

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

AUG 24 2012

L. Casey Manning, Circuit Court Judge

S.C. Supreme Court

Opinion No. 4961 (S.C. Ct. App. Filed April 4, 2012)

Ex Parte: Stephen E. Lipscomb, Ron Safko,
And L. K. Harrell, II,.....Respondents,

In Re:
Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, Janette H. Robinson.....Petitioners,

v.

Stonington Development, LLC.....Respondent.

APPENDIX

**VOLUME 2 OF 2
(Pages 404 – 757)**

H. Freeman Belser
William C. Dillard, Jr.
P.O. Box 96
Columbia, SC 29202
(803) 929-0096
Attorneys for Petitioners

James Edward Bradley
William B. Fortino
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Attorneys for Respondent Harrell

George V. Hanna, IV
Kelley Shull Cannon
Caroline H. Raines
P.O. Box 12009
Columbia, SC 29211
(803) 758-6000
Attorneys for Respondent Safko

Timothy G. Quinn
William M. Saltzman
P.O. Drawer 12589
Columbia, SC 29211
(803) 771-0936
Attorneys for Respondents
Lipscomb and Stonington
Development, LLC

INDEX

VOLUME 2

Record on Appeal (pp. 404-511).....	404
Appendix to Record on Appeal.....	512
Final Brief of Appellant Ron E. Safko	554
Final Brief of Appellant L.K. Harrell, III.....	580
Final Brief of Appellants Stonington Development, LLC and Stephen E. Lipscomb.....	620
Final Brief of Respondents.....	655
Reply Brief of Appellant Ron E. Safko.....	690
Reply Brief of Appellant L.K. Harrell, III.....	698
Reply Brief of Appellants Stonington Development, LLC and Stephen E. Lipscomb.....	711
Decision of Court of Appeals.....	745
Respondents' Petition for Rehearing.....	750
Order Denying Rehearing.....	756

HOWSER, NEWMAN & BESLEY, L.L.C.

R. DAVIS HOWSER
JAMES P. NEWMAN, JR.
WILLIAM G. BESLEY
BENJAMIN D. MCCOY
KELLEY SHULL CANNON
ANDREW E. HASELDEN
GEORGE V. HANNA, IV*
MICHAEL COOPER JONES
MICHAEL TODD LOFTIS
ROWLAND P. ALSTON, III**
KASSI B. SANDIFER
J. FRANK MOCK
KYLENE L. KESLEY
JENNIFER E. THOMAS
ALBERT RICHARD PIERCE, JR.*
ASHLEY B. CORNWELL
JAMES P. SULLIVAN

ATTORNEYS AND COUNSELORS AT LAW

POST OFFICE BOX 12009
COLUMBIA, SC 29211

1508 WASHINGTON STREET
COLUMBIA, SC 29201

TELEPHONE (803) 758-8000
FAX (803) 758-4445
TOLL FREE (866) 207-6209
WWW.HNSLAW.COM

CHARLESTON OFFICE
1110 QUEENSBOROUGH BLVD.
SUITE C
MT. PLEASANT, SC 29464
(843) 216-6940
FAX (843) 216-6942
TOLL FREE (877) 216-6870

REAL ESTATE PRACTICE
1340 BULL STREET
SUITE 250
COLUMBIA, SC 29201
(803) 252-7434
FAX (803) 252-7436

* ALSO ADMITTED IN NORTH CAROLINA
** ALSO ADMITTED IN WASHINGTON, D.C.

May 18, 2009

FAX: 425-5519
The Honorable L. Casey Manning
Judge of Fifth Judicial Circuit
P. O. Box 192
Columbia, South Carolina 29202

RE: Glen Y. Hollis, Jr., et al vs. Stonington Development, LLC, et al.
Civil Action Number: 07-CP-40-7627

Dear Judge Manning:

I am in receipt of the proposed order prepared by Freeman Belser, Esquire related to the Rule to Show Cause hearing held before you on April 14, 2009. I am writing to set forth objections to the proposed order on behalf of my client Ron Safko. While I honestly have a multitude of objections to the Order as written, the vast majority of my objections can be cured easily by rejecting the Proposed Order to the extent it makes any rulings beyond a finding that Stonington Development, LLC has not complied with the Court's injunction dated June 26, 2008. We believe the Proposed Order goes far beyond the scope of the April 14, 2009 hearing.

As your Honor may recall, I submitted a memorandum of law prior to the hearing setting forth my position that the Plaintiffs' were attempting to use the Injunction and Rule to Show Cause to make an end around the protections afforded individuals in the South Carolina Limited Liability Company Act. At the outset of the April 14 hearing, I attempted to make this argument and was advised by the Court that the Court only wanted to hear the merits of whether Stonington Development had complied with the underlying injunction. The Court further noted that if the Court found on behalf of Stonington that the arguments that I had been trying to make were moot. Freeman Belser, on behalf of the Plaintiffs, offered to address the points I had begun to make and the Court instructed him to move on to the merits of whether the injunction was being complied with or not. We understood that the issue of what the Court could or could not do to the individual members of Stonington would be left for another day, in the event the Court

The Honorable L. Casey Manning

Page Two - May 18, 2009

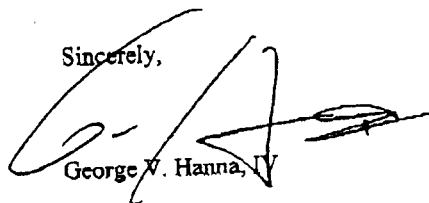
RE: Glen Y. Hollis, Jr., et al vs. Stonington Development, LLC, et al.

Civil Action Number: 07-CP-40-7627

found, as the Court apparently has, that the injunction had not been complied with. If the Court were to take our suggested action, it will allow us the opportunity to be heard in full on our contention that South Carolina law does not hold our client personally liable for complying with the injunctive order issued against Stonington and that your underlying Order correctly recognizes this in only holding individuals liable in their capacity as members of the organization.

Your consideration of this request is appreciated, if you should have any questions or concerns please do not hesitate to contact me.

Sincerely,



George V. Hanna, IV

GVH/jwh

CC: H. Freeman Belser, Esquire
Timothy G. Quinn, Esquire
James Edward Bradley, Esquire

FAX: 929-0196
FAX: 254-7751
FAX: 791-8410

Belser & Belser, P.A.

C. HEYWARD BELSER, SR.
(1918-1994)
CLINCH H. BELSER, JR.
MICHAEL J. POLK
H. FREEMAN BELSER
ROBERT YOUNG, P.A.
OF COUNSEL

ATTORNEYS AND COUNSELORS AT LAW
POST OFFICE BOX 96
COLUMBIA, SOUTH CAROLINA 29202
FACSIMILE 803-929-0196
TELEPHONE 803-929-0096
www.belserpa.com

OFFICE LOCATION:
BANK OF AMERICA PLAZA
1901 MAIN STREET
SUITE 1550
COLUMBIA, SC 29201

May 26, 2009

FACSIMILE TRANSMITTAL SHEET
NUMBER OF PAGES BEING TRANSMITTED 2
FACSIMILE NUMBER 803-576-1744

The Honorable L. Casey Manning
5th Judicial Circuit
1701 Main Street
Columbia, South Carolina 29201

RE: Glenn Y. Hollis, Jr., et al. v. Stonington
Development, LLC
Case Number 2005-CP-40-3736

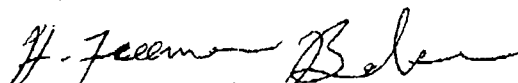
Dear Judge Manning:

I am writing to respond to George V. Hanna's fax to you on May 18, 2009. Very respectfully, we believe that, since Mr. Safko neither filed a Motion to Reconsider nor a Notice of Appeal, the June 26, 2008 Injunction is the law of the case, so Mr. Safko has not preserved his right to make the legal arguments that he now seeks to make. Neither have Stonington, Mr. Lipscomb, or Mr. Harrell. This issue is specifically addressed in the proposed Order.

Although we do not have a transcript of the hearing, our notes of the hearing reflect that Mr. Hanna presented his legal arguments on behalf of Mr. Safko, along with a legal memorandum. Nevertheless, if the Court would like to hear arguments on the issues, then we will of course be available to do so.

Thank you very much for your consideration, and best regards.

Sincerely,


H. Freeman Belser

HFB/sra

*Test
FYI
Ward*

*SENT
Email to
Trey
Trey@LK
Hanna.com
THX
Ward*

05-26-09;15:40 ;Belser&Belser,PA

7918410

;8039290196

2/ 2

The Honorable L. Casey Manning
May 26, 2009
Page Two

cc: Timothy G. Quinn, Esq. (via facsimile number (803) 254-
7751)
George V. Hanna, IV, Esq. (via facsimile number (803) 758-
4445)
James Edward Bradley, Esq. (via facsimile number (803) 791-
8410)
Mr. Glenn Y. Hollis, Jr. (via email)
Mr. John E. Hollis (via email)
Mr. and Mrs. Joseph R. Robinson (via email)
bradons/const/05066/manningfax 090526

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	Case Number 2005-CP-40-3736
	)	
Glenn Y. Hollis, Jr.,	)	
John E. Hollis, Joseph	)	
R. Robinson, Janette H. Robinson,	)	
	)	MEMORANDUM OPPOSING THE
Plaintiffs,	)	PROPOSED ORDER GRANTING
	)	STONINGTON DEVELOPMENT, LLC AND
v.	)	STEPHEN E. LIPSCOMB'S
	)	CONTEMPT OF COURT
Stonington Development, LLC	)	
	)	
Defendant.	)	

INTRODUCTION

In response to the proposed Order Granting Plaintiffs' Motion for an Order Holding Stonington Development, LLC and its Members in Contempt, Stonington Development, LLC (Stonington) and Stephen E. Lipscomb (Mr. Lipscomb) assert South Carolina law does not hold them in contempt of court.

FACTS

On April 6, 2007, a Richland County jury rendered a verdict in favor of the Plaintiffs against Stonington in the amount of \$400,000.00 in actual damages and \$3.5 million in punitive damages, for a total of \$3.9 million, for a private nuisance arising from siltation and increased runoff that damaged the Plaintiffs' properties and ponds. The Court filed the Orders on November 12, 2007 and December 4, 2007. Stonington filed a Notice of Appeal on December 13, 2007. This Appeal has been briefed, filed, and is pending. Also, Plaintiffs' separate action to pierce the corporate veil of Stonington, LLC is pending.

On June 26, 2008, this Court issued an Order enjoining Stonington "... from discharging sediment-laden stormwater onto the plaintiffs' property." *June 26, 2008 Order* at 2. On September 11, 2008, the Plaintiffs filed a Motion for an Order Holding Stonington Development, LLC and its Members in Contempt of Court for failing to comply with the June 26, 2008 Order. This Motion was filed without any prior notice to Stonington or Mr. Lipscomb.

