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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Pickens County
In the Court of Common Pleas
Hon. Alex Kinlaw, Jr. and Hon. Perry H. Gravely

2022-001499

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

Versus

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

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This matter is an appeal of a judgment entered against the Appellants following a jury trial which took place in Pickens County Court of Common Pleas on May 23-26, 2022. (R. pp. 16-18) The Appellants and Respondents in this matter are business entities that own adjacent parcels of commercial property in Pickens County, South Carolina. The Respondents own property at 3668 Calhoun Memorial Highway (the "Click" property), which was purchased by Brent Click on February 10, 2017 and later transferred to Click Properties, LLC. (R. p. 739, lines 16-19; R. p. 764, lines 11-14) Brent Click testified that he opened his shop in January, 2013, at the 3668 address, while the property was owned by Mark Smith. (R. p. 608, lines 11-23) The Appellant Thomas SC Properties owns property located at 3670 Calhoun Memorial Highway (the "Thomas" property), which was purchased by Jonathan Thomas on May 23, 2018. (R. p. 1113, lines 5-8) Jonathan Thomas owns a one-hundred-percent (100%) interest in Thomas SC Properties. In 2013, the Thomas property was owned by Greg Grissenger. (R. p. 721, lines1-4) Between the two pieces of property lies a gravel driveway that allows both property owners to access the upper portion of both properties. (R. pp. 1375-1376) Pursuant to the evidence presented at trial, the majority of the gravel driveway is on the Click property, while the upper portion and a larger gravel area (the "turn around" area) is on the Thomas property. Prior to the inception of the litigation in this matter, both parties and their predecessors in ownership used both the driveway and turn-around areas, by "neighborly" permission. However, the Appellants asserted during the litigation that pursuant to a survey conducted in 1996 (the "Ramey" plat/survey) owners and lessors of both properties recognized the property lines as shown in the 1996 survey, which clearly showed that the disputed turnaround area that is at issue in this case is owned by the Thomas property. (R. pp. 1304-1310) Brent Click testified at trial that at

closing when he purchased the Click property, he was provided with the "Ramey Plat" showing the property lines of the neighboring plats. (R. p. 740, lines 1-2.; R. p. 1323; R. p. 1374) Brent Click specifically testified that he questioned the closing attorney and Mark Smith regarding ownership of the turnaround area, which was on the Thomas property, but was assured by Smith that he had a "right to that" despite the clear boundaries in the plat. (R. p. 742, lines 1-7) The property lines as displayed in the 1996 survey clearly showed that the turn-around area was located on the Thomas property. Additionally, Brent Click testified pursuant to cross-examination that he agreed that he did not have any document stating that he owned the turnaround area, nor any documents stating that he had a right to use the turnaround area. (R. p. 849, lines 12-25) Shelly Click, Brent Click's wife, also testified that pursuant to the 1996 plat the turnaround area was not located on her property. (R. p. 931, lines 23-25; R. p. 932, lines 1-6) Click further testified that he did not have an inspection nor an appraisal done when he bought the Click property. (R. p. 851, lines 4-7) Click specifically testified at trial that the turnaround property is not his. (R. p. 852, lines 2-3)

On or about October, 2014 and prior to the 2017 purchase of the Click property by Brent Click, Mr. Click testified that he built a carport by pouring concrete next to the building he was renting. (R. p. 726, lines 1-6) On or about 2016, Brent Click (while renting the subject Click property prior to the purchase by Click Properties) erected awnings extending onto the Thomas property. (R. p. 1156, lines 3-7; R. p. 1156, lines 20-21.) Following the erection of the awnings, the interactions between Click and Thomas deteriorated, although the cause and characteristics of such was disputed at trial. Brent Click testified regarding his interest in buying the Thomas property from the previous owner, however the property was sold by the previous owner to Thomas for a reduced amount than the offer allegedly given to Click to buy the property. (R. p.

754, lines 7-16) Jimmy Watkins, who testified at the trial of this matter, stated that he told Brent Click that if he did not get along with the lessor of the Thomas property (the lessor being Jonathan Thomas) that he would erect a fence along his property line, which included most of the turn-around area and which would prevent Mr. Click from accessing the turn-around area for his business interests. Subsequently, Brent Click enforced *his* property line and blocked Jonathan Thomas and associates from using the gravel driveway, which also prevented Thomas and associates from accessing the Thomas property in the turnaround area. In addition, in 2018, the Respondents erected a gate on the lower portion of the Click property that prevented Mr. Thomas and his associates from accessing the upper portion of the Thomas property. In August, 2018, Jonathan Thomas excavated a portion of his land to build a driveway and parking area, following the series of events and exchanges between Jonathan Thomas and Brent Click. Over a year and a half after the excavation work was completed, the Respondents filed the present lawsuit against the Appellants seeking various points of relief which are discussed *infra*. (R. pp. 45-57) The Respondents' causes of action that survived pre-trial motions and directed verdict at trial were nuisance *per se,* negligence, acquiescence, prescriptive easement, and injunctive relief which issue would be submitted to the trial court following the jury's verdict.

As stated, on February 27, 2020, the Respondents filed a Motion for Temporary Injunction and Memorandum in Support of Motion, and a Summons and Complaint seeking various points of relief, and alleging the following causes of action: nuisance per se; negligence; declaratory judgment – quiet title; declaratory judgment – acquiescence; declaratory judgment – prescriptive easement; declaratory judgment – easement by estoppel; declaratory judgment – easement by necessity; and injunction. (R. pp. 45-57; R. pp. 64-80) On March 30, 2020, the Appellants filed a Motion to Dismiss alleging that the Respondents had not properly alleged the

