circuit court's ruling on a directed verdict motion, this court must 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." *Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). An appellate court will reverse the circuit court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. *Law v. S.C. Dep't of Corr*., 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006). "On the

other hand, the [circuit] court must deny a motion for a directed verdict when the evidence yields more than one inference or its inference is in doubt." *Id.* "When considering a directed verdict motion, neither the [circuit] court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 188-89, 691 S.E.2d 170, 173 (Ct. App. 2010).

ii. Appellants are entitled to a directed verdict on their claims for Breach of Restrictive Covenants and Injunction because Respondent painted vehicles on his property in violation of the Restrictive Covenants.

1. Respondent uses his property for business purposes.

The circuit court concluded in its Order that Appellants had not proved by a preponderance of the evidence that Respondent "has engaged in operating a business on his property" and therefore, found in favor of Respondent on Appellants' claims for Breach of Restrictive Covenants and Injunction.[2] (R.pp. 14-16.) However, the evidence presented to the circuit court on this issue showed conclusively that Respondent had indeed engaged in operating a business on his property, which violates the Restrictive Covenants as a matter of law. Therefore, the circuit court's Order should be reversed, and judgment should be entered for Appellants on their claims.

As stated above, a breach of restrictive covenants action is analyzed under the same lens as a breach of contract action. Here, the state "The said lots shall be used for residential purposes only and no part of said lots shall be used for <u>any</u> business, commercial, mercantile, or industrial purpose." (R.p. 27, emphasis added.) It is undisputed that the Restrictive Covenants apply to Respondent's property.

[2] Although it is not reflected in the Record, counsel for Appellants and Respondent agreed prior to trial that Appellants would not litigate their claim for Nuisance.

The evidence at trial is also undisputed in that it shows that Respondent was using his property for a business purpose. At trial, Respondent admitted to spray painting cars on his property for friends and family in exchange for money. (R.pp. 100-101, 104-106, 108-109, 114.) Respondent testified that the reason that he spray painted these cars was to improve his skills for the purpose of enhancing his business, the main part of which he operated elsewhere. (R.pp. 109, 128-129.) This is on its face a business purpose.

The witnesses and evidence corroborate the fact that Respondent was using his property for a business purpose. Respondent's sole neighborhood witness testified to the fact he painted his car in exchange for a "donation" and paid him more than he would have paid an auto shop because Respondent did such great work. (R.pp. 194-195.) Further, Respondent's tax return was admitted into evidence which stated that in 2018, Respondent had an additional income of $1,156 as "Maurice Powers Body Shop". (R.pp. 111, 112.)

Respondent's only argument for why he believes his painting activities are not violative of the Restrictive Covenants is when he performed them at his home, the activities were a "hobby" but when he performed them elsewhere, they were business. (R.p. 109.) This is circular logic that the circuit court should have rejected. Respondent clearly used and uses his property for business purposes and should be enjoined from doing so. Therefore, Appellants are entitled to a directed verdict on this claim.

2. Even if Respondent is not using his property for business purposes, he should be enjoined from painting vehicles on his property as a matter of law.

Although the circuit court solely based its conclusion that Respondent did not violate the Restrictive Covenants on the fact that the circuit court found that Respondent

was not running a business, this is not the only way Respondent violated the Restrictive Covenants. As stated in the circuit court's order, Appellants claimed violations of covenants A, I, and K. (R.pp. 14-16.) The pertinent covenants state:

> A. The said lots **shall be used for residential purposes only** and no part of said lots shall be used for any business, commercial, mercantile, or industrial purpose. (Emphasis added).
>
> **I. All garages, storage buildings or barns may be used incidential [sic] to residential purposes only** and shall not be rundown or dilapidated. (Emphasis added).
>
> K. No noxious or offensive activity shall be carried on or upon said lots nor shall anything be done thereon which may become a substantial annoyance or nuisance to the owners of the other lots.

(R.pp. 27-28.)

Regardless of whether Respondent is engaging in business activities or not, the act of painting cars is a violation of the covenants because it is not a residential purpose for the lot. It is clear through the testimony that Respondent used his lot and the garage he built for painting cars. (R.pp. 100-101, 104-106, 108-109, 114.) The circuit court, in its order, was completely silent as to whether the painting of vehicles is a residential purpose as contemplated by the covenants. Appellants assert that as a matter of law, the act of painting vehicles, and spray-painting vehicles in one's garage, is a de facto violation of the covenants.