A Rule to Show Cause hearing was heard on April 14, 2009. The Court heard the sworn testimony of Plaintiff Janette H. Robinson, Kevin Lee of the Stonington Homeowners' Association, and of Mr. Lipscomb. The Court also reviewed numerous photographs identified by the witnesses.

At this hearing, Ms. Robinson testified that the Plaintiffs have done nothing to repair their property. She said the Plaintiffs settled with an insurance company for approximately \$400,000. Despite this \$400,000 settlement, Plaintiffs admit they have not removed any of the silt from the pond, they have not hired engineers to help diagnose or fix the silt and runoff problem, and Plaintiffs have not assisted Stonington in any way to find a solution for the alleged issues. Ms. Robinson also acknowledged on cross examination that the engineers she consulted all state that siltation will likely continue until the upper area is developed. Mr. Lipscomb testified that it was the continued actions of the Plaintiffs that are preventing the development of the upper land areas.

Plaintiffs did not prove what caused the silt and runoff problem, if any. Plaintiffs admit that Phase III of the Stonington subdivision was not owned by Stonington at the time of the jury trial, not at the present time. Plaintiffs also admit that the drainage system from Phase III flowed through the property owned by Stonington. However, Plaintiffs did not bring any evidence

showing Stonington caused the alleged silt and runoff from Phase III to enter Plaintiffs' property. Plaintiffs also did not show that additional harm was done to their property since the June 26, 2008 Order was filed, nor did they present any testimony as to monetary damage caused by any additional siltation and no testimony that their damage, if any, could not be cured by their earlier settlement monies.

At the Rule to Show Cause Hearing, Defendants showed that Stonington and Mr. Lipscomb took remedial measures to solve the silt and runoff issues. On cross-examination, Ms. Robinson testified that she saw Mr. Lipscomb, as well as several other workers, setting up silt fences along her property. On direct examination of Mr. Lipscomb, Mr. Lipscomb testified that he hired three separate engineers to inspect the property and find a solution for any problems if they existed. Mr. Lipscomb also hired Carolina Storm Water Services to: monitor the property, check on the silt fences, set up a rock dam, and give Mr. Lipscomb reports regarding the condition of the property. Carolina Storm Water Services has monitored the property every week for over one year. Mr. Lipscomb also testified that DHEC and the Army Corps of Engineers have been to the property and they have never found any violations, nor has Mr. Lipscomb ever been cited for not being in code compliance.

On May 12, 2009, Plaintiffs submit a proposed Order Granting Plaintiffs' Motion for an Order Holding Stonington Development, LLC and its Members in Contempt. The proposed Order states as a Findings of Fact. First, the proposed Order states "[t]he siltation and increased runoff problems that were the subject of the underlying lawsuit between the plaintiffs and Stonington are continuing[,] and Plaintiffs proved these damages "beyond question" by showing photographs of the property and the testimony of Ms. Robinson. *Proposed Order* at 2. However,

the photographs were taken on days right after it rained and Plaintiffs would not allow Defendants onto the property to make similar observations.

Second, the proposed Order states "Stonington and Mr. Lipscomb have made minimal efforts but have not done enough to stop the siltation and increased runoff problems. . . ." Id. However, "Mr. Lipscomb testified that he had hired a consultant to periodically inspect Stonington's property." Id. Lastly, the proposed Order states that Defendants "failed to show cause why they should not be held in contempt of Court[,]" and that the ". . . damages will need to be remediated after the siltation is stopped. . . ." Id.

Under the Conclusions of Law section, the proposed order finds Stonington, Mr. Lipscomb, Mr. Safko, and Mr. Harrell in Contempt of Court. Id. at 3-5. The proposed order accuses Defendants of violating § 26-273(b) of the Richland County Code of Ordinances and S.C. Code Ann. § 48-14-140. Id. at 4. The proposed order then awards compensatory damages to Plaintiffs. Id. at 4-5.

The Orders of the Court section finds Stonington, Mr. Lipscomb, Mr. Safko and Mr. Harrell individually liable for civil contempt. Id. at 5-6. The Defendants are found joint and severally liable for the amount \$25,000.00 in compensatory damages to the Plaintiffs, and Defendants are joint and severally liable for the Plaintiffs' attorney's fee and costs. Id. at 5. Finally, the proposed Order demands that the Defendants pay to remediate the silt and runoff problems. Id. at 5-6.

DISCUSSION

I. AN ORDER OF CONTEMPT IS NOT PROPER WHEN AN APPEAL IS PENDING.

Rules 205 and 225 of the South Carolina Appellate Court Rules terminates the Circuit

Court's jurisdiction over a Contempt hearing when the issue under review is pending in the Appellate Court. Rule 205 states that "[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal[.]" Rule 205, SCACR. Rule 225 states:

...the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 225. SCACR. In Arnal v. Fraser, 371 S.C. 512, 521 (2007), a final divorce order gave a father specific parameters for child visitation. The father appealed a portion of the order concerning the visitation. Id. While the appeal was pending, the Family Court issued several orders modifying the visitation schedule. Id. The father argued the Family Court could not modify the divorce order while an appeal was pending. Id. The Supreme Court of South Carolina agreed with the father and held that the Appellate Court had exclusive jurisdiction over the matter, rather than the lower court. Id.

Here, just as in Arnal, the lower court is attempting to enforce a matter that is pending with the Appellate Court. Stonington is appealing whether it is liable in the underlying case. Final Br. of Appellant 14-15. The trial court's order originally found Stonington liable for \$3.9 million and required Stonington to stop any further silt and runoff from entering Plaintiffs' property. November 14, 2007 Order; December 4, 2007, Order; September 17, 2007, Form-4 J.

When Defendants' Notice of Appeal was filed, the matters issued in the order were automatically stayed, in accordance with Rule 225, SCACR. However, the trial court issued an injunction against the Defendants on June 26, 2008 without effectively lifting the stay. The injunction orders Defendants to stop any silt or runoff from entering Plaintiffs' property. *June 26, 2008 Order* at 2. This is a matter stayed for appeal. Allowing the Circuit Court to enforce this injunction would infringe the Appellate Court's jurisdiction. Therefore, under Rules 205 and 225 SCACR, the Circuit Court lacks jurisdiction to enforce the injunction. The Appellate Court has exclusive jurisdiction over this matter.

II. SOUTH CAROLINA LAW PROVIDES TEN DAYS' WRITTEN NOTICE TO AN OWNER OF REAL ESTATE BEFORE A PROCEEDING IS COMMENCED FOR FAILING TO ABATE A NUISANCE.

Plaintiffs failed to provide Defendants with a ten day notice before filing the Rule to Show Cause. South Carolina Civil Remedies and Procedures provides the following, regarding notice to an owner before an action is brought against him:

No proceeding against the owner of the real estate shall be commenced hereunder unless ten days' written notice be given by the prosecuting attorney to such owner or his agent and upon his failure thereafter to abate the nuisance.

S.C. Code Ann. § 15-43-120. In the instant case, on September 11, 2008, Plaintiffs filed a Motion for an Order Holding Stonington and its Members in Contempt of Court. Plaintiffs filed this motion without providing prior notice to Defendants. Under South Carolina law, when a defendant is accused of failing to abate a nuisance, ten days notice must be given to a defendant before an action is commenced. *Id.* Therefore, Plaintiffs' motion for contempt is not viable

because Plaintiffs did not comply with S.C. Code Ann. § 15-43-120.

**III. STONINGTON AND MR. LIPSCOMB DID NOT INTENTIONALLY
DISREGARD THE JUNE 26, 2008 ORDER.**

Stonington and Mr. Lipscomb complied with the June 26, 2008 Order of injunction and sought to abate the nuisance. "Contempt results from the willful disobedience of a court order." Browder v. Browder, 4524 (S.C.Ct.App 3-26-2009) (citing Bigham v. Bigham, 264 S.C. 101, 104 (Ct.App. 1975)). "Willful disobedience requires an act to be 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" Id. (quoting Spartanburg Co. Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-3 (1988)). "Civil contempt must be proven by clear and convincing evidence." Floyd v. Floyd, 365 S.C. 56 (Ct.App. 2005).

In Browder, a divorce order was issued requiring the husband to provide an accounting of proceeds collected from the sale of property. Id. at 1-2. The wife accused the husband of being in contempt for failing to provide the accounting. Id. at 2. However, the husband testified that he repeatedly requested the accounting records to avail. Id. at 4. He also explained that the records were sent to the marital residence and he could not locate the information that was requested. Id. Instead, the husband tried to explain the accounts to the best of his knowledge. Id. at 4-5. The Court did not hold the husband in contempt because his actions to comply with the order were adequate. Id. at 2.

Here, just as in Browder, Stonington and Mr. Lipscomb's actions were adequate enough to find they were complying with the June 26, 2008 Order. Mr. Lipscomb, acting on behalf of

Stonington, hired consultants and workers to monitor the Plaintiffs' property and to set up fencing where there was a possibility of siltation and runoff. Ms. Robinson admits to seeing Mr. Lipscomb observing the property and she has seen the workers constructing fences on the property. There is no clear and convincing proof that Stonington and Mr. Lipscomb wilfully disobeyed the June 26, 2008 Order.

Plaintiffs' testimony that Defendants have done nothing to remediate the siltation and runoff problem are untrue. Stonington and Mr. Lipscomb have in fact made several attempts to abate the alleged nuisance. It may be so, however, that Stonington and Mr. Lipscomb's actions did not completely remediate the alleged problem. On the other hand, Stonington and Mr. Lipscomb did not wilfully disregard the June 26, 2008 Order. Mr. Lipscomb have made a good faith attempt to abate the nuisance by hiring consultants and workers to set up fences.

Even if the Plaintiffs believe Stonington and Mr. Lipscomb's attempts are insufficient, Plaintiffs have not proven that Stonington and Mr. Lipscomb have intentionally disregarded the June 26, 2008 Order. Plaintiffs did not provide testimony by Ms. Robinson nor did Plaintiffs show in cross-examination that Stonington and Mr. Lipscomb wilfully disregarded the June 26, 2008 Order. Plaintiffs have done nothing in assisting Stonington and Mr. Lipscomb as to what needs to be done to remediate the situation and the remediation of the situation requires the Plaintiffs' cooperation which has not been forthcoming. Furthermore, the extent of the alleged continuing damages is unknown because Plaintiffs have not cleaned their property with the assistance of the \$400,000 insurance money. It is unreasonable, if not impossible, for Defendants to prevent every ounce of silt and runoff from entering Plaintiffs' property.

This lawsuit is preventing Stonington from completely remediating the alleged siltation and runoff problem. The Plaintiffs are threatening to take legal action against those who purchase the upper lots of the Stonington subdivision. As a result, no one is interested in purchasing the land for the purpose of building a house. If houses are built, the land will become stabilized, sod will be laid down, and vegetation will be planted. These improvements to the land would stop the alleged harms done to Plaintiffs. In effect, Plaintiffs are hindering the Defendants from complying with the June 26, 2008 Order.