elements of a claim for nuisance and nuisance was not an appropriate cause of action. (R. pp. 81-82; R. pp. 100-108) On April 27, 2020 the Respondents filed the Respondents' Objection and Response to Appellants' Motion to Dismiss, and the Appellants filed a Memorandum in Opposition to Respondents' Motion for Temporary Restraining Order and/or Preliminary Injunction. (R. pp. 83-4; R. pp. 93-99) Both parties filed affidavits of their clients in support of their respective positions. (R. pp. 85-92; R. pp. 118-126) On April 29, 2020 the Respondents filed their Reply to the Appellants' Response to Its Motion for Temporary Restraining Order and/or Preliminary Injunction. (R. pp. 127-131) On May 8, 2020, Honorable Judge Perry H. Gravely issued an order granting the Respondents' request for a temporary injunction and denied the Appellants' motion to dismiss. (R. pp. 1-5) Subsequently, the Appellants filed an Answer and Jury Demand, including multiple affirmative defenses. (R. pp. 58-63) On December 7, 2020, the parties submitted the case to mediation, which ended in an impasse with no resolution of the issues before the Court. On February 23, 2022, the Appellants filed a Motion to Amend Answer to Add Counterclaim, and a Motion to Remove Temporary Injunction with a supporting affidavit from Jonathan Thomas. (R. pp. 132-159) On March 25, 2022, the Respondents filed their Respondents' Response in Opposition to Appellants' Motion to Remove Temporary Injunction with accompanying affidavits. (R. pp. 160-183) On April 27, 2022, Honorable Judge Alex Kinlaw issued an order denying the Appellants' motion to remove the temporary injunction and denying the Appellants' motion to amend Answer. (R. pp. 6-10) On April 14, 2022, the Appellants filed a Motion for Reconsideration, which was denied by Judge Kinlaw. (R. pp. 11-15; R. pp. 187-191)

On April 27, 2022 the Appellants filed a Motion for Summary Judgment with an accompanying Memorandum in Support of Motion for Summary Judgment. (R. pp. 192-265)

On May 9, 2022, the Appellants and Respondents filed respective Motions in Limine with accompanying Memorandums in Support of Motion. (R. pp. 266-336) On May 13, 2022, the Appellants filed their Appellants' Supplemental Memorandum in Support of Motion for Summary Judgment. (R. pp. 337=373) On May 17, 2022 the Respondents filed their Respondents' Response in Opposition to Appellants' Motion for Summary Judgment with accompanying exhibits. (R. pp. 374-496)

This matter proceeded to a jury trial on May 23-26, 2022. At the conclusion of the Respondents' case-in-chief, the Appellants' moved for directed verdict. Judge Gravely found that four (4) of the Respondents' causes of action remained viable, which were nuisance *per se,* negligence, acquiescence, and prescriptive easement. The jury initially returned a verdict in favor of the Respondents, however the jury did not enter an amount of damages in favor of the Respondents. (R. p. 1291, lines 1-21) Subsequently, Judge Gravely instructed the jurors to return to the jury room to assess damages consistent with their judgment for the Respondents. (R. p. 1291, lines 5-11) Subsequently, the jury returned a verdict in favor of the Respondents on the nuisance per se claim and awarded actual damages of twenty-eight-thousand-dollars ($28,000.00) and no punitive damages; returned a verdict in favor of the Respondents on the negligence claims and awarded actual damages of one-hundred-sixty-eight-thousand-dollars ($168,000.00) and no punitive damages; returned a verdict in favor of the Respondents on the acquiescence claim; and returned a verdict in favor of the Respondents on the prescriptive easement claim. (R. pp. 1821-1822) On June 3, 2022, following the jury's verdict in this case, the Appellants filed Post-Trial Motions. (R. pp. 558-566) On the same date, Judge Gravely issued an order requiring the parties to file post-trial motions within ten (10) days of the verdict. (R. pp. 19-21) On June 6, 2022 – eleven (11) days after the jury's verdict was entered – Judge

Gravely filed his order pursuant to the Appellants' Motion for Summary Judgment, finding the following: that the Respondents would not go forward on their claims of declaratory judgment for easement by necessity nor the claim for adverse possession; and, that the Appellants' motion was denied except for the action for declaratory judgment for easement by estoppel in which Judge Gravely found that there was no genuine issue of material fact and Appellants were entitled to summary judgment on this cause of action. (R. pp. 22-24) Also on June 6, 2022, the Respondents filed their Respondents' Motions and Memorandum for Declaratory Judgment Implementing Acquiescence and Prescriptive Easement and for Order Granting Temporary and Permanent Injunction with accompanying Exhibits. (R. pp. 567-577) On June 30, 2022, Judge Kinlaw denied the Appellants' motion to reconsider the court's previous order of April 7, 2022 denying the Appellants' motion to dismiss. (R. pp. 25-26) On July 19, 2022, the Respondents filed their Respondents' Memorandum in Opposition to Appellants' Motion for Post-Trial Relief. (R. pp. 578-590). On September 21, 2022, Judge Gravely issued his order denying the Appellants' Post-Trial Motions and granting the injunctive relief sought by the Respondents. (R. pp. 27-44) On October 21, 2022, the Appellants filed a timely Notice of Appeal.

STANDARD OF REVIEW

On appeal from a case tried before a jury in an action at law, appellate courts may not disturb the jury's factual findings "unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). Thus, this Court's jurisdiction in those cases extends only to the correction of errors of law. *In re Care & Treatment of Gonzalez* , 409 S.C. 621, 628, 763 S.E.2d 210, 213 (2014). *In re Chapman*, 419 S.C. 172, 796 S.E.2d 843 (S.C. 2017)

ARGUMENT

I. **The trial court erred in denying the Appellants' motion to amend its answer to include a counterclaim for a declaratory judgment.**

Standard of Review

"'As a general rule, appellate courts will be bound by the factual findings of a lower court made in response to motions preliminary to trial where there has been conflicting evidence or where the findings are supported by evidence and not clearly wrong or controlled by error of law. *City of Chester v. Addison*, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981).

Argument

Honorable Judge Alex Kinlaw erred in denying the Appellants' motion to file an amended answer to include a counterclaim. The Appellants sought to add a cause of action for Declaratory Judgment in their filing of February 23, 2022 (three months prior to the trial of this matter) due to the fact that a justiciable controversy existed between the parties to determine the rights of the parties with regard to the location of the shared property boundary line between the parties, rights to the gravel turnaround area located on the Appellants' property, and the Appellants' rights to use of the driveways off of Calhoun Memorial Highway to access its property. (R. pp. 132-135) Following the discovery process, the Appellants determined that to assure full adjudication of the issues between the parties that the Court should permit the amended Answer and counterclaim to add a claim pursuant to S.C. Code Ann. § 15-53-10, et seq, the Uniform Declaratory Judgments Act. The Appellants in their motion correctly asserted that the Respondents would not be prejudiced by the amendment as the issues set forth in the proposed counterclaim were already set to be adjudicated as part of the Respondents' claims.