Appellants further assert that while there was a question as to whether the number of calls made to authorities was harassment of Respondent and thereby inflicting emotional distress, those same calls show that Appellants were annoyed by the continued smells of Respondent's vehicle painting activities. Through operation of the Restrictive Covenants, Respondent was restricted from carrying on any activity which may become

a substantial annoyance or nuisance to the owners of the other lots. Appellants testified they smelled paint fumes in their house and lost the enjoyment to use their property; facts Respondent cannot refute. (R.pp. 170, 258.) Because Respondent conducted activities that not only might have been a substantial annoyance but were in fact a substantial annoyance to his neighbors, he should be enjoined from these activities.

b. JUDGMENT NOTWITHSTANDING THE VERDICT

i. STANDARD OF REVIEW

Rule 50(a), SCRCP provides that “[w]hen upon a trial the case presents only questions of law the judge may direct a verdict.” Rule 50(b), SCRCP provides that “whenever a motion for directed verdict made at the close of all the evidence is denied . . . the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.”

"On appeal from a 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." *Gause v. Smithers*, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013) (quoting *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000)). "We will not reverse the circuit court's ruling on a JNOV motion unless there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Id.* (citing *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006)).

ii. Appellants are entitled to Judgment Notwithstanding the Verdict on Respondent's claim for Intentional Infliction of Emotional Distress because there was no evidence proffered at trial that Respondent suffered severe emotional distress and there was no evidence that Appellants' conduct was "extreme and outrageous."

The circuit court abused its discretion when it denied Appellants' Motion for Judgment Notwithstanding the Verdict on Respondent's Counterclaim for Intentional Infliction of Emotional Distress because there was no evidence proffered at trial that Respondent suffered severe emotional distress and there was no evidence that Appellants' conduct was "extreme and outrageous" such that the jury could have properly found liability.

As stated above, the four elements which a plaintiff must establish in order to recover under a theory of intentional infliction of emotional distress are: (1) The defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result 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 actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it. *Ford v. Huston*, 276 S.C. 157, 162, 276 S.E.2d 776, 778. (1981). "[W]here physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious." *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 650 S.E.2d 68 (2007).

The South Carolina Supreme Court has emphasized that there is a heightened burden of proof for the second and fourth elements. *See Ford* at 157. *See also Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 780 S.E.2d 252 (S.C. 2015); *Hansson* at 352.

Here, after failing to proffer evidence in discovery, Respondent continued to fail to proffer any evidence at trial which could properly establish any of the elements of Intentional Infliction of Emotional Distress. Respondent's claim for IIED centers around Appellants' conduct in contacting various government entities regarding Respondent and his use of his property, causing government officials to investigate Respondent and his property but ultimately resulting in no arrests, warnings, or infractions. (R.p. 35.) When asked directly at trial what harm had come to him as a result of Appellants' calls to law enforcement, Respondent stated:

> When you buy a house, you're supposed to turn it into a home. Year after year, I couldn't build on my home. I couldn't paint my personal cars. I couldn't do yard work. I've been totally under surveillance in a sense. That's not a way a person is supposed to live. So through all of this, I haven't had a peaceful year in my home. So this has caused so much stress and anxiety, something where we're supposed to have happy moments. How can I have happy moments with all of this?

(R.pp. 152-153.)

Respondent also testified that:

> I haven't been able to sleep. After multiple people would come out, I would get so stressed, 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.

(R.p. 282.)

Respondent further testified that the only time he visited a doctor about any of these issues was the month before trial. (R.p. 284.) Respondent admitted that he had not visit a doctor in over a decade because "Well, it's kind of hard as a man to speak about things like that and I kept that, like, held in so much to the point where it got

uncontrollable." (R.p. 289.) He then testified that he suffered erectile dysfunction which he alleged was caused by the stress and anxiety he suffered (and did not seek treatment for until the month before trial). (R.p. 289.) Respondent's girlfriend, Michelle Nance, testified that Respondent had "sexual issues from the phone calls" that occurred "more so when [law enforcement or other officials came out] or when yard work led to an argument." (R.p. 294.) No medical records were in evidence at trial.