Plaintiffs have not told Defendants specifically what needs to be done to remediate the problem. Stonington and Mr. Lipscomb have done what they can to solve any alleged problem. Plaintiffs have not provided Defendants with any guidance. Therefore, this Court should find, like Browder, that Stonington and Mr. Lipscomb's actions in abating the nuisance are adequate enough to find they did not disregard the June 26, 2008 Order.

**IV. MR. LIPSCOMB IS NOT IN CONTEMPT BECAUSE PLAINTIFFS DID NOT
PIERCE STONINGTON'S VEIL.**

Plaintiffs did not pierce Stonington's veil. "A member or manager [of a limited liability company (LLC)] is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." S.C. Code Ann. § 33-44-303(a) Although no South Carolina appellate decision discusses protecting the personal liability of an LLC's individual members, other state courts apply the same test for finding LLC individual members personally liable as they apply in situations involving business corporations. *See, e.g.* State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 666 S.E.2d 107 (N.C. 2008). In deciding whether to find individuals personally liable for the debts and obligations of the business entity

which they serve, South Carolina courts place the burden of proof on the party seeking to pierce the corporate veil. Mid-South Mgmt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 597 (Ct. App. 2007) (citing the test established in Sturkie v. Sifly, 280 S.C. 453 (Ct. App. 1984). 313 5e2 316 320 459

South Carolina applies a two prong test for piercing the corporate veil. Drury Dev. Corp. v. Foundation Ins. Co., 380 S.C. 97,102 (2008). The first prong analyzes the shareholder's relationship to the corporation by evaluating eight factors. Id. The second prong requires the plaintiff to demonstrate that "fundamental unfairness" would result from recognition of the corporate entity. Id. "The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." Dumas v. InfoSafe Corp., 320 S.C. 188, 192-3, (Ct.App. 1995).

At the April 14, 2009 hearing, Plaintiffs did not bring any evidence showing Mr. Lipscomb abused the formalities of a limited liability company, nor did Plaintiffs show that a "fundamental unfairness" would result from recognizing Stonington as an entity. The Plaintiffs did however, attempt to compel Stonington's members to pay for the liabilities of Stonington. One of the purposes of forming a LLC is to limit the members' liability. Having the members pay for the liabilities of the LLC, without piercing the veil is contrary to the law and to public policy. Furthermore, a subsequent action to pierce the veil of Stonington is pending in the Circuit Court. Piercing Stonington's veil by way of this contempt hearing would be premature, and would deprive Mr. Lipscomb of his day in Court on this issue. Therefore, Mr. Lipscomb is shielded by the LLC's veil in this contempt action.

**V. RULE 65(d) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE
DOES NOT BIND MR. LIPSCOMB INDIVIDUALLY TO THE INJUNCTION.**

Mr. Lipscomb is not bound to the June 26, 2008 Order in his individual capacity. Rule 65(d) of the South Carolina Rules of Civil Procedures states injunctions are “binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Officers are bound to an injunction against the business entity only in their capacity as an officer. 42 Am.Jur. 2d. Injunctions § 299. Agents of the company are bound to an injunction to the extent they are acting on behalf of the company. Id. Parties who are “. . . outside an injunction’s coverage subject themselves to its proscriptions should they aid or abet the named parties in a concerted attempt to subvert those proscriptions. Id. at § 300.]

In the instant case, on June 26, 2008, this Court filed an “. . . Injunction Against Stonington Development, LLC.” *June 26, 2008 Order* at 1. The June 26, 2008 Order enjoins Stonington from “discharging sediment-laden stormwater onto the plaintiffs’ property. . . .” Id. at 2. The Order goes on to include Stonington’s “members” in the injunction, which it claims is [i]n accordance with Rule 65(d) SCRCF. . . .” Id. at 3. The proposed order now seeks to hold Mr. Lipscomb in contempt, individually. Id.

The June 26, 2008 Order, misquotes Rule 65(d). Id. Rule 65(d) of the South Carolina Rules of Civil Procedures states injunctions are “binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Members are not included in the rule. Therefore, the June 26, 2008 Order was not in accordance

with Rule 65(d) SCRCP and Stonington's members should not have been included in the injunction.

[The June 26, 2008 Order did not establish jurisdiction over Mr. Lipscomb.] Mr. Lipscomb was not a named party of the original action against Stonington, nor was he named in his individual capacity in the June 26, 2008 Order. It may be argued that Mr. Lipscomb has not preserved his right to set aside the June 26, 2008 Order because Mr. Lipscomb did not file a Motion to Reconsider or a Notice of Appeal. However, these actions are not necessary to find that the injunction is not binding on Mr. Lipscomb individually. The June 26, 2008 Order failed to name the specific members who are bound to the injunction, and whether they would be liable in their individually capacity. Therefore, it is not proper to hold Mr. Lipscomb in contempt because this Court does not have jurisdiction over him individually.

Mr. Lipscomb is not individually liable for contempt even if he was acting as an officer or agent of Stonington. As a member of Stonington, Mr. Lipscomb may be considered an agent or officer. However, officers are bound to injunctions against the business entity only in their capacity as an officer, and agents can only act on behalf of the company. 42 Am.Jur. 2d. Injunctions § 299. Therefore, any alleged actions Mr. Lipscomb made in violation of the injunction, would be imputed to Stonington because Mr. Lipscomb was acting on behalf of Stonington.

Mr. Lipscomb did not aid Stonington in violating the injunction. Mr. Lipscomb did have knowledge of the June 26, 2008 Order, but he did not participate in concert to violate the injunction. Plaintiffs did not show Mr. Lipscomb actively participated in any wrongful act. To the contrary, Mr. Lipscomb only aided Stonington in complying with the injunction by hiring

consultants and workers to help remediate the alleged silt and runoff problem. Therefore, under Rule 65(d) SCRCF, Mr. Lipscomb is not individually liable for contempt.

VI. STONINGTON AND MR. LIPSCOMB DID NOT VIOLATE COUNTY ORDINANCES AND STATE STATUTES.

Stonington and Mr. Lipscomb are not liable for violating any county ordinances or state statutes. Under § 26-273(b) of the Richland County Code of Ordinances:

When an authorized county official finds violations of this [Land Development Code Compliance Ordinance], it shall be the duty of said official to notify the person alleged to be in violation. Such notice of violation shall be in writing and sent by certified or registered mail or delivered by personal service. If the violator cannot be ascertained, then the notice of violation shall be sent to the record owner of the land on which the violation occurs. The notice of violation shall include an opportunity to cure the violation within a prescribed period of time.

Richland County Code of Ordinance § 26-273(b). The proposed order states "Sec. 26-273(b) of the Richland County Code of Ordinances subjects a violator of the stormwater provisions to a per diem penalty of not more than \$500.00, beginning on the date the violator receives notice of a violation of the Ordinance. . ." *Proposed Order* at 4. The proposed order then goes on to claim the Defendants are liable for the code violations and should pay the fines to Plaintiffs.

This proposed order misstates the law. First, Plaintiffs do not have standing to bring an action for violating a county ordinance. Richland County Code of Ordinances § 26-36(a)(2). Second, the proposed order misquotes what the actual ordinance states. *See* Richland County Code of Ordinances § 26-273(b); *Proposed Order* at 4. Richland County Code of Ordinances § 26-273(b) deals with the procedure for providing notice to a violator of Land Development

Code Compliance Ordinances, while the Proposed Order incorrectly states that § 26-273(b) deals with penalties for violating stormwater provisions. The Proposed Order d Third, Defendants have not been formally accused of nor found in violation of any Richland County Ordinance or South Carolina state law. Therefore, Defendants due process rights would be violated if such a finding was made without notice and a hearing. Fourth, the proposed order does not cite exactly which stormwater code the Defendants allegedly violated. Fifth, the state statute, S.C. Code Ann. § 48-14-140 does not apply here because the county ordinance does not apply. *See* S.C. Code Ann. § 48-14-140. Sixth, the June 26, 2008 order seeks to have Defendants abate the nuisance, not to enforce county codes and state statutes. June 26, 2008 Order at 2-3. Lastly, Plaintiffs are not entitled to an amount of \$25,000.00 because the amount is arbitrary and South Carolina courts do not allow citizen Plaintiffs from collecting fines that would ordinarily be for the state. *See* 85 A.L.R. 3d. 895, § 3 (1978).

There was no such testimony regarding violations of county codes or state laws at the April 14, 2009 hearing. As a result, the proposed compensatory damages for violating the codes and statutes are not proper. This Court should strike all of the damages from the proposed Order.

VII. PLAINTIFFS ARE UNJUSTLY ENRICHED BY AN ORDER OF CONTEMPT.

The Court would place an undue burden on the Defendants if it holds the Defendants in contempt. Plaintiffs will be unjustly enriched at the Defendants' expense. The Court would open the door for Plaintiffs to bring a Rule to Show Cause action whenever any silt or runoff enters their property, which would be the result of any rainfall. It is unreasonable for this Court to compel Defendants to stop all silt and runoff from entering Plaintiffs' property, which at this time, would be an impossible task. Plaintiffs are using the judgment and injunction against

Defendants for the Plaintiffs' own monetary gain.

Awarding Plaintiffs monetary damages, despite Plaintiffs' lack of evidence as to monetary damages, would allow the Plaintiffs to abuse the Defendants at the Plaintiffs' discretion. Plaintiffs brought biased photographs and biased testimony that the damage is continuing. Plaintiffs admit that Plaintiffs have done nothing to clean their pond nor have any water samples been analyzed by experts to see if there has been any further damage to the pond. An insurance company settled with Plaintiffs for approximately \$400,000 and Plaintiffs admit to not using any of it to remediate the alleged problems. Plaintiffs also failed in proving who exactly was causing alleged silt and runoff. Plaintiffs did not even prove the extent of the alleged continuing damages or if there was any additional silt or runoff coming onto the property. If the Plaintiffs are awarded damages under this low burden for standard of proof, Plaintiffs will likely keep bringing these actions against Defendants and collect money that is not rightfully deserved.

The proposed order's issuance of damages misstates the law and would unjustly enrich Plaintiffs. The proposed order states "...the remedial remedy of compensatory contempt is available to the Court to restore the plaintiffs as nearly as possible to their original position." *Proposed Order* at 4. The proposed order then goes on to award Plaintiffs compensatory damages of \$25,000.00, attorney's fees, costs, and pay for the costs to remove the silt that has resulted from the alleged non-compliance with the injunction. *Id.*

The proposed order misstates the law for awarding actual damages, attorney's fees and costs. The proposed order cites Cheapo's Truck Stop, Inc. v. Cloyd, 350 S.C. 596 (2002) to justify these awards. However, Cheapo's Truck Stop was an action involving a settlement reached in open court in which the owner of the company was also named as a defendant in the

action. Id. This cited case does not apply here.