Lastly, pursuant to Rule 15(a) of the SCRCP, the trial court must freely give leave to amend pleadings when justice so requires and the amendment does not prejudice any other party. The Respondents in this matter could not have been prejudiced by the amendment, contrary to the findings of Judge Kinlaw, due to the fact that the issues were already pending in their complaint. However, although Judge Kinlaw found that the issue was already pending in the Respondents' third cause of action requesting a declaratory judgment to quiet title as to the common property line of the parties, and that the proposed amendment would be futile to the Appellants, the Respondents actually abandoned this cause of action at the outset of the trial in pre-trial matters before Judge Gravely. (R. pp. 22-24)

Also problematic is the timing of the filing of Judge Kinlaw's orders regarding this issue. Judge Kinlaw filed his order on April 7, 2022, and then on April 29, 2022, which were identical orders. (R. pp. 6-10; R. pp. 11-15) The Appellants filed a Motion for Reconsideration on April 14, 2022 asking Judge Kinlaw to reconsider his order regarding amendment of the complaint, however he did not issue an order denying the Appellants' motion until June 30, 2022 – over a month following the trial of this matter. (R. pp. 11-15) Judge Kinlaw should have permitted the Appellants to amend their answer to include a counterclaim as discussed, *supra*, and this matter should be remanded to the trial court for further proceedings.

II. **The trial court erred in denying the Appellants' Motion to Dismiss this matter.**

Standard of Review

"'As a general rule, appellate courts will be bound by the factual findings of a lower court made in response to motions preliminary to trial where there has been conflicting evidence or where the findings are supported by evidence and not clearly wrong or controlled by error of law. *City of Chester v. Addison*, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981).

Argument

Honorable Judge Perry H. Gravely erred in denying the Appellants' Motion to Dismiss in summary fashion by merely finding that the Respondents' various causes of action have been properly plead without making specific factual findings to support the order. (Order of Judge Gravely, May 8, 2020.) The court found that 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 the complaint. *HHHunt Corp v. Town of Lexington*, 699 S.E.2d 699, 703 (S.C. App. 2010). "The trial court……must presume all well pled facts to be true." *Cricket Cove Ventures, LLC v. Gilland*, 701 S.E.2d 39, 44 (S.C. App. 2010). In the case at bar, the Appellants' trial counsel submitted a sound Memorandum in Support of the Appellants' Motion to Dismiss. (Memorandum in Support of Appellants' Motion to Dismiss.) The Appellants fully incorporate the entirety of the Memorandum in Support of Appellants' Motion to Dismiss into the Appellants' argument as if wholly reproduced herein. Specifically, after providing a recitation of the Facts, Appellants' counsel asserted that the Respondents' claims for nuisance, negligence, acquiescence, and prescriptive easement (the causes of action that ultimately remained for the jury's verdict), all must fall. Of particular concern to the

Appellants is the nuisance claim of Respondents due to the fact that Judge Gravely entered an order following the trial of this matter requiring the Appellants to abate the nuisance – seemingly adding to the jury's verdict of award of damages for nuisance (which is discussed in more detail *infra*). (Judge Gravely's order of September 21, 2022.) As Appellants' trial counsel asserted, a nuisance claim is wholly inapplicable to excavation that allegedly caused erosion and damage to structures on the Respondents' property. The S.C. Supreme Court held in the case of *Contos Metracas v. Jamison Morris*, 81 S.C. 488 (S.C. 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……and no action lies against such excavator except upon allegation and proof of negligence." *See also Bailey v. Gray*, 53 S.C. 518, 31 S.E. 354. Further, pursuant to *Chestnut v. Avx Corp.*, 776 S.E.2d 82, 85 n. 5 (S.C. 2015), a plaintiff must articulate *how* the alleged nuisance interferes with the plaintiff's use and enjoyment of their land, which the Respondent's complaint fails to do. The claim of nuisance simply does not fit the allegations and facts of this case, and Judge Gravely erred in denying the Appellants' Motion to Dismiss on nuisance.

Judge Gravely further erred in denying the Appellants' Motion to Dismiss regarding the claim of negligence. As Appellants' counsel asserts in Memorandum In Support of Appellants' Motion to Dismiss, the Respondents' negligence claim fails because the complaint does not allege a duty of care and does not meet South Carolina pleading standards. The only allegations of the Complaint in this matter are that Thomas owed a duty "not to harm others and not to unreasonably interfere with the rights of adjoining landowners," which is not an actionable duty of care under South Carolina law. (Complaint) Additionally, as trial counsel asserted, the Respondents alleged specific breaches of duty without identification of the legal duties that were breached. Respondents alleged that Thomas "failed to properly supervise the excavation of its

premises," but failed to state a legal standard or basis on which a landowner owes a legal duty to supervise activities on the landowner's private premises. (Complaint) Further, Respondents failed to identify an actionable basis for protective, preventative or cautionary duties owed to the Respondents in Paragraph 32, subparagraphs (a), (c), (d) or (e) of the Complaint. (Complaint) The Respondents further failed to identify the specific harm or articulate how the alleged actionable harm was foreseeable.

Regarding the claims for acquiescence and prescriptive easement, these claims cannot co-exist as the claim for prescriptive easement requires "hostility" while a claim for acquiescence requires "mutual intent to agree to a particular property line." *Paine Gayle Properties, LLC v. CSX Transp., Inc.* 400 S.C. 568 (2012); *Croft v. Sanders*, 283 S.C. 507, 510 (S.C. App. 1984). The trial court erred in denying the Appellants' motion to dismiss, and this Honorable Court should reverse the order of Judge Gravely.