Vague assertions of stress and anxiety, even coupled with testimony about Respondent's erectile dysfunction simply do not rise to the level of legally actionable severe and extreme emotional distress. *See AJG Holdings LLC v. Dunn*, 392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011) (following *Hansson* and finding that claims of high blood pressure, digestive problems, emotional illness, and weight loss were insufficient to survive a motion for summary judgment). Just as in this matter, Respondent failed to provide sufficient evidence that his emotional distress was severe by only relying on his own and his girlfriend's otherwise uncorroborated statements about stress and anxiety.

Although Respondent testified that he had suffered stress and anxiety due to Appellants' actions, it was not severe enough to seek medical attention until the month before trial, even though it allegedly caused erectile dysfunction. Respondent was never arrested, never detained, and never charged in relation to any of Appellants' complained-of conduct. (R.pp. 259-260.)

Additionally, Appellants' conduct itself did not rise to the level of being so extreme and outrageous that it has no place in a civilized society. On the contrary, when Appellants began to have problems with Respondent and Respondent's painting activities, they did exactly what a civilized society requires- they reported the issues to the authorities.

Making calls to law enforcement is not an extreme and outrageous act. "[R]eporting information about a crime is not sufficiently outrageous to create a jury question," when the defendant "had reason to believe that the police, as they in fact did, would investigate the report before deciding to make an arrest," and “plaintiff suffered no physical harm.” *Richardson v. Rent-A-Ctr. East, Inc.*, 2012 U.S. Dist. LEXIS 6617; C/A No.: 3-11-cv-1408-JFA (D.S.C., Jan. 20, 2012). The same issue was present in this case at trial, Appellants made reports, sometimes at the request of those agencies, to law enforcement, DHEC, and the fire department; the government agencies investigated the report before taking any action; and Respondent was not arrested nor suffered any physical harm. (R.p. 281.) While the Appellants did make numerous calls to governmental agencies, no evidence beyond Respondent’s arguments show that the calls were excessive as to warrant the agencies to consider it harassment or that such calls rise to the level of extreme and outrageous acts.

Making calls to DHEC also does not rise to extreme and outrageous conduct as anticipated in this claim. In *Hainer v. American Medical Internat’l, Inc.*, 320 S.C. 316, 465 S.E.2d 112 (Ct. App. 1995), *aff’d*, 328 S.C. 128, 492 S.E.2d 103 (1997) the court stated that “[c]learly, the mere reporting of an individual to a licensing board, as mandated by the state, is not conduct so extreme and outrageous that no reasonable person could be expected to endure it.” As shown in this matter, Respondent paints cars on his property. Appellants were reasonable in their act of calling DHEC to investigate whether that conduct was proper or not. But even if Appellants were not reasonable in making the calls, they still did not rise to the level of intentional infliction of severe emotional distress.

Further, for every relevant non-painting related report to the authorities in evidence, there were either no findings made in the record by law enforcement, or law enforcement found that the reports had a basis in fact.

Respondent filed his counterclaim against Appellants on April 22, 2022. (R.pp. 32-36.) The statute of limitations for intentional infliction of emotional distress is three years. S.C. Code Ann. § 15-3-530(5). Therefore, only Appellants' conduct within the three years prior to April 22, 2022, that is from April 22, 2019 forward, is compensable through Respondent's claim. In those three years, the following calls were in the record as made regarding Respondent's property and attributed to one of the Appellants:

DATE	**Incident**	**Findings**	**Record Citation**
7/18/2019	Appellants report that someone is dumping cat litter between properties and smell is making people sick.	DHEC sent letter on 8/7/19 requesting access to Respondent's property and requesting that he stop disposing of the cat litter onto the ground "if he is in fact doing so."	R.pp. 471-472
7/18/2019	Appellant Sandra Colorado calls 911 to report horrific smell at her property.	Police arrive over two and a half hours after report and note no smell.	R.pp. 402-403
7/30/2019	Appellant Guadalupe Colorado calls police to report that Respondent cut the branches of a tree belonging to Appellants.	Police determine Respondent had cut tree limbs but had legal right to do so.	R.p. 435
7/30/2019	"Hispanic Male" asked for someone to come out in reference to problems with his neighbor.	No findings listed.	R.pp. 404-405
8/05/2019	Appellant Guadalupe Colorado calls 911 to report Respondent	No findings listed.	R.pp. 406-407