The proposed \$25,000.00 in compensatory damages would unjustly enrich Plaintiffs. The proposed order states that the Court has the power "... to restore the plaintiffs as nearly as possible to their original position." *Proposed Order* at 4. \$25,000.00 in compensatory damages would put the Plaintiffs in a position better than they were in before. The pond already had silt in it and Plaintiffs did not prove that any additional silt has caused any additional damages. This \$25,000.00 amount is also arbitrary and has no basis in the testimony. Furthermore, the Plaintiffs would not use this money to clean the pond or prevent any further silt from entering their property because Plaintiffs are seeking to compel Defendants to pay for the cleaning and remedial measures. Also, the Plaintiffs have not done anything to remediate the damages thus far, despite the \$400,000 in insurance money they received and a \$3.9 million judgment entered in their favor. As a result, Plaintiffs are seeking to profit from the injunction at the Defendants' expense.

CONCLUSION

In conclusion, South Carolina law does not hold Stonington or Mr. Lipscomb in contempt of court for violating the injunction and the proposed order misstates several important issues. First, Circuit Court does not have jurisdiction to enforce this injunction. Second, Defendants were not given proper notice of the Motion for a Contempt Hearing. Third, Stonington did not intentionally disregard the Order because they did in fact attempt to remediate the alleged problems. Fourth, Plaintiffs did not bring evidence to pierce the corporate veil against Mr. Lipscomb. Fifth, Rule 65(d) SCRPC does not extend to Mr. Lipscomb in finding him individually liable for contempt. Sixth, Stonington and Mr. Lipscomb should not be penalized

for violating ordinances that are inapplicable here. Richland County Code of Ordinances § 26-273(b); S.C. Code Ann. § 48-14-140. Lastly, Plaintiffs should not be allowed to profit from this injunction at Defendants' expense. When looking at the totality of the circumstances, the proposed order is improper, the Plaintiffs failed to satisfy their burden of proof, and Stonington and Mr. Lipscomb did show cause that they are not in contempt. On behalf of Stonington Development, LLC and Stephen E. Lipscomb, the undersigned urges the Court to decline to execute the proposed order..

May 17, 2009


Timothy G. Quinn
Law Offices of Timothy G. Quinn, P.A.
1421 Calhoun Street
Post Office Drawer 12589
Columbia, South Carolina 29211
(803) 771-0936
Fax: (803) 254-7751
Attorney for Defendants
Stonington Development, LLC and
Stephen E. Lipscomb

Belser & Belser, P.A.

C. HEYWARD BELSER, SR.
(1918-1994)
CLINCH H. BELSER, JR.
MICHAEL J. POLK
H. FREEMAN BELSER

ROBERT YOUNG, P.A.
OF COUNSEL

ATTORNEYS AND COUNSELORS AT LAW
POST OFFICE BOX 88
COLUMBIA, SOUTH CAROLINA 29202
FACSIMILE 803-929-0198
TELEPHONE 803-929-0098
www.belserpa.com

OFFICE LOCATION:
BANK OF AMERICA PLAZA
1901 MAIN STREET
SUITE 1550
COLUMBIA, SC 29201

June 5, 2009

FACSIMILE TRANSMITTAL SHEET
NUMBER OF PAGES BEING TRANSMITTED 3
FACSIMILE NUMBER 803-576-1744

The Honorable L. Casey Manning
5th Judicial Circuit
1701 Main Street
Columbia, South Carolina 29201

RE: Glenn Y. Hollis, Jr., et al. v. Stonington
Development, LLC
Case Number 2005-CP-40-3736

Dear Judge Manning:

I am writing to respond to Tim Quinn's letter to you dated May 28, 2009, and his document titled "Memorandum Opposing the Proposed Order Granting Stonington Development, LLC and Stephen E. Lipscomb's Contempt of Court."

Before I specifically respond to Mr. Quinn's objections, I would like to point out, again, that neither Stonington nor Mr. Lipscomb filed either a Motion to Reconsider or a Notice of Appeal of the June 26, 2008 Injunction. Therefore, the Injunction is the law of the case, since neither Stonington nor Mr. Lipscomb has preserved the right to make the legal arguments that they now seek to make. This issue is specifically addressed in the proposed Order, but not addressed in Mr. Quinn's Memorandum.

With reference to the argument beginning on page 4 that an order of contempt is not proper when an appeal is pending, the appeal that is now pending relates to money damages award from the April 6, 2007 jury verdict, not the June 28, 2008 Injunction, which was not appealed. Further, even if the Injunction were related to the pending appeal, Rule 225(b)(8), SCRAP, expressly provides that an appeal from an order granting an injunction is excepted from the stay of an appeal.

The Honorable L. Casey Manning
June 5, 2009
Page 2 of 3

With reference to the argument beginning on page 6 that Stonington and Lipscomb where not given notice of the nuisance, the lawsuit was filed in July 2005, the verdict was rendered in April 2007, the Injunction was ordered and served in June 2008, and the Motion for an Order Holding Stonington Development, LLC and its Members in Contempt of Court was filed and served in September 2008, so Stonington and Lipscomb cannot say with any credibility that they did not have notice of the nuisance.

With reference to the argument beginning on page 7 that Stonington and Lipscomb have not intentionally disregarded the June 26, 2008 Injunction, Stonington and Lipscomb are making the same factual arguments that they made at the Rule to Show Cause Hearing. The Court was the fact finder at the Hearing, and the Court made a factual finding based on the evidence presented.

With reference to the argument beginning on page 9 that an order of contempt is not proper because the plaintiffs have not pierced the veil, Stonington and Lipscomb again fail to recognize fundamental distinction between the jury's April 6, 2007 verdict for money damages and the Court's June 26, 2008 order of injunctive relief. Further, piercing the veil is not necessary in light of the terms of the Injunction.

With reference to the argument beginning on page 11 that the June 26, 2008 Injunction was not binding on Stonington's members, Rule 65(d), SCRCP, and the June 26, 2008 Injunction speak for themselves.

With reference to the argument beginning on page 13 that Stonington and Lipscomb have not violated applicable ordinances and statutes, the proposed Order does not make a finding that applicable ordinances and statutes were violated. Rather, the relevant provisions of the applicable ordinances and statutes are recited as conclusions of law.

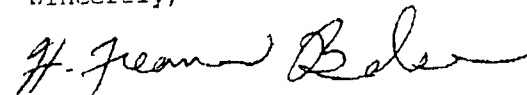
With reference to the argument beginning on page 14 that the plaintiffs would be unjustly enriched by the proposed order of contempt, the record is clear the siltation and increased runoff problems are continuing and that the plaintiffs are being damaged. The Court has the discretionary authority through the contempt power to award the plaintiffs compensatory contempt.

Thank you very much for your consideration. Please let me know if you would like anything further from us.

The Honorable L. Casey Manning
June 5, 2009
Page 3 of 3

Best regards.

Sincerely,



H. Freeman Bclser

HFB/sra

~~Enclosures~~

cc: ✓ Timothy G. Quinn, Esq. (via facsimile number (803) 254-7751)
✓ George V. Hanna, IV, Esq. (via facsimile number (803) 758-4445)
James Edward Bradley, Esq. (via facsimile number (803) 791-8410)
Mr. Glenn Y. Hollis, Jr. (via email)
Mr. John E. Hollis (via email)
Mr. and Mrs. Joseph R. Robinson (via email)

srados/corp/05066/2005-CP-40-3736 manningfax 090603

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Glenn Y. Hollis, Jr.,)
John E. Hollis, Joseph)
R. Robinson, Janette H. Robinson,)
)
Plaintiffs,)
)
v.)
)
Stonington Development, LLC)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT
Case Number 2005-CP-40-3736

NOTICE AND MOTION
RULE 59(e) SCRCP

2009 OCT -7 PM 4:41
RECEIVED
CLERK OF COURT
FIFTH JUDICIAL CIRCUIT
SOUTH CAROLINA

To the Plaintiffs, via their attorney, H. Freeman Belser:

Please take notice that the undersigned intends to move before the Honorable L. Casey Manning for an Order altering or amending his Order dated September 28, 2009, and recorded September 28, 2009 in the following particulars:

INTRODUCTION

In response to the Order Granting Plaintiffs' Motion for an Order Holding Stonington Development, LLC and its Members in Contempt, Stonington Development, LLC (Stonington) and Stephen E. Lipscomb (Mr. Lipscomb) assert South Carolina law does not hold them in contempt of court.

FACTS

On April 6, 2007, a Richland County jury rendered a verdict in favor of the Plaintiffs against Stonington in the amount of \$400,000.00 in actual damages and \$3.5 million in punitive damages, for a total of \$3.9 million, for a private nuisance arising from siltation and increased runoff that damaged the Plaintiffs' properties and ponds. The Court filed the Orders on

November 12, 2007 and December 4, 2007. Stonington filed a Notice of Appeal on December 13, 2007. This Appeal has been briefed, filed, and is pending. Also, Plaintiffs' separate action to pierce the corporate veil of Stonington, LLC is pending.

On June 26, 2008, this Court issued an Order enjoining Stonington "... from discharging sediment-laden stormwater onto the plaintiffs' property." *June 26, 2008 Order* at 2. On September 11, 2008, the Plaintiffs filed a Motion for an Order Holding Stonington Development, LLC and its Members in Contempt of Court for failing to comply with the June 26, 2008 Order. This Motion was filed without any prior notice to Stonington or Mr. Lipscomb.

A Rule to Show Cause hearing was heard on April 14, 2009. The Court heard the sworn testimony of Plaintiff Janette H. Robinson, Kevin Lee of the Stonington Homeowners' Association, and of Mr. Lipscomb. The Court also reviewed numerous photographs identified by the witnesses.

At this hearing, Ms. Robinson testified that the Plaintiffs have done nothing to repair their property. She said the Plaintiffs settled with an insurance company for approximately \$400,000. Despite this \$400,000 settlement, Plaintiffs admit they have not removed any of the silt from the pond, they have not hired engineers to help diagnose or fix the silt and runoff problem, and Plaintiffs have not assisted Stonington in any way to find a solution for the alleged issues. Ms. Robinson also acknowledged on cross examination that the engineers she consulted all state that siltation will likely continue until the upper area is developed. Mr. Lipscomb testified that it was the continued actions of the Plaintiffs that are preventing the development of the upper land areas.

Plaintiffs did not prove what caused the silt and runoff problem, if any. Plaintiffs admit that Phase III of the Stonington subdivision was not owned by Stonington at the time of the jury trial, not at the present time. Plaintiffs also admit that the drainage system from Phase III flowed through the property owned by Stonington. However, Plaintiffs did not bring any evidence showing Stonington caused the alleged silt and runoff from Phase III to enter Plaintiffs' property. Plaintiffs also did not show that additional harm was done to their property since the June 26, 2008 Order was filed, nor did they present any testimony as to monetary damage caused by any additional siltation and no testimony that their damage, if any, could not be cured by their earlier settlement monies.