III. **The trial court erred in denying the Appellants' Motion for Summary Judgment.**

Standard of Review

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRCP. *Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).* Thus, the appellate court must view the evidence and all inferences therefrom in the light most favorable to the non-moving party. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

Argument

Judge Gravely erred in denying the Appellants' Motion for Summary Judgment on most of the issues raised in the motion as described *infra*. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003)* (quoting Rule 56(c), SCRCP). Once the moving party meets this initial burden, the nonmoving party cannot simply rest on the allegations or denials contained in the pleadings. Rule 56(e), SCRCP. "[T]he nonmoving party must do more than simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. *Grimsley v. S.C. Law Enf't Div., 415 S.C. 33, 42, 780 S.E.2d 897, 901 (2015)* (quoting *Russell*, 353 S.C. at 220, 578 S.E.2d at 335). Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).* "In cases applying the preponderance of the evidence burden of proof, the [nonmoving] party is only required to submit a . . . scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)*. The South Carolina Supreme Court has held that great care should be used in the consideration of summary judgment motions. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Carolina All. For Fair Emp't. v. S.C. Dept. of Labor, Licensing & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999)(citing Etheredge v. Richland Sch. Dist. I, 330 S.C. 447, 499 S.E, 2d 238 (Ct. App. 1998.)*

On June 6, 2022 – eleven (11) days after the jury's verdict was entered – Judge Gravely

filed his order pursuant to the Appellants' Motion for Summary Judgment, which motion was argued on the first day of trial. (R. pp. 22-24) Judge Gravely found the following: that the Respondents would not go forward on their claims of declaratory judgment for easement by necessity nor the claim for adverse possession; and, that the Appellants' motion was denied except for the action for declaratory judgment for easement by estoppel in which Judge Gravely found that there was no genuine issue of material fact and Appellants were entitled to summary judgment on this cause of action. (R. pp. 22-24) The only substantive factual findings made by Judge Gravely are regarding the action for declaratory judgment for easement by estoppel, which ruling went in favor of the Appellants. Otherwise, the order in summary fashion finds that there was a genuine issue of material fact to the remaining causes of action and the Appellants' Motion is respectively denied and the Respondents would be entitled to proceed to trial on these issues. (R. pp. 22-24) Respectfully the trial court has erred and this Honorable Court should reverse the trial court's order.

a. There is no viable cause of action for nuisance *per se* as the Respondents did not present evidence that there exists a condition that is "dangerous at all times and under all circumstances."

The order entered by Judge Gravely does not make any factual findings regarding the Appellants' argument in motion for summary judgment regarding the claim of nuisance *per se*. However, trial counsel for Appellants submitted a sound Defendant's Memorandum in Support of Motion for Summary Judgment, as reproduced herein.

The test for determining the existence of a nuisance *per se* in South Carolina is "whether the nuisance has become dangerous at all times and under all circumstances to life, health, or property." *Suddeth v. Knight*, 280 S.C. 5400, 545, 314 S.E.2d 11, 14 (Ct. App. 1984); Black's

Law Dictionary 1094 (7th ed. 1999) ("a nuisance *per se* is an interference so severe that it would constitute a nuisance under any circumstances.) In a 1994 article, Bradford W. Wyche, Esq. noted that only one case in South Carolina history had found an activity to be a nuisance *per se*. Wyche, Bradford W. (1994) "A Guide to the Common Law of Nuisance in South Carolina," South Carolina Law Review: Vol. 45: Iss. 2, Article 5, p. 350. Nearly thirty (30) years later, there are no additional reported cases finding a nuisance *per se*. In this case, Respondents assert that Appellants' excavation work that was done in August 2018 is a nuisance *per se*. (R. pp. 45-57) However, there is no evidence that the excavation performed on the Thomas Property is dangerous "at all times and under all circumstances." Brent Click and his wife Shelly Click both testified that they have continued to use the gravel driveway adjacent to where the excavation work was completed on a regular basis to access the back building and the apartment inside it. (R. pp. 192-265). Over three years after the excavation work was done, Respondents had no evidence of danger under all circumstances from the grading. Respondents' own expert—David Hall—provided a report on April 22, 2022 that showed the slope that was graded at the back of the Thomas Property is safe and stable. While Mr. Hall alleged that the front slope is unsafe, the cross-section diagram he submitted shows that the potential area of slope failure is 40 feet away from Respondents' buildings and 10 feet away from the property line. (R. pp. 222-223) This certainly cannot demonstrate a nuisance that is "dangerous at all times and under all circumstances to life, health, or property." ***Suddeth***, 280 S.C. at 545, 314 S.E.2d at 14.

Additionally, Mr. Hall could not testify that the slope was currently failing, only that it could fail in the future. (R. pp. 244-253) ("Now, impending failure doesn't mean it's going to fail in a week, two weeks, two years. We don't know.") South Carolina nuisance law further elaborates that "mere fears of the plaintiff" are insufficient to support a cause of action for

nuisance. *Emory v. Hazard Powder Co*., 22 S.C. 476, 483 (1885). There are no reported cases in South Carolina where a plaintiff has successfully made a showing of anticipatory nuisance. *See Welborn*, 247 S.C. 554, 148 S.E.2d 375 (denying injunctive relief against proposed automobile wrecking service); *Moss v. South Carolina State Highway Dep't*, 223 S.C. 282, 75 S.E.2d 462 (1953) (refusing to issue temporary restraining order against relocation of highway); *Emory v. Hazard Powder Co*., 22 S.C. 476, 483 (1885) (stating that "mere fears of the plaintiff" are insufficient basis for nuisance action); *Roach v. Combined Util. Comm'n*, 290 S.C. 437, 351 S.E.2d 168 (Ct. App. 1986) (denying injunctive relief against proposed sewage treatment plant); *Charleston Comm. for Safe Water v. Commissioners of Pub. Works*, 286 S.C. 10, 331 S.E.2d 371 (Ct. App. 1985) (holding that plaintiff failed to meet burden of showing that proposed fluoridation of city's water supply would constitute a nuisance). Thus, as a matter of law, Respondents' claim for nuisance *per se* cannot survive based on speculation of potential future failure of the front slope. Therefore, Judge Gravely erred in denying the Appellants' summary judgment motion regarding nuisance *per se*, and the order should be reversed by this Honorable Court.

b. Respondents have no evidence of damages resulting from the excavation work on the Thomas Property, and the Respondents' claim for negligence against the Appellant must fall.

Respondents assert that the excavation work on the Thomas Property in 2018 caused damages to the back building of the Click Property. To support this theory, Respondents point to cracks in the floor of the back building and cracks in the cement block wall. However, Respondents cannot link these cracks to the excavation work performed on the Thomas Property.