	was yelling racial slurs at him.		
10/26/2019	Appellant Sandra Colorado calls fire service to report that neighbors are burning something.	Fire Department finds illegal burn already out before arrival.	R.p. 522
11/17/2019	Appellant Sandra Colorado calls to report that neighbor is burning something which smells like plastic.	Deputy observes smokey haze in air and smell of chemical burn, attributed to different property.	R.pp. 408-409, 434-435
3/16/2020	Appellant Sandra Colorado calls 911 to report smoke from a controlled burn blowing into her residence.	No findings listed.	R.pp. 414-415, 521
6/30/2020	Female caller reports chemical smell coming from property, allergies bothering her.	No findings listed.	R.pp. 416-417
1/18/2021	Appellant Sandra Colorado calls 911 to report cooking something, smells like rotten eggs, maybe some type of chemicals.	Police arrive an hour after report, no smell noted.	R.pp. 422-423
6/15/2021	Appellant Sandra Colorado calls 911 to report Respondent's dog on porch.	Respondent's dog returned to Respondent.	R.pp. 430-431
8/16/2021	Appellants call DHEC about paint odors emanating from Respondent's property.	DHEC calls Respondent on phone and Respondent reports he is painting cars elsewhere.	R.pp. 474-476

Appellants did not scream at or threaten Respondent. Appellants did not take matters into their own hands. (R.p. 176.) Appellants simply called the relevant authorities

to assist them when they had disputes with their neighbors, acts which were a legally permissible way to assert their rights. (R.p. 176.) Therefore, Appellants are entitled to Judgment Notwithstanding the Verdict.

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). "The jury's determination of damages, however, is entitled to substantial deference." *Id.* The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so 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. *Id.* at 379-80, 426 S.E.2d at 805.

“[T]he court possesses broad, inherent authority to grant a new trial for any prejudicial errors committed during the trial as a matter of fundamental fairness.” *Ex parte Kent*, 379 S.C. 633, 640-41, 666 S.E.2d 921 (S.C. App., 2008); *see Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 449, 450 S.E.2d 582, 584-85 (1994) (holding the court may order a new trial based upon the erroneous admission of testimony when the record shows error and prejudice). The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Umhoefer v. Bollinger,* 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989); *see also Boozer v. Boozer,* 300 S.C. 282, 283, 387 S.E.2d 674, 675 (Ct.

App. 1988) (stating the court of appeals has no power to review circuit court's ruling unless it rests on basis of fact wholly unsupported by evidence or is controlled by error of law). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Umhoefer,* 298 S.C. at 224, 379 S.E.2d at 297. Granting a new trial is particularly appropriate in cases of cumulative errors. *See Wall v. Keels*, 331 S.C. 310, 501 S.E.2d 754 (S.C. App. 1998).

"The test for granting a new trial on the basis of improper closing argument by opposing counsel is whether the complaining party was prejudiced to the extent that he or she was denied a fair trial." *Scoggins v. McClellion*, 321 S.C. 264, 269, 468 S.E.2d 12 (S.C. App. 1996), citing *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975). The South Carolina Supreme Court has held that even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994), citing, *South Carolina Highway Dept. v. Nasim*, 255 S.C. 406, 179 S.E.2d 211 (1977). The South Carolina Supreme Court has also held that when a remedy is not adequately remedied at the trial level, that a new trial can be appropriate. *Scott v. International Agr. Corp.*, 180 S.C. 1, 184 S.E. 133 (S.C. 1936).

ii. Appellants are entitled to a New Trial Absolute because the multiple errors in this case regarding improper and prejudicial jury argument weigh heavily in favor of a new trial.

1. Damages were requested for acts beyond the Statute of Limitations

In Respondent's closing argument, Respondent's attorney requested $1,000 per phone call the Appellants made. (R.pp. 318-319.) Appellants started making phone calls approximately ten years before the filing of Respondent's action. (R.pp. 350-351.)