At the Rule to Show Cause Hearing, Defendants showed that Stonington and Mr. Lipscomb took remedial measures to solve the silt and runoff issues. On cross-examination, Ms. Robinson testified that she saw Mr. Lipscomb, as well as several other workers, setting up silt fences along her property. On direct examination of Mr. Lipscomb, Mr. Lipscomb testified that he hired three separate engineers to inspect the property and find a solution for any problems if they existed. Mr. Lipscomb also hired Carolina Storm Water Services to: monitor the property, check on the silt fences, set up a rock dam, and give Mr. Lipscomb reports regarding the condition of the property. Carolina Storm Water Services has monitored the property every week for over one year. Mr. Lipscomb also testified that DHEC and the Army Corps of Engineers have been to the property and they have never found any violations, nor has Mr. Lipscomb ever been cited for not being in code compliance.

On September 28, 2009, the Court entered an Order Granting Plaintiffs' Motion for an Order Holding Stonington Development, LLC and its Members in Contempt. The Order states a

Findings of Fact. First, the Order states “[t]he siltation and increased runoff problems that were the subject of the underlying lawsuit between the plaintiffs and Stonington are continuing[.]” and Plaintiffs proved these damages “beyond question” by showing photographs of the property and the testimony of Ms. Robinson. *September 28, 2009 Order* at 2. However, the photographs were taken on days right after it rained and Plaintiffs would not allow Defendants onto the property to make similar observations.

Second, the Order states “Stonington and Mr. Lipscomb have made minimal efforts but have not done enough to stop the siltation and increased runoff problems. . . .” *Id.* However, “Mr. Lipscomb testified that he had hired a consultant to periodically inspect Stonington’s property.” *Id.* Lastly, the Order wrongfully states that Defendants “failed to show cause why they should not be held in contempt of Court[.]” and that the “. . . damages will need to be remediated after the siltation is stopped. . . .” *Id.* at 3.

Under the Conclusions of Law section, the Order finds Stonington, Mr. Lipscomb, Mr. Safko, and Mr. Harrell in Contempt of Court. *Id.* at 3-5. The Order found the Defendants violated § 26-273(b) of the Richland County Code of Ordinances and S.C. Code Ann. § 48-14-140. *Id.* at 4. The Order then awards compensatory damages to Plaintiffs. *Id.* at 4-5.

The Orders of the Court section finds Stonington, Mr. Lipscomb, Mr. Safko and Mr. Harrell individually liable for civil contempt. *Id.* at 5-6. The Defendants are found joint and severally liable for the amount of \$25,000.00 in compensatory damages to the Plaintiffs, and Defendants are joint and severally liable for the Plaintiffs’ attorney’s fee and costs. *Id.* at 5. Finally, the Order demands that the Defendants pay to remediate the silt and runoff problems. *Id.* at 5-6.

DISCUSSION

I. AN ORDER OF CONTEMPT IS NOT PROPER WHEN AN APPEAL IS PENDING.

Rules 205 and 225 of the South Carolina Appellate Court Rules terminates the Circuit Court's jurisdiction over a Contempt hearing when the issue under review is pending in the Appellate Court. Rule 205 states that "[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal[.]" Rule 205, SCACR. Rule 225 states:

. . .the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 225. SCACR. In Arnal v. Fraser, 371 S.C. 512, 521 (2007), a final divorce order gave a father specific parameters for child visitation. The father appealed a portion of the order concerning the visitation. Id. While the appeal was pending, the Family Court issued several orders modifying the visitation schedule. Id. The father argued the Family Court could not modify the divorce order while an appeal was pending. Id. The Supreme Court of South Carolina agreed with the father and held that the Appellate Court had exclusive jurisdiction over the matter, rather than the lower court. Id.

Here, just as in Arnal, the lower court is attempting to enforce a matter that is pending with the Appellate Court. Stonington is appealing whether it is liable in the underlying case.

Final Br. of Appellant 14-15. The trial court's order originally found Stonington liable for \$3.9 million and required Stonington to stop any further silt and runoff from entering Plaintiffs' property. November 14, 2007 Order; December 4, 2007, Order; September 17, 2007, Form-4 J. When Defendants' Notice of Appeal was filed, the matters issued in the order were automatically stayed, in accordance with Rule 225, SCACR. However, the trial court issued an injunction against the Defendants on June 26, 2008 without effectively lifting the stay. The injunction orders Defendants to stop any silt or runoff from entering Plaintiffs' property. *June 26, 2008 Order* at 2. This is a matter stayed for appeal. Allowing the Circuit Court to enforce this injunction would infringe the Appellate Court's jurisdiction. Therefore, under Rules 205 and 225 SCACR, the Circuit Court lacks jurisdiction to enforce the injunction. The Appellate Court has exclusive jurisdiction over this matter.

II. SOUTH CAROLINA LAW PROVIDES TEN DAYS' WRITTEN NOTICE TO AN OWNER OF REAL ESTATE BEFORE A PROCEEDING IS COMMENCED FOR FAILING TO ABATE A NUISANCE.

Plaintiffs failed to provide Defendants with a ten day notice before filing the Rule to Show Cause. South Carolina Civil Remedies and Procedures provides the following, regarding notice to an owner before an action is brought against him:

No proceeding against the owner of the real estate shall be commenced hereunder unless ten days' written notice be given by the prosecuting attorney to such owner or his agent and upon his failure thereafter to abate the nuisance.

S.C. Code Ann. § 15-43-120. In the instant case, on September 11, 2008, Plaintiffs filed a Motion for an Order Holding Stonington and its Members in Contempt of Court. Plaintiffs filed this motion without providing prior notice to Defendants. Under South Carolina law, when a

defendant is accused of failing to abate a nuisance, ten days notice must be given to a defendant before an action is commenced. Id. Therefore, Plaintiffs' motion for contempt is not viable because Plaintiffs did not comply with S.C. Code Ann. § 15-43-120.

III. STONINGTON AND MR. LIPSCOMB DID NOT INTENTIONALLY DISREGARD THE JUNE 26, 2008 ORDER.

Stonington and Mr. Lipscomb complied with the June 26, 2008 Order of injunction and sought to abate the nuisance. "Contempt results from the willful disobedience of a court order." Browder v. Browder, 675 S.E. 830 (Ct.App 2009) (citing Bigham v. Bigham, 264 S.C. 101, 104 (Ct.App. 1975)). "Willful disobedience requires an act to be 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" Id. (quoting Spartanburg Co. Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-3 (1988)). "Civil contempt must be proven by clear and convincing evidence." Floyd v. Floyd, 365 S.C. 56 (Ct.App. 2005).

In Browder, a divorce order was issued requiring the husband to provide an accounting of proceeds collected from the sale of property. Browder, 675 S.E. at 822. The wife accused the husband of being in contempt for failing to provide the accounting. Id. However, the husband testified that he repeatedly requested the accounting records to no avail. Id. at 825. He also explained that the records were sent to the marital residence and he could not locate the information that was requested. Id. Instead, the husband tried to explain the accounts to the best of his knowledge. Id. The Court did not hold the husband in contempt because his actions to comply with the order were adequate. Id.

Here, just as in Browder, Stonington and Mr. Lipscomb's actions were adequate enough to find they were complying with the June 26, 2008 Order. Mr. Lipscomb, acting on behalf of Stonington, hired consultants and workers to monitor the Plaintiffs' property and to set up fencing where there was a possibility of siltation and runoff. Ms. Robinson admits to seeing Mr. Lipscomb observing the property and she has seen the workers constructing fences on the property. There is no clear and convincing proof that Stonington and Mr. Lipscomb wilfully disobeyed the June 26, 2008 Order.

Plaintiffs' testimony that Defendants have done nothing to remediate the siltation and runoff problem are untrue. Stonington and Mr. Lipscomb have in fact made several attempts to abate the alleged nuisance. It may be so, however, that Stonington and Mr. Lipscomb's actions did not completely remediate the alleged problem. On the other hand, Stonington and Mr. Lipscomb did not wilfully disregard the June 26, 2008 Order. Mr. Lipscomb has made a good faith attempt to abate the nuisance by hiring consultants and workers to set up fences.

Even if the Plaintiffs believe Stonington and Mr. Lipscomb's attempts are insufficient, Plaintiffs have not proven that Stonington and Mr. Lipscomb have intentionally disregarded the June 26, 2008 Order. Plaintiffs did not provide testimony by Ms. Robinson nor did Plaintiffs show in cross-examination that Stonington and Mr. Lipscomb wilfully disregarded the June 26, 2008 Order. Plaintiffs have done nothing in assisting Stonington and Mr. Lipscomb as to what needs to be done to remediate the situation and the remediation of the situation requires the Plaintiffs' cooperation which has not been forthcoming. Furthermore, the extent of the alleged continuing damages is unknown because Plaintiffs have not cleaned their property with the assistance of the \$400,000 insurance money. It is unreasonable, if not impossible, for Defendants

to prevent every ounce of silt and runoff from entering Plaintiffs' property.

This lawsuit is preventing Stonington from completely remediating the alleged siltation and runoff problem. The Plaintiffs are threatening to take legal action against those who purchase the upper lots of the Stonington subdivision. As a result, no one is interested in purchasing the land for the purpose of building a house. If houses are built, the land will become stabilized, sod will be laid down, and vegetation will be planted. These improvements to the land would stop the alleged harms done to Plaintiffs. In effect, Plaintiffs are hindering the Defendants from complying with the June 26, 2008 Order.

Plaintiffs have not told Defendants specifically what needs to be done to remediate the problem. Stonington and Mr. Lipscomb have done what they can to solve any alleged problem. Plaintiffs have not provided Defendants with any guidance. Therefore, this Court should amend its Order, and like Browder, find that Stonington and Mr. Lipscomb's actions in abating the nuisance are adequate enough to find they did not disregard the June 26, 2008 Order.

IV. MR. LIPSCOMB IS NOT IN CONTEMPT BECAUSE PLAINTIFFS DID NOT PIERCE STONINGTON'S VEIL.

Plaintiffs did not pierce Stonington's veil. "A member or manager [of a limited liability company (LLC)] is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." S.C. Code Ann. § 33-44-303(a) Although no South Carolina appellate decision discusses protecting the personal liability of an LLC's individual members, other state courts apply the same test for finding LLC individual members personally liable as they apply in situations involving business corporations. *See, e.g. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 666 S.E.2d 107 (N.C. 2008). In deciding

whether to find individuals personally liable for the debts and obligations of the business entity which they serve, South Carolina courts place the burden of proof on the party seeking to pierce the corporate veil. Mid-South Mgmt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 597 (Ct. App. 2007) (citing the test established in Sturkie v. Sifly, 280 S.C. 453 (Ct. App. 1984).