Greg Porter and Jessie Lingerfelt have both provided affidavits affirming that the cracks in the floor of the back building were there even before Click purchased the property. (R. pp. 254-259) Respondents have no contradictory evidence. Mr. Hall has no personal knowledge of when the cracks occurred. (R. p. 250) He relies solely on Mr. Click's testimony and a blurry photograph. (R. p. 250; R. p. 253) Shelly Click testified that damages were on the opposite side of the back building from where the excavation took place. (R. p. 242.) No inspection was conducted of the Click Property prior to Respondents' purchase of it which could show the condition of the slab prior to the excavation. (R. pp. 230-231) And Respondents cannot defeat summary judgment with a self-serving affidavit by Brent Click. Additionally, it defies logic that the cracks in the back building were caused by the excavation work. Along the western side of the back building on the Click Property, Mr. Click had a concrete slab poured in October 2014. (R. p. 229) This slab is between the area of excavation and the back building. Civil engineer Paul Mills examined the outside slab and observed no cracking in it. (R. pp. 260-262) If the excavation work had caused damage to the inside floor of the back building, it also would have caused damage to the closer outside slab. Thus, Respondents have no evidence of damages that arose after the excavation work nor do Respondents have any evidence that would link the alleged damages to the excavation. Even if this Court finds that there is some scintilla of evidence to support Respondents' claims for damages, there is no credible evidence of the value of the alleged damages. In discovery, Respondents asked for an itemization of damages, the value of such damages, and an explanation as to how and by whom the amount was calculated. (R. pp. 263-265) Respondents responded that Brent Click could testify as to the current value and diminution in value of the Click Property. Mr. Click is not an appraiser and has no real estate experience. Mr. Click cannot speculate as to the value of his property based on some other unknown and

unidentified "industrial properties" that have come on the market at some point after 2017. Thus, there is no admissible evidence as to the value of the damages Respondents allege. "In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial" and may not "simply rest on mere allegations or denials contained in the pleadings." *NationsBank v. Scott Farm*, 465 S.E.2d 98, at 100 (S.C. App. 1995). As Respondents cannot make these evidentiary showings of damages and proximate cause, their nuisance *per se* and negligence claims fail as a matter of law. *See, e.g.* *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001) (damages and proximate cause are required elements of negligence claim); *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (2001) (nuisance requires a showing of interference with the use and enjoyment of plaintiff's property proximately caused by the defendant).

Additionally, in the Appellants' Defendants' Supplemental Memorandum in Support of Motion for Summary Judgment, the Appellants presented evidence to the trial court in the form of a YouTube video and screen shots upon information and belief uploaded by agents of the Respondents which shows "abundantly clear" extensive and noticeable cracking in the floor/foundation inside of the upper building of Mr. Click's property prior to the Appellants' excavation work, which began in 2018. (R. pp. 337-373) At trial, Brent Click testified that he made the video in 2013. (R. pp. 337-373; R. p. 802, lines 10-24.) Judge Gravely erred in denying summary judgment in favor of the Appellants regarding the Respondents' negligence claim and the order must be reversed.

c. Respondents' claim of acquiescence fails because Respondents have provided no evidence that any owners of the Thomas or Click Properties ever agreed the true boundary line was such that the turn-around area was on the Click Property.

Acquiescence is a very particular claim and requires a mutual intent to agree to a particular property line. "Absent recognition by both [parties] that a particular line constituted the true property line, a new boundary [can] not be established by acquiescence." *Croft v. Sanders*, 283 S.C. 507, 510 (S.C. Ct. App. 1984) (rejecting plaintiff's argument that a fence constituted a particular property line and finding that the parties' establishment of a marker between adjacent properties did not prove intent to establish a new boundary line). Acquiescence by one party is not sufficient. *Pittman v. Lowther*, 363 S.C. 47 (S.C. 2005) (noting that a landowner "is not required to battle successfully for his rights… if the principle of prescription be attributed solely to the acquiescence of the servient owner"). Here, Respondents have provided absolutely no evidence that any owners of the Thomas or Click Properties—including Brent Click himself—ever agreed that the boundary line was anywhere other than that shown on the 1996 Plat. (R. p. 1374) Mr. Click testified that he was given the 1996 Plat after he closed on the property and that Mark Smith, the prior owner, affirmed the property lines conveyed in the Plat. (R. p. 232) Further, Mr. Click had surveyors come out to his property after he purchased it and locate the property pins, which were as shown on the 1996 Plat. (R. p. 234) Mr. Click then informed Mr. Thomas of where the property lines were, in accordance with the 1996 Plat. (R. pp. 236-237) Finally, Mr. Click testified that Jimmy Watkins, prior owner of the Thomas Property, specifically acknowledged the location of the property line, which was consistent with the placement shown on the 1996 Plat. (R. p. 235) Respondents have no basis to assert that there was acquiescence by the parties to a different property line, and without that specific evidence, Respondents' claim for acquiescence cannot stand.

d. Because the Respondents' use of any portion of the Thomas property was permissive, Respondents' claim for prescriptive easement fails as a matter of law.

South Carolina law is "well-established that evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse or under a claim of right." *Bundy v. Shirley*, 412 S.C. 292, 310, 772 S.E.2d 163, 173 (2015). *See also Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 586, 735 S.E.2d 528, 538 (Ct. App. 2012) (recognizing that a claimant's permissive use of landowner's property cannot begin to ripen into a prescriptive easement until the claimant makes a distinct and positive assertion of right hostile to the landowner); *Horry Cnty. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993) (holding evidence, which established that use of property was permissive, showed use of property was not adverse); *Williamson v. Abbott*, 107 S.C. 397, 401, 93 S.E. 15, 16 (1917) (stating that permissive use of property "stamps the character of the use as not having been adverse, or under claim of right"); *see also* 12 S.C. Jur. *Easements* § 10 (Supp. 2015) ("Use with the permission of the owner is not adverse."). "Stated another way, when a claimant uses property with the permission of the owner, he or she acknowledges the owner's rights and uses the property without an affirmative, hostile act toward the owner's rights." *Bundy v. Shirley*, 412 S.C. at 310, 772 S.E.2d at 173. Prior owners of the Thomas Property allowed owners and renters of the Click Property to use the turn-around area. (R. pp. 254-259) Because the use of the area was permissive, there can be no claim of adversity or hostility. Thus, Respondents' claims for adverse possession and prescriptive easement fail as a matter of law.

e. Because all Respondents' other claims fail as a matter of law, there is no basis for injunctive relief.

Respondents do not have evidence sufficient to make a claim to Thomas SC Properties, LLC's private property. Therefore, there is no basis for this Court to enter an order for injunction restricting Appellants' use of the Thomas Property.

Judge Gravely erred in denying the Appellants' motion for summary judgment and this Honorable Court should reverse his order and enter judgment in favor of the Appellants dismissing this case.