Actions arising prior to April 15, 1988, for outrage or intentional infliction of emotional distress must be commenced within six years; actions accruing on or after this date must be filed within three years. S.C. Code Ann. § 15-3-530(5). The statute of limitations begins to run from the time when the plaintiff "knew or by the exercise of reasonable diligence should have known that he had a cause of action, regardless of whether it was possible to realize the extent of his injuries. See S.C. Code Ann. § 15-3-535; *Doe v. R.D. and E.D.*, 308 S.C. 139, 417 S.E.2d 541 (1992). *But see Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000), overruled on other grounds; *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (S.C. 2004).

Respondent testified that after every instance of a phone call made, he felt emotionally distressed. (R.p. 294.) Based on all the calls made, Respondent's attorney requested $40,000 in damages due to the phone calls totaling 40 calls since 2012. (R.pp. 318-319.) However, there are only 12 calls within the statute of limitations, as discussed above. Respondent clearly testified that he knew or should have known he had a cause of action for distress after each phone call. Therefore, Respondent cannot recover damages for conduct so far back in time.

2. Respondent used requested but non-produced information to argue for damages.

As stated above, in Appellants' Second Set of Interrogatories, Appellants requested information on the damages Respondent alleged he sustained due to Appellants' conduct. (R.p. 574.) Respondent's response referred only to Appellants' conduct of calling the authorities for damages. (*Id.*) However, during closing, as described in detail above, Respondent's counsel requested actual damages partially based upon $24,000 for a property that Respondent's counsel stated Respondent had to sell due to his emotional distress, but which was not in evidence at trial. (R.pp. 318-319.) Appellants, like the jury, had not heard that Respondent intended to claim this as a damage until Respondent's attorney mentioned it in closing.

Respondent continually refused to produce information on damages to Appellants only to ambush them with unverifiable information at trial and unpresented evidence at closing. Respondent cannot recover for damages which were not presented to the jury or produced to Appellants in discovery and this significant error adds to the prejudice to Appellants.

3. Respondent used acts not attributed to Appellants to show liability.

As discussed above, after Appellants' counsel presented his closing argument, Respondent's counsel stated in rebuttal "They made a claim [Respondent] had a gun, law enforcement came out and there was no gun." (R.p. 325.) Again, the evidence and testimony on the issue of a report that Respondent had brandished a gun conclusively showed that Appellants did not make that call, as Respondent himself testified that it was actually "the sister and sister's husband" who called the police and stated that he pulled

a gun on them. (R.p. 119.) Respondent cannot use an act not attributed to Appellants to prove Appellants' liability for damages.

Based on the arguments above and the prejudicial nature of counsel's statements and Respondent's conduct of not producing any evidence of damages justifies a new trial so that Appellants may have the merits of their case determined by a jury untainted by the seriously improper conduct.

iii. New Trial Pursuant to the Thirteenth Juror Doctrine because the jury's verdict was clearly against the preponderance of the evidence presented.

South Carolina's thirteenth juror doctrine is a well-established standard for granting a new trial. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). "Under the 'thirteenth juror doctrine,' a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict." *Haselden v. Davis,* 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000). Stated differently, a trial judge may grant a new trial under the thirteenth juror doctrine if the judge determines the verdict "is contrary to the fair preponderance of the evidence." *Dent v. Redd*, 270 S. C. 585, 243 S.E.2d 460, 460 (1978); *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715 (Ct. App. 1996) ("Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the Judge's finding that justice has not prevailed."). Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view the evidence in the light most favorable to the opposing party. *McEntire v. Mooregard Exterminating Servs. Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003). Moreover, the question of whether to grant a new trial upon the facts is one addressed to the discretion of the trial

judge. *South Carolina State Highway Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976).

"South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, 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.'" *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 576 S.E.2d 851 (2002 (quoting *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990)). In fact, as the "thirteenth juror," the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. *Id*. As the South Carolina Supreme Court explained in *Folkens*:

> The effect is the same as if the jury failed to reach a verdict . . . When the jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Id.