South Carolina applies a two prong test for piercing the corporate veil. Drury Dev. Corp. v. Foundation Ins. Co., 380 S.C. 97,102 (2008). The first prong analyzes the shareholder's relationship to the corporation by evaluating eight factors. Id. The second prong requires the plaintiff to demonstrate that "fundamental unfairness" would result from recognition of the corporate entity. Id. "The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." Dumas v. InfoSafe Corp., 320 S.C. 188, 192-3, (Ct.App. 1995).

At the April 14, 2009 hearing, Plaintiffs provide any evidence showing Mr. Lipscomb abused the formalities of a limited liability company, nor did Plaintiffs show that a "fundamental unfairness" would result from recognizing Stonington as an entity. The Plaintiffs did however, attempt to compel Stonington's members to pay for the liabilities of Stonington. One of the purposes of forming a LLC is to limit the members' liability. Having the members pay for the liabilities of the LLC, without piercing the veil, is contrary to the law and to public policy. Furthermore, a subsequent action to pierce the veil of Stonington is pending in the Circuit Court. Piercing Stonington's veil by way of this contempt hearing would be premature, and would deprive Mr. Lipscomb of his day in Court on this issue. Therefore, Mr. Lipscomb is shielded by the LLC's veil in this contempt action.

V. RULE 65(d) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE DOES NOT BIND MR. LIPSCOMB INDIVIDUALLY TO THE INJUNCTION.

Mr. Lipscomb is not bound to the June 26, 2008 Order in his individual capacity. Rule 65(d) of the South Carolina Rules of Civil Procedures states injunctions are “binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Officers are bound to an injunction against the business entity only in their capacity as an officer. 42 Am.Jur. 2d. Injunctions § 299. Agents of the company are bound to an injunction to the extent they are acting on behalf of the company. *Id.* Parties who are “. . .outside an injunction’s coverage subject themselves to its proscriptions should they aid or abet the named parties in a concerted attempt to subvert those proscriptions. *Id.* at § 300.

In the instant case, on June 26, 2008, this Court filed an “. . .Injunction Against Stonington Develoment, LLC.” *June 26, 2008 Order* at 1. The June 26, 2008 Order enjoins Stonington from “discharging sediment-laden stormwater onto the plaintiffs’ property. . .” *Id.* at 2. The Order goes on to include Stonington’s “members” in the injunction, which it claims is [i]n accordance with Rule 65(d) SCRCP. . .” *Id.* at 3. The Order now seeks to hold Mr. Lipscomb in contempt, individually. *Id.*

The June 26, 2008 Order, misquotes Rule 65(d). *Id.* Rule 65(d) of the South Carolina Rules of Civil Procedures states injunctions are “binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Members are not included in the rule. Therefore, the June 26, 2008 Order was not in accordance

with Rule 65(d) SCRCF and Stonington's members should not have been included in the injunction.

The June 26, 2008 Order did not establish jurisdiction over Mr. Lipscomb. Mr. Lipscomb was not a named party of the original action against Stonington, nor was he named in his individual capacity in the June 26, 2008 Order. It may be argued that Mr. Lipscomb has not preserved his right to set aside the June 26, 2008 Order because Mr. Lipscomb did not file a Motion to Reconsider or a Notice of Appeal. However, these actions are not necessary to find that the injunction is not binding on Mr. Lipscomb individually. The June 26, 2008 Order failed to name the specific members who are bound to the injunction, and whether they would be liable in their individually capacity. Therefore, it is not proper to hold Mr. Lipscomb in contempt because this Court does not have jurisdiction over him individually.

Mr. Lipscomb is not individually liable for contempt even if he was acting as an officer or agent of Stonington. As a member of Stonington, Mr. Lipscomb may be considered an agent or officer. However, officers are bound to injunctions against the business entity only in their capacity as an officer, and agents can only act on behalf of the company. 42 Am.Jur. 2d. Injunctions § 299. Therefore, any alleged actions Mr. Lipscomb made in violation of the injunction, would be imputed to Stonington because Mr. Lipscomb was acting on behalf of Stonington.

Mr. Lipscomb did not aid Stonington in violating the injunction. Mr. Lipscomb did have knowledge of the June 26, 2008 Order, but he did not participate in concert to violate the injunction. Plaintiffs did not show Mr. Lipscomb actively participated in any wrongful act. To the contrary, Mr. Lipscomb only aided Stonington in complying with the injunction by hiring

consultants and workers to help remediate the alleged silt and runoff problem. Therefore, under Rule 65(d) SCRCP, Mr. Lipscomb is not individually liable for contempt.

VI. THE COURT'S ORDER OF JUNE 26, 2008 DOES NOT SUFFICIENTLY SET FORTH THE ACT ENJOINED.

South Carolina Rule of Civil Procedure 65 states that injunctions "...shall describe in reasonable detail, and not be reference to the complaint or other document, the act or acts sought to be restrained..." S.C. R. Civ. Pro. 65(d). "Before a person may be held in contempt for violating a court order, the order should inform him in definite terms to the duties thereby imposed upon him, and the command must therefore be express rather than implied."

Spartanburg v. Kimbrell's Inv. Co., 259 S.C. 203, 215-16 (1972) (citing 17 Am.Jur.(2d) 54, Contempt. Sec. 52); See also American Federal Bank, FSB v. Kateman, 335 S.C. 273 (Ct. App. 1999) (Holding the court's order was not sufficiently definite to indicate what the third party held subject to the order had to do to comply with the order).

The Court's Order of June 26, 2008 only vaguely describes the acts sought to be restrained. The Order enjoins the discharging of sediment-laden storm water and referenced South Carolina Regulations. Further, the order does not require Mr. Lipscomb to take any affirmative acts.

Stonington and Mr. Lipscomb do not have the capacity to interpret the Order and documents it references to figure out the implication of what is enjoined. As Rule 65 states, the act enjoined must be described in detail. The Court's Order is not reasonably detailed and it references outside documents. As a result, Stonington and Mr. Lipscomb complied with the June 26, 2008 Order to the best of their ability and they should not be bound to the vague terms.

VII. STONINGTON AND MR. LIPSCOMB DID NOT VIOLATE COUNTY ORDINANCES AND STATE STATUTES.

Stonington and Mr. Lipscomb are not liable for violating any county ordinances or state statutes. Under § 26-273(b) of the Richland County Code of Ordinances:

When an authorized county official finds violations of this [Land Development Code Compliance Ordinance], it shall be the duty of said official to notify the person alleged to be in violation. Such notice of violation shall be in writing and sent by certified or registered mail or delivered by personal service. If the violator cannot be ascertained, then the notice of violation shall be sent to the record owner of the land on which the violation occurs. The notice of violation shall include an opportunity to cure the violation within a prescribed period of time.

Richland County Code of Ordinance § 26-273(b). The Order states "Sec. 26-273(b) of the Richland County Code of Ordinances subjects a violator of the stormwater provisions to a per diem penalty of not more than \$500.00, beginning on the date the violator receives notice of a violation of the Ordinance. . ." *September 28, 2009 Order* at 4. The Order then goes on to claim the Defendants are liable for the code violations and should pay the fines to Plaintiffs.

This Order misstates the law. First, Plaintiffs do not have standing to bring an action for violating a county ordinance. Richland County Code of Ordinances § 26-36(a)(2). Second, the Order misquotes what the actual ordinance states. *See* Richland County Code of Ordinances § 26-273(b); *September 28, 2009 Order* at 4. Richland County Code of Ordinances § 26-273(b) deals with the procedure for providing notice to a violator of Land Development Code Compliance Ordinances, while the Order incorrectly states that § 26-273(b) deals with penalties for violating stormwater provisions. Third, Defendants have not been formally accused of nor found in violation of any Richland County Ordinance or South Carolina state law. Therefore,

Defendants due process rights would be violated if such a finding was made without notice and a hearing. Fourth, the Order does not cite exactly which stormwater code the Defendants allegedly violated. Fifth, the state statute, S.C. Code Ann. § 48-14-140 does not apply here because the county ordinance does not apply. *See* S.C. Code Ann. § 48-14-140. Sixth, the June 26, 2008 order seeks to have Defendants abate the nuisance, not to enforce county codes and state statutes. June 26, 2008 Order at 2-3. Lastly, Plaintiffs are not entitled to an amount of \$25,000.00 because the amount is arbitrary and South Carolina courts do not allow citizen Plaintiffs from collecting fines that would ordinarily be for the state. *See* 85 A.L.R. 3d. 895, § 3 (1978).

There was no such testimony regarding violations of county codes or state laws at the April 14, 2009 hearing. As a result, the proposed compensatory damages for violating the codes and statutes are not proper. This Court should strike all of the damages from the Order.

VIII. PLAINTIFFS ARE UNJUSTLY ENRICHED BY AN ORDER OF CONTEMPT.

The Court would place an undue burden on the Defendants if it holds the Defendants in contempt. Plaintiffs will be unjustly enriched at the Defendants' expense. The Court would open the door for Plaintiffs to bring a Rule to Show Cause action whenever any silt or runoff enters their property, which would be the result of any rainfall. It is unreasonable for this Court to compel Defendants to stop all silt and runoff from entering Plaintiffs' property, which at this time, would be an impossible task. Plaintiffs are using the judgment and injunction against Defendants for the Plaintiffs' own monetary gain.

Awarding Plaintiffs monetary damages, despite Plaintiffs' lack of evidence as to monetary damages, would allow the Plaintiffs to abuse the Defendants at the Plaintiffs'

discretion. Plaintiffs brought biased photographs and biased testimony that the damage is continuing. Plaintiffs admit that Plaintiffs have done nothing to clean their pond nor have any water samples been analyzed by experts to see if there has been any further damage to the pond. An insurance company settled with Plaintiffs for approximately \$400,000 and Plaintiffs admit to not using any of it to remediate the alleged problems. Plaintiffs also failed in proving who exactly was causing alleged silt and runoff. Plaintiffs did not even prove the extent of the alleged continuing damages or if there was any additional silt or runoff coming onto the property. If the Plaintiffs are awarded damages under this low burden for standard of proof, Plaintiffs will likely keep bringing these actions against Defendants and collect money that is not rightfully deserved.

The Order's issuance of damages misstates the law and would unjustly enrich Plaintiffs. The Order states "...the remedial remedy of compensatory contempt is available to the Court to restore the plaintiffs as nearly as possible to their original position." *September 28, 2009 Order* at 4. The Order then goes on to award Plaintiffs compensatory damages of \$25,000.00, attorney's fees, costs, and pay for the costs to remove the silt that has resulted from the alleged non-compliance with the injunction. *Id.*

The Order misstates the law for awarding actual damages, attorney's fees and costs. The Order cites Cheapo's Truck Stop, Inc. v. Cloyd, 350 S.C. 596 (2002) to justify these awards. *September 28, 2009 Order* at 4-5. However, Cheapo's Truck Stop was an action involving a settlement reached in open court in which the owner of the company was also named as a defendant in the action. *Id.* This cited case does not apply here.