IV. **The trial court erred in denying the Appellants' Motions for Directed Verdict.**

Standard of Review

When reviewing a motion for directed verdict, an appellate court must employ the same standard as the trial court. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999)

Argument

The trial court erred in denying the Appellants' Motions for Directed Verdict. Following the receipt of all evidence and testimony from the Respondents in this matter and subsequent to the Respondents resting, the Appellants moved for directed verdict on the remaining causes of action that were pursued by the Respondents in their case-in-chief -- nuisance *per se*, negligence, prescriptive easement, acquiescence, and injunctive relief. (R. p. 1057, et seq.) In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. id. When the evidence yields only one inference, a directed verdict in favor of the moving party is proper."); *Wright v. Craft*, 372 S.C. at 19, 640 S.E.2d at 496 (Ct. App. 2006) Because the arguments supporting a directed verdict in favor of

the Appellants in this case mirror the arguments made in the Appellants' post-trial motions, the arguments supporting the grant of a directed verdict motion on all causes of action urged by the Appellants are addressed in Argument V, *infra.*

V. The trial court erred in denying the Appellants' Post-Trial Motions and Motion to Reconsider.

Standard of Review

When reviewing a motion for JNOV, an appellate court must employ the same standard as the trial court. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999)

Argument

Following the presentation of all evidence in this case, and following the entry of the jury's verdict in this matter, the Appellants filed Appellants' Post-Trial Motions on June 3, 2022, which were a judgment notwithstanding the verdict (JNOV) on all claims or, in the alternative, for a new trial. (R. pp. 558-566) Additionally, in the trial court's order the court found that the Appellants argued the doctrine of "Thirteenth Juror" during the hearing and ruled on the motion. (R. pp. 27-44) As the trial court found, the standard for JNOV or new trial are found in Rule 50(b), SCRCP:

> *"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, 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. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict…..A*

motion for new trial may be joined with this motion."

In ruling on a JNOV motion, the trial court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012.)

The Post-Trial Motions included legal argument as applied to the facts, as reproduced herein, with additional citations to the trial record of this case which supports the Appellants' argument.

a. Respondents did not present any evidence of a nuisance *per se*, which requires a showing that a condition is "dangerous at all times and under all circumstances."

The test for determining the existence of a nuisance *per se* in South Carolina is "whether the nuisance has become dangerous at all times and under all circumstances to life, health, or property." *Suddeth v. Knight*, 280 S.C. 540, 545, 314 S.E.2d 11, 14 (Ct.App.1984); Black's Law Dictionary 1094 (7th ed.1999) (a nuisance *per se* is an interference so severe that it would constitute a nuisance under any circumstances). No evidence was presented that the excavation performed on the Thomas Property is dangerous "at all times and under all circumstances." Brent Click and his wife Shelly both testified that they have continued to use the gravel driveway adjacent to where the excavation work was completed on a regular basis to access their back building and the apartment inside it. Brent Click testified that he uses the gravel driveway to move things from one building to the next. (R. p. 852, lines 21-25; R. p. 853, lines 1-4) Brent Click also testified that he walks on the gravel driveway. (R. p. 853, lines 12-14) Click also testified that despite his assertion that the excavation was at a dangerous slope, he parked his RV right alongside the edge of that excavation. (R. p. 864, lines 3-9) Click also admitted that during

the trial of this matter he parked a bobcat right on the edge of the slope in question when there was a tornado watch. (R. p. 864, lines 20-25; R. p. 865, lines 1-13)

The Respondents called William David Hall to testify at trial – a registered professional engineer in the State of South Carolina. (R. p. 937 et seq.) Although Click testified to cracks in the upper building that were allegedly caused by the excavation, Mr. Hall testified that the "cone of influence" of material that would be affected by the failure of the slope does not affect the upper building ***at all***, based on the global stability analysis. (R. p. 976, lines 21-25; R. p. 977, lines 1-9) At trial, the Appellants introduced a topography map that demonstrated the excavation and grading work that was performed. (R. p. 1375) Pursuant to an inspection of the property for the purposes of trial, and pursuant to a "Slope Stability Summary," the Respondents' expert, David Hall, concluded that the slope at the back of the Thomas property (furthest from the highway) is stable, but that the slope toward the front of the property (closest to the highway) could "fail" in the future. Mr. Hall concluded that the cross-section of the slope toward the front of the property that showed potential failure in the future is at least ten (10) feet from the property line and approximately forty (40) feet away from the Respondents' building. Hall further testified that although his testimony was that the driveway (located solely on Click property) showed potential for failure in the future, no failure has occurred such that it has taken out any dirt on Click's property. (R. p. 977, lines 10-20) Hall concluded only that there was potential for the embankment to fail, not that failure had occurred. In fact, he also testified that there had been no impact on the back building from the excavation work. Hall admitted that he did not speak to any previous owners of the Click property prior to reaching his opinion and only saw photographs provided by Brent Click. (R. p. 979, lines 4-13) Hall testified that he did not know what kind of foundation was put underneath the concrete nor did he know the tolerance of

the concrete slab for equipment loading. (R. p. 979, lines 14-19) Lastly, Hall testified that he never actually saw any damage to a water line, but rather relied on Mr. Click's assertions to him. (R. p. 981, lines 15-25; R. p. 982, lines 1-2)

The Appellants called Paul Mills as a witness at trial – a civil engineer with twenty-three (23) years of experience who was accepted as an expert in the field of engineering. (R. p. 1162 et seq.) Mr. Mills prepared a report based on his investigation in this case, which was admitted into evidence. Mr. Mills concluded that the slope between the two property lines is generally comprised of a hard clay material and most likely some limestone, and that the distance that the slope is from the buildings it is highly unlikely that it has caused any damage to the buildings. (R. p. 1167, lines 6-10) Specifically, Mr. Mills testified that within a reasonable degree of engineering certainty that the slope had not impacted the back building on Click's property. (R. p. 1167, lines 11-23) Mr. Mills concluded that a retaining wall ***was not*** necessary to contain erosion on the property. (R. p. 1168, lines 9-15) Mr. Mills further concluded that there was no evidence that the soil outside of the upper building had moved, and if the slope was the cause of the effects to the building that you would see a difference in the grade and settlement in the roadway. (R. p. 1170, lines 17-25; R. p. 1171, lines 1-2) Mr. Mills also testified regarding the findings of the Respondents' expert regarding the safety stability survey, however Mills concluded that the slope would have to fail three to four times before there was ever any danger to the building. (R. p. 1173, lines 23-25; R. p. 1174, lines 1-2) Mills also testified that he noticed the cracks on the Click building pursuant to Defendant's Exhibit 22. (R. p. 1181, lines 1-10)

In short, none of the offered testimony or documentary evidence supports a finding of nuisance *per se* as a matter of law. For the jury to find that the excavation resulted in a condition that is dangerous at all times and under all circumstances is contrary to the evidence presented.