Here, the jury's verdict is clearly against the preponderance of the evidence. Appellants presented more than sufficient evidence on every element against Respondent's cause of action. Respondent failed to present the necessary evidence to support his cause of action. The result in this case is clearly the result of prejudice cultivated by Respondent. Upon weighing the evidence in this case, the court, acting in its capacity as the thirteenth juror, should have ruled that the verdict was against the preponderance of the evidence and granted a new trial so that justice may prevail. Therefore, Appellants are entitled to a new trial under the Thirteenth Juror Doctrine.

d. NEW TRIAL *NISI* REMITTITUR

i. STANDARD OF REVIEW

A circuit court has wide discretion to reduce an excessive verdict by granting a new trial *nisi* remittitur. The reduced judgment is a suggested settlement figure, which the defendant may accept, or reject and request a new trial. Ruling on a new trial *nisi* remittitur "requires the court to consider the adequacy of the verdict in light of the evidence presented." *Waring v. Johnson*, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). The touchstone for deciding whether to disturb a jury's verdict by granting a *nisi* motion is whether the award excessively compensates the injured party. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984).

When the jury's verdict is inadequate or excessive, the trial judge has the discretionary power to grant a new trial *nisi*. *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995). *See also McCourt by and through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995) (trial judge alone has power to grant new trial *nisi* when he finds amount of verdict to be merely inadequate or excessive). Compelling reasons, however, must be given to justify invading the jury's province in this manner. *Bailey*, *supra*. The grant or denial of a motion for a new trial *nisi* rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *See Krepps by Krepps v. Ausen*, 324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996). *See also Vinson* at 389 (grant of motion for new trial *nisi* is within trial judge's discretion and will not be reversed on appeal absent abuse of discretion). Yet, such discretion is not absolute. *Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427

S.E.2d 673 (1993). The appellate court has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law. *Vinson*, *supra*.

ii. Appellants are entitled to a New Trial *Nisi* Remittitur because the jury's verdict grossly overcompensated Respondent because it was based on evidence not before the jury.

Appellants moved the circuit court to find the jury's verdict grossly overcompensated Respondent in this matter. (R.pp. 590-601.) The circuit court heard the testimony of all the witnesses, with only two witnesses testifying as the Intentional Infliction of Emotional Distress Claim's damages: Respondent and Respondent's girlfriend. As noted above, the jury considered damages not produced in evidence, outside the statute of limitations, and attributed to others in order to calculate Respondent's actual damages.

In these circumstances, should Respondent's award stand, it should be reduced to a maximum of the requested $1,000 per "unfounded" phone call made by one of the Appellants within the statute of limitations regarding Respondent. Per the evidence presented at trial, and outlined above, only <u>two</u> reports within the statute of limitations could be reasonably considered unfounded: the phone call made on July 18, 2019 by Appellant Sandra Colorado to report a horrific smell and the phone call on January 18, 2021 by Appellant Sandra Colorado to report that she smelled rotten eggs. (R.pp. 402-404, 422-423.) The remainder of the calls within the statute of limitations were either based upon independently verified and valid issues or had no findings listed. Therefore, Appellants are entitled to a New Trial *Nisi* Remittitur because the jury's verdict was based

upon evidence that was outside the statute of limitations, not produced to the jury in evidence, and attributed to others.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court reverse the circuit court's orders, grant summary judgment for Appellants on all claims because Respondent did not present evidence to establish his claim nor any evidence to refute Appellants' claims. Should this Court decline to order summary judgment for Appellants, Appellants respectfully request that this Court grant Appellants' motions for directed verdict, judgment notwithstanding the jury verdict, and in the alternative, grant Appellants' motion for a new trial *nisi* remittitur.

Respectfully submitted,

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November 2, 2023

Columbia, South Carolina

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SC Court of Appeals

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-CJP-30-000256

APPELLATE CASE NO. 2023-000053

Guadalupe J. Colorado and Sandra B. Colorado

Appellants,

vs.

Maurice Powers

Respondent.

PROOF OF SERVICE

I certify that the **FINAL BRIEF OF APPELLANT** was served on the following counsel of record for Respondent on November 2, 2023, via electronic mail under Paragraph (d)(1) of Order re: Methods of Electronic Filing and serve under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

Christopher L. Jones (SC Bar No. 78892)
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s/Sarah J.M. Cox
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From: Amy L. Abercrombie
Sent: Thursday, November 2, 2023 9:18 AM
To: chris@chrisljoneslaw.com
Cc: Sarah J.M. Cox (she/her); Annie Bame
Subject: Colorado v. Powers
Attachments: 2023-11-02 Final Brief of Appellants.pdf

Dear Counsel:

I have attached a copy of the Final Brief of Appellants which is being filed with the Court of Appeals today.

Kind regards,
Amy