The proposed \$25,000.00 in compensatory damages would unjustly enrich Plaintiffs. The Order states that the Court has the power "... to restore the plaintiffs as nearly as possible to

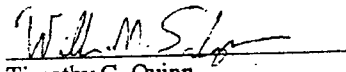
their original position." *September 28, 2009 Order* at 4. \$25,000.00 in compensatory damages would put the Plaintiffs in a position better than they were in before. The pond already had silt in it and Plaintiffs did not prove that any additional silt has caused any additional damages. This \$25,000.00 amount is also arbitrary and has no basis in the testimony. Furthermore, the Plaintiffs would not use this money to clean the pond or prevent any further silt from entering their property because Plaintiffs are seeking to compel Defendants to pay for the cleaning and remedial measures. Also, the Plaintiffs have not done anything to remediate the damages thus far, despite the \$400,000 in insurance money they received and a \$3.9 million judgment entered in their favor. As a result, Plaintiffs are seeking to profit from the injunction at the Defendants' expense.

CONCLUSION

In conclusion, South Carolina law does not hold Stonington or Mr. Lipscomb in contempt of court for violating the injunction and the Order misstates several important issues. First, Circuit Court does not have jurisdiction to enforce this injunction. Second, Defendants were not given proper notice of the Motion for a Contempt Hearing. Third, Stonington did not intentionally disregard the Order because they did in fact attempt to remediate the alleged problems. Fourth, Plaintiffs did not bring evidence to pierce the corporate veil against Mr. Lipscomb. Fifth, Rule 65(d) SCRPC does not extend to Mr. Lipscomb in finding him individually liable for contempt. Sixth, Rule 65(d) SCRPC does not allow vague injunctions to bind the parties. Seventh, Stonington and Mr. Lipscomb should not be penalized for violating ordinances that are inapplicable here. Richland County Code of Ordinances § 26-273(b); S.C. Code Ann. § 48-14-140. Lastly, Plaintiffs should not be allowed to profit from this injunction at

Defendants' expense.

When looking at the totality of the circumstances, the Order is improper. The Plaintiffs failed to satisfy their burden of proof, and Stonington and Mr. Lipscomb did show cause that they are not in contempt. On behalf of Stonington Development, LLC and Stephen E. Lipscomb, the undersigned urges the Court to alter and amend the Order.



Timothy G. Quinn
William M. Saltzman
Quinn & Quinn, P.A.
2309 Devine Street
Post Office Drawer 12589
Columbia, South Carolina 29205
(803) 771-0936
Fax: (803) 254-7751
Attorney for Defendants
Stonington Development, LLC and
Stephen E. Lipscomb

Columbia, South Carolina
October 7, 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A NUMBER: 05-CP-40-3736

Glenn Y. Hollis, Jr., John E. Hollis, Joseph
E. Robinson, Janette H. Robinson,

Plaintiffs,

vs.

Stonington Development, LLC,

Defendant.

**RON SAFKO'S NOTICE OF AND
MOTION TO ALTER OR AMEND
ORDER DATED SEPTEMBER 28, 2009
GRANTING PLAINTIFFS' MOTION
FOR AN ORDER HOLDING
STONINGTON DEVELOPMENT, LLC
AND ITS MEMBERS IN CONTEMPT
OF COURT**

2009 OCT -7 PM 3:05
FILED
CLERK OF COURT
FIFTH JUDICIAL CIRCUIT
SOUTH CAROLINA

PLEASE TAKE NOTICE that Ron Safko, by and through his undersigned attorneys, will move before the Honorable Judge L. Casey Manning, on the tenth (10th) day after service hereof or at such time and place as is convenient to the Court for an Order granting Ron Safko's ("Safko") Motion to Alter or Amend Judge Manning's Order dated September 28, 2009 Granting Plaintiff's Motion for an Order Holding Stonington Development, LLC and its Members in Contempt of Court, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Counsel for Safko received written notice of the entry of said Order on September 28, 2009. This motion is based upon the following grounds.

**I. THE COURT LACKES JURISDICTION OVER SAFKO BECAUSE HE
WAS NEVER MADE A PARTY TO THE UNDERLYING ACTION**

Safko was never served a summons or made an individual Defendant to the original action, giving rise to the injunction. The sole Defendant is Stonington Development, LLC. In addition, the Plaintiffs never joined Safko pursuant to Rule 19. Therefore, the Court never obtained jurisdiction over Safko individually.

II. SAFKO IS NOT INDIVIDUALLY BOUND BY THE INJUNCTION

A valid injunction issued by a South Carolina court "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." S.C. Civ. P. 65(d). The Rule does not mention members or shareholders. Therefore, at best the original injunction may have bound Safko in his capacity as an agent or employee of Stonington. However, he subsequently withdrew from Stonington and no longer qualifies as an officer, agent or employee of Stonington, LLC. Therefore, at the time this Order was issued finding him in contempt, he did not have the authority to direct Stonington to do anything.

III. SOUTH CAROLINA LAW PROVIDES A CORPORATE SHIELD TO PROTECT FORMER INDIVIDUAL MEMBER SAFKO FROM THE OBLIGATIONS OF STONINGTON.

The Court appears to have found that Ron Safko, who is a former member of Defendant Stonington, LLC, is in contempt of Court and jointly and severally liable to the Plaintiffs the sum of \$25,000 plus attorneys fees along with Defendant Stonington and former member L.K. Harrell, III and member Stephen E. Lipscomb. In making this ruling the Court has disregarded the protections of the corporate shield applicable to individual members of LLC's found at S.C. Code Ann. § 33-44-303. The Court has also failed to address Safko's argument that in order for the Plaintiffs to establish Safko's liability they would have the burden of proof in an action to pierce the corporate veil. At this time, there is a separate action pending to try and pierce the corporate veil. The court therefore, is without jurisdiction in this Rule to Show cause matter to make rulings that have the effect of piercing the corporate veil. Furthermore, even if the Court

has jurisdiction, there was no evidence or testimony offered to even make a prima facie case for piercing the corporate veil.

IV. SAFKO DID NOT INTENTIONALLY VIOLATE THE TERMS OF THE INJUNCTION.

There was no evidence presented at the hearing to show that Safko did anything to disobey the Court's order. Because the records completely lacks any evidentiary foundation to support a finding that Safko willfully disobeyed the Courts Order, the finding of contempt must fail.

V. THE JUNE 26, 2008 INJUNCTION DOES NOT SUFFICIENTLY SET FORTH THE ACT ENJOINED.

Rule 65(d) requires that an injunction must set forth with reasonable detail the specific acts or acts to be enjoined. The Injunction vaguely enjoins the discharge of sediment-laden stormwater with a reference to certain South Carolina Regulations. However, the Injunction fails to set forth any specific standard that must be followed.

VI. PLAINTIFFS FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF S.C. CODE ANN. § 15-43-120

South Carolina Code Ann. § 15-43-120 requires the Plaintiffs' to provide ten days notice prior to filing a motion for abatement of a nuisance. This was not done.

VII. SAFKO IS NOT LIABLE FOR VIOLATIONS OF COUNTY ORDINANCES AND STATE STATUTES

The September 28, 2009 Order purports to find Safko liable for violating Richland County Ordinance § 26-273(b) and South Carolina Code Ann. § 48-14-140. This is improper for numerous reasons, including but not limited to: 1) the Plaintiffs do not have standing to bring an

action for violations of county ordinances and state law; 2) the Order misstates the wording of the ordinances; 3) Salko has never been formally accused, much less found in actual violation of any ordinance or statute; 4) the Order fails to set for the precise ordinance and/or code allegedly violated; 5) the original June 26, 2008 seeks to abate a nuisance, not enforce Codes, Ordinances and/or statutes; 6) the amount of the fine is arbitrary and it is improper for Plaintiffs to collect a compensatory award for violating county ordinances and/or state law.

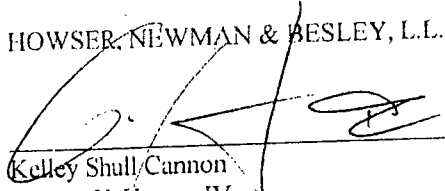
VIII. PLAINTIFFS WILL BE UNJUSTLY ENRICHED BY THE ORDER OF CONTEMPT.

The Plaintiffs offered absolutely no testimony that could possibly support the Court's award of \$25,000. The amount is arbitrary and clearly has no reasonable relation to the testimony actually offered at the hearing. Furthermore, the case of Cheapo's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 567 S.E.2d 514 (2002) cited by the Court in support of the damages awarded, is completely distinguishable on the facts and is inapplicable. Therefore, the Plaintiffs will be unjustly enriched by the Court's damage award.

This motion is further based upon the pleadings, the deposition testimony of the witnesses, discovery responses of all parties, and any affidavits or memorandum of law to be filed by Salko.

(SIGNATURE PAGE TO FOLLOW)

HOWSER, NEWMAN & BESLEY, L.L.C.



Kelley Shull Cannon

George V. Hanna, IV

1508 Washington Street

Post Office Box 12009

Columbia, South Carolina 29211

(803) 758-6000

Attorney for Ron E. Safko

October 7, 2009

1

(

)

1

1

1

1

1

2

1

1

C

1

and

111

personal service or otherwise." Rule 65(d) does not mention members, shareholders or the like. However, officers or employees of an enjoined business entity are only liable in their capacity with the entity. See 42 Am. Jur. 2d. Injunctions § 299. Further, agents of the enjoined entity are only liable to the extent they act on behalf of the entity. See *Id.*

Since Mr. Harrell was not named in the injunction and was not personally served, he can only be liable in his capacity as a member of Stonington Development. Thus, Mr. Harrell cannot be held personally liable for contempt.

B. Mr. Harrell Was Not Properly Served Or Joined As A Party In This Original Action.

i. Mr. Harrell Was Never Summoned In The Original Action Against Stonington Development.

A civil action is commenced when a summons and complaint are filed with the court and served on the defendant. See S.C. R. Civ. Pro. 3(a). "Service of summons brings civil defendant within court's jurisdiction and gives the court the power to render personal judgment against person served." *Louden v. Morgne*, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (1997).

Mr. Harrell was not served a summons as a named party in the original action against Stonington Development. No action has been filed against him. Furthermore, the statute of limitations for filing an action against Mr. Harrell has run. See S.C. Code § 15-3-530. As a result, the Court does not have jurisdiction over Mr. Harrell. Thus he cannot be held in contempt for violation of the Court's Order. As a further result of the statute of limitations against Mr. Harrell having run, the Plaintiffs have waived any claim against him personally.

ii. Mr. Harrell Was Not Joined As A Party Under South Carolina Rule of Civil Procedure 19 In The Original Action.