South Carolina nuisance law further elaborates that "mere fears of the plaintiff" are insufficient to support a cause of action for nuisance. *Emory v. Hazard Powder Co*., 22 S.C. 476, 483 (1885). There are no reported cases in South Carolina where a plaintiff has successfully made a showing of anticipatory nuisance. *See Welborn*, 247 S.C. 554, 148 S.E.2d 375 (denying injunctive relief against proposed automobile wrecking service); *Strong*, 240 S.C. 244, 125 S.E.2d 628 (denying injunctive relief against proposed grocery store); *Moss v. South Carolina State Highway Dep't*, 223 S.C. 282, 75 S.E.2d 462 (1953) (refusing to issue temporary restraining order against relocation of highway); *Emory v. Hazard Powder Co*., 22 S.C. 476, 483 (1885) (stating that "mere fears of the plaintiff" are insufficient basis for nuisance action); *Roach v. Combined Util. Comm'n*, 290 S.C. 437, 351 S.E.2d 168 (Ct. App. 1986) (denying injunctive relief against proposed sewage treatment plant); *Charleston Comm. for Safe Water v. Commissioners of Pub. Works*, 286 S.C. 10, 331 S.E.2d 371 (Ct. App. 1985) (holding that plaintiff failed to meet burden of showing that proposed fluoridation of city's water supply would constitute a nuisance). As nuisance *per se* requires a showing of danger *at all times*, by definition anticipating that something might become a nuisance in the future cannot be a nuisance *per se*. Respondents cannot prevail or be awarded a judgment based on their claim for nuisance *per se*, and this Court should reverse the order of Judge Gravely denying the Appellants' post trial motion.

b. Respondents presented no evidence of damages which were a proximate cause of the excavation work performed on the Thomas property.

Respondents assert that the excavation work on the Thomas Property in 2018 caused damages to the back building of the Click Property in the form of cracks in the floor and in the structure of the building. However, Respondents' own expert explicitly testified that this was not the case, stating that there were no damages sustained to the back building as a result of the excavation, as is addressed, *supra*. Mr. Hall further elaborated that minimal if any damage had occurred to the driveway area, commenting that there could have been some nominal erosion of gravel. Click testified that no water drainage comes from the Thomas property as the Thomas property is lower than his property, and there was no grading nor excavation done behind his upper building. (R. p. 857, lines1-17) At trial, Brent Click specifically testified that there were cracks in the floor and sheetrock damage in the building he used in 2013, the "upper" building, that there were cracks in the floor as of the date of trial in 2022, and the building was an older building having been on the property since 1978. (R. p. 723, lines13-16; R. p. 856, lines 9-17; R. p. 942, lines 1-13) Jimmy Watkins (a previous owner of the Thomas property) testified that the one-time owner of the Click property, Dobson, had discussed with him the possibility of Watkins buying the Click property, although Watkins was not interested due to the condition and structural damage (including poor foundation) of the top building. (R. p. 1101, lines 1-8) Additionally, Mr. Thomas testified that he took pictures during the excavation process that showed a crack running down the blocks of the wall on the Click upper building which were clearly present prior to the excavation. (R. p. 1128, lines 11-22; R. p. 1458) Thomas also testified that he never dug across the property lines, and never had any intent to hurt Click's property by the way he was grading the parking lot. (R. p. 1129, lines 14-22)

The jury's finding of damages as to the claims for nuisance *per se* and negligence does not comport with the evidence presented and Judge Gravely's order should be reversed.

c. Respondents' claim of acquiescence must fail because the Respondents provided no evidence that any owners of the Thomas or Click properties ever agreed the true boundary line was such that the turn-around area was on the Click property.

Acquiescence is a very particular claim and requires a mutual intent to agree to a particular property line. "Absent recognition by both [parties] that a particular line constituted the true property line, a new boundary cannot be established by acquiescence." *Croft v. Sanders*, 283 S.C. 507, 510 (S.C. Ct. App. 1984) (rejecting plaintiff's argument that a fence constituted a particular property line and finding that the parties' establishment of a marker between adjacent properties did not prove intent to establish a new boundary line). Acquiescence by one party is not sufficient. *Pittman v. Lowther*, 363 S.C. 47 (S.C. 2005) (noting that a landowner "is not required to battle successfully for his rights… if the principle of prescription be attributed solely to the acquiescence of the servient owner"). Here, *none* of the prior owners of the properties testified that they agreed to a boundary line different than that shown on the 1996 Plat. *In fact, each one specifically acknowledged that the boundary line was that shown on the 1996 Plat.* Mr. Thomas testified that he never provided anything to Brent Click in writing that Click owned the turnaround area, *nor did he ever agree that the boundary line is different than what it was as shown on the 1996 plat*. (R. p. 1121, lines 16-25)

Therefore, Respondents' claim for acquiescence cannot stand. Further, there was neither testimony nor documentary evidence defining any specific new boundary between the properties. General statements regarding where the parties thought a boundary line might be does not meet the strict requirements to prove acquiescence to a specific new boundary line. Further, these types of general statements do not provide the specific information necessary to meet South

Carolina Code requirements for recording of property boundary lines. For these reasons, the jury's finding of acquiescence does not comport with the evidence presented, and judgment notwithstanding the verdict is appropriate.

d. Because Respondents' use of any portion of the Thomas property was permissive, Respondents' claims for prescriptive easement fail as a matter of law.

South Carolina law is "well-established that evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse or under a claim of right." *Bundy v. Shirley*, 412 S.C. 292, 310, 772 S.E.2d 163, 173 (2015). *See also Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 586, 735 S.E.2d 528, 538 (Ct. App. 2012) (quoting *Williamson* and recognizing that a claimant's permissive use of landowner's property cannot begin to ripen into a prescriptive easement until the claimant makes a distinct and positive assertion of right hostile to the landowner); *Horry Cnty. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993) (holding evidence, which established that use of property was permissive, showed use of property was not adverse); *Williamson v. Abbott*, 107 S.C. 397, 401, 93 S.E. 15, 16 (1917) (stating that permissive use of property "stamps the character of the use as not having been adverse, or under claim of right"); *see also* 12 S.C. Jur. *Easements* § 10 (Supp. 2015) ("Use with the permission of the owner is not adverse."). "Stated another way, when a claimant uses property with the permission of the owner, he or she acknowledges the owner's rights and uses the property without an affirmative, hostile act toward the owner's rights." *Bundy*. Prior owners of the Thomas Property allowed owners and renters of the Click Property to use the turn-around area. Bradley Dobson, who bought the Click property in 1996, testified at trial and admitted that he could not have sold the gravel driveway to Mark Smith when he bought the

property. (R. p. 1009, lines1-6) Dobson testified about permissive use of the turnaround area during the time he owned the property. The Appellants also called Jimmy Watkins to testify at trial. Watkins owned the Thomas property from approximately 2004 to 2019. (R. p. 1100, lines 11-13) Watkins testified that the one time owner of the Click property, Dobson, had discussed with him the possibility of Watkins buying the Click property, although Watkins was not interested due to the condition and structural damage (including poor foundation) of the top building. (R. p. 1101, lines 1-8) Watkins testified to a "friendly" understanding about use of the driveway and turnaround area in dispute in this case, with no formal written agreement. (R. p. 1102, lines 4-10) Jonathan Thomas also testified at the trial of this matter regarding this issue. Mr. Thomas testified that when he first occupied and purchased the Thomas property he was getting along with Mr. Click with both individuals having access to and using property that belonged to the other, i.e. the driveway and turnaround area. However, Mr. Thomas testified that eventually Mr. Click changed the rules and would set the parameters for how Mr. Thomas could use the driveway that led to Thomas' property in the turnaround. (R. p. 1127, lines 1 – 25) Thomas testified that eventually Mr. Click put up a gate to block the access to the driveway that led to Thomas' property. (R. p. 1118, lines 1-22) Mr. Thomas testified that he never provided anything to Brent Click in writing that Click owned the turnaround area, nor did he ever agree that the boundary line is different than what it was as shown on the 1996 plat. (R. p. 1121, lines 16-25)

Because the use of the area was permissive, there can be no hostility. Thus, Respondents' claim for prescriptive easement fails as a matter of law. For these reasons, Appellants request this Court enter judgment notwithstanding the verdict or grant Appellants' request for a new trial.

e. The jury's finding of acquiescence (requiring mutual agreement) and prescriptive easement (requiring hostility and no mutual agreement) are inconsistent.

A finder of fact cannot find acquiescence in a new property boundary (an essential element of which is mutual agreement) and also find hostility that would support a prescriptive easement. The facts of a case cannot simultaneously demonstrate mutual agreement *and* hostility. Therefore, the finding by the jury in favor of Respondents on both of these claims is inconsistent, illogical, and should be void.

f. The jury returned a verdict in favor of the Respondents, but found zero in damages, and Judge Gravely's instruction to the jury to return to the jury room to assess for damages was error as the jury had already reached their verdict.

An essential element of nuisance *per se* is damages. As stated, the Respondents' claims for any damages fail given the arguments of the Appellants, *supra,* as the Respondents did not further any legitimate claims for relief. However, even if this Court believes that the claims of Respondents have merit, the Respondents have failed to present any reliable evidence regarding damages other than speculation. Brent Click was permitted to testify regarding the value of his business, and an estimate based on no facts whatsoever of the percentage of damage to his property based on the alleged actions of the Appellants. In his 2020 deposition, Click testified that he did not know his business margins, revenue and the profit of the business, contrary to his trial testimony – although he did not testify in specifics regarding these values. (R. p. 862, lines1-25; R. p. 863, lines 1-14) Click also never mentioned damages to a water line in his deposition, contrary to his trial testimony wherein he requested compensation for damage to his water line. (R. p. 863, lines15-24) At trial, Brent Click testified as to the value of his property

and what in his opinion were the losses in value from the alleged actions of the Appellants. (R. p. 843, lines 1-19)

Following the presentation of testimony and evidence, the jury found for Respondents on this claim but found $0 in damages. This is inconsistent and demonstrates an obvious lack of understanding and/or proper application of the law. Pursuant to the Thirteenth Juror doctrine, the trial judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Norton v. Norfol S. Ry. Co.*, 350 S.C.473, 479, 567 S.E.2d 851, 854 (2002). The jury is bound by the law and cannot reinvent the law to reach a desired result. The jury's alteration of the verdict form after being sent back to deliberate was insufficient to cure the underlying issue as the jury was not reinstructed on the law and only returned to the jury room for 5-10 minutes before revising the damages amount. The trial court erred and the order should be reversed.

g. The trial court should have acted in equity to modify or clarify the verdict of the jury as related to the issue of damages, as an award of damages for remedial measures is inconsistent with prevention of future damages.

As the Appellants have asserted, the claims for nuisance *per se* and negligence should fall for the reasons cited above. However, Judge Gravely in his post-trial order finds that when the existence of a nuisance has been established by the verdict of a 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 (1996). The *Dill* case involved a nuisance of a red blanket of dust covering the injured party's land continually – clearly distinguishable from the facts in this case. Although Judge Gravely finds that the jury awarded damages in the amount of $28,000.00 to the Respondents based on the finding of nuisance *per se*, he orders the Appellants to abate the nuisance and to "take such action to avoid any further damage to the Plaintiffs' property." (R.

pp. 27-44) This order impermissibly adds to the jury's verdict, and it is unclear how the jury determined that the Respondents were entitled to damages based on the issue of nuisance *per se.* Judge Gravely's order should be reversed by this Honorable Court.

CONCLUSION

The Appellants respectfully pray that this Honorable Court will reverse the orders of Honorable Judge Alex Kinlaw and Honorable Perry Gravely as described above, entering Judgment against the Respondents, and for any further relief that this Court deems necessary and appropriate.

Respectfully Submitted,

s/Scarlet B. Moore

_____

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November 13, 2023.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Pickens County
In the Court of Common Pleas
Hon. Alex Kinlaw, Jr. and Hon. Perry H. Gravely

2022-001499

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

Versus

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

CERTIFICATE OF COUNSEL

I certify that Final Brief of Appellants complies with Rule 210(g).

Respectfully Submitted,

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