South Carolina Rule of Civil Procedure 19 sets forth the requirements for joinder of

indispensable parties. See S.C. R. Civ. Pro. 19. The Plaintiffs had the opportunity to join Mr. Harrell as a party to the original action under Rule 19. Mr. Harrell was not joined as an indispensable party. As a result, the Court did not establish jurisdiction over Mr. Harrell. Thus he cannot be held in for violation of the Court's Order.

C. The Plaintiffs Did Not Pierce The Corporate Veil In The Original Action To Bring Mr. Harrell In This Matter Individually.

The Plaintiffs did not pierce Stonington Development's veil. A member of a limited liability company is not personally liable for a debt, obligation or liability of the company *solely* because he is a member of the company. S.C. Code § 33-44-303(a). The burden is on the party seeking to hold the member liable to pierce the company's veil. *Mid-South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007).

South Carolina's piercing test has two factors. *Drury Dev. Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 102, 668 S.E.2d 798, 801 (2008). The first analyzes the individual defendant's relationship to the business entity. *Id.* The second requires the plaintiff to demonstrate a "fundamental unfairness" will result if the veil is not pierced. *Id.*

The Plaintiffs have not brought any evidence showing Mr. Harrell has an improper relationship with Stonington Development. Nor have the Plaintiffs brought evidence that a fundamental unfairness will result if Mr. Harrell is not held personally liable for debts and obligations of Stonington Development. As a result, Mr. Harrell should have been shielded from the contempt action by Stonington Development's veil. Holding him in contempt now would be contrary to South Carolina law and public policy.

II. **Mr. Harrell Did Not Intentionally Violate The Terms Of The Injunction To Be Held In Contempt Of Court.**

A. **Mr. Harrell Does Not Have The Authority Within The Company To Violate The Injunction.**

Mr. Harrell did not have the authority within Stonington Development to cause the company to take any action, let alone violate the terms of the injunction. Aff. L.K. Harrell, III, ¶¶ 8, 12. Mr. Harrell was a passive investor in the company. Aff. L.K. Harrell, III, ¶ 5. He only owned 12.5% of the company. Aff. L.K. Harrell, III, ¶ 5. Furthermore, he has never made any business decisions for the company. Aff. L.K. Harrell, III, ¶ 7.

Mr. Harrell cannot be considered a "controlling person" in the company. *State ex. rel. Medlock v. Nest Egg Society Today, Inc.*, 290 S.C. 124, 348 S.E.2d 381 (Ct. App. 1986). Controlling persons "formulate and direct corporate policy and are deeply involved in the important business affairs" of the company. *Id.* When individual liability is assigned for corporate actions, it is assigned to a controlling person. *See e.g. Id.* (finding controlling persons individually liable for corporate violations of the South Carolina Unfair Trade Practices Act). Mr. Harrell does not formulate or direct Stonington Development's policy. He is not at all involved in its business affairs. He is not a controlling person and was in no position to cause any violations of the injunction, or ensure compliance.

"If, through no fault of his own, the contemnor is unable to obey a court order, the contemnor cannot be held in contempt." *Ex parte Gannon*, ---S.E.2d--- 2009 WL 1861910 (citing *Floyd v. Floyd* 365 S.C., 56, 75, 615 S.E.2d 465, 476 (Ct. App. 2005)). Therefore, because Mr. Harrell was not a controlling person in Stonington Development and did not have the authority to cause the company to take any action, let alone any action in compliance or

violation of the injunction, he should not be held personally liable for any violation Stonington Development may have carried out.

B. Mr. Harrell Did Not Actively Participate In Any Wrongdoing.

"Contempt results from the willful disobedience of a court order." *Browder v. Browder*, 382 S.C. 512, 521, 675 S.E.2d 820, 825 (Ct. App. 2009)(citing *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (Ct. App. 1975). "Willful disobedience requires an act be 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law'" *Id.* (citing *Spartanburg Co. Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 82-3, 370 S.E.2d 872, 873-874 (1988). Furthermore, "Civil contempt must be proven by clear and convincing evidence." *Floyd*, 365 S.C. at 74, 615 S.E.2d at 476.

Mr. Harrell did nothing to disobey or disregard the Court's order. *Aff. L.K. Harrell, III*, ¶¶ 11, 12, 13, 14. Mr. Harrell is not involved in the operations of Stonington Development. He has done nothing to contribute in any way to the discharge of any sediment-laden storm water onto the Plaintiffs' property. The Plaintiffs have provided no evidence to the contrary. If any slit or runoff entered the Plaintiffs' property it was not caused by Mr. Harrell. Therefore, Mr. Harrell should not be held personally liable for any sediment which may have discharged onto the Plaintiffs' property.

III. The Court's Order Of June 26, 2008 Does Not Sufficiently Set Forth The Act Enjoined.

South Carolina Rule of Civil Procedure 65 states ever injunction "shall describe in *reasonable detail, and not by reference to the complaint or other document*, the act or acts sought to be restrained...." S.C. R. Civ. Pro. 65(d) (emphasis added). "Before a person may be held in contempt for violating a court order, the order should inform him in definite terms as to the

duties thereby imposed upon him, and the command must therefore be express rather than implied.” *Spartanburg v. Kimbrell's Inv. Co.*, 259 S. C. 203, 215-216, 191 S. E. 2d 150, 155-6 (1972) (citing 17 Am.Jur.(2d) 54, Contempt. Sec. 52); See also *American Federal Bank, FSB v. Kateman*, 335 S.C. 273, 516 S.E.2d 1 (Ct. App. 1999)(holding the court’s order was not sufficiently definite to indicate what the third party held subject to the order had to do to comply with the order).

The Court’s Order of June 26, 2008 only vaguely describes the acts sought to be restrained. The Order enjoins the discharging of sediment-laden storm water and references South Carolina Regulations. Further, the order does not require Mr. Harrell to take any affirmative acts.

Mr. Harrell has no expertise in storm water, runoff, grading land or stopping siltation. *Aff. L.K. Harrell, III*, ¶ 14. He has no capacity to interpret the order and documents it references to figure out the implication of what is enjoined. As Rule 65 states, the act enjoined must be described in detail. The Court’s Order is not reasonably detailed and it references outside documents. As a result, Mr. Harrell should not be bound to the vague terms of the injunction.

IV. Plaintiffs Did Not Comply With The Notice Requirements Of South Carolina Code § 15-43-120.

South Carolina Code § 15-43-120 provides as follows:

No proceeding against the owner of the real estate shall be commenced hereunder unless ten days’ written notice be given by the prosecuting attorney to such owner or his agent and upon his failure thereafter to abate the nuisance.

When the Plaintiffs filed their motion to hold Stonington Development and its members in contempt for failure to abate the nuisance, they did not provide the required ten days notice. Therefore, Plaintiffs motion for contempt was not viable.

V. Mr. Harrell Is Not Liable For Violating Richland County Ordinances Or State Statutes.

The Court's Order of September 28, 2009 finds Mr. Harrell liable for violating Richland County Ordinance § 26-273(b) and South Carolina Code § 48-14-140. This is improper. Plaintiffs did not have standing to bring an action for violating county ordinances or state law. Mr. Harrell has never been accused of violating an ordinance or state law. There was no testimony in this regard. Further, it would be improper for the Plaintiffs to collect a compensatory damage award for violating county ordinances and state law. See 85 A.L.R. 3d. 895 § 3 (1978).

VI. Plaintiffs Will Be Unjustly Enriched By The Court's Order Of Contempt.

The Court's Order of September 28, 2009 provides for a damage award of \$25,000 to restore the Plaintiffs to their original position. However, the Plaintiffs did not present any evidence to support such a damage award. The amount of the award is arbitrary and has no basis in the testimony offered. Thus, the Plaintiffs will be unjustly enriched by the Court's damage award.

VII. Conclusion.

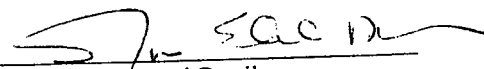
Thus, this Court should vacate its Order of September 28, 2009, including, but not limited to, the following reasons:

- (1) The Court did not establish jurisdiction over Mr. Harrell to bind him individually to the injunction and subject him to the Court's contempt powers;
- (2) Mr. Harrell did not intentionally violate the terms of the injunction to be held in contempt of Court;
- (3) The Court's Order of June 26, 2008 does not sufficiently set forth the act enjoined;

- (4) The Plaintiffs did not comply with the Notice Requirements of South Carolina Code § 15-43-120.
- (5) Mr. Harrell is not liable for violating Richland County Ordinances or State Statutes.
- (6) The Plaintiffs will be unjustly enriched by the Court's order of contempt.

Respectfully Submitted,

MOORE, TAYLOR & THOMAS, P.A.

By: 
James Edward Bradley
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
ward@mttlaw.com

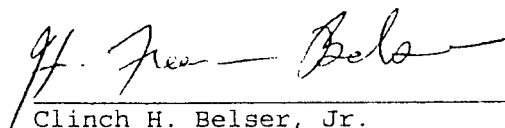
West Columbia, South Carolina

October 6, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	Case Number 2005-CP-40-3736
Glenn Y. Hollis, Jr.,	)	
John E. Hollis, Joseph	)	
R. Robinson, Janette H.	)	
Robinson,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	PLAINTIFFS' MOTION FOR ATTORNEYS'
	)	FEES AND COSTS
Stonington Development,	)	
LLC,	)	
	)	
Defendant.	)	
	)	

PLEASE TAKE NOTICE THAT the plaintiffs, pursuant to Rule 54 of the South Carolina Rules of Civil Procedure, and pursuant to the terms of the Order Granting Plaintiffs' Motion For An Order Holding Stonington Development, LLC and Its Members in Contempt of Court, dated and filed September 28, 2009, hereby move the Court for an Order awarding the plaintiffs \$27,695.00 in attorney's fees and costs. In support thereof, attached to this motion is the Affidavit of H. Freeman Belser.

BELSER & BELSER, P.A.



Clinch H. Belser, Jr.
H. Freeman Belser
1901 Main St., Suite 1550 (29201)
Post Office Box 96
Columbia, South Carolina 29202
Attorneys for the Plaintiffs
(803) 929-0096

Columbia, South Carolina

October 8, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	Case Number 2005-CP-40-3736
Glenn Y. Hollis, Jr.,	)	
John E. Hollis, Joseph	)	
R. Robinson, Janette H.	)	
Robinson,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	RETURN TO 59(e) MOTIONS
	)	
Stonington Development,	)	
LLC,	)	
	)	
Defendant.	)	
	)	

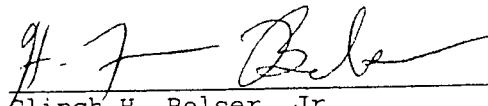
FILED
C.C.H. & G.S.
KIDE

2009 OCT 20 AM 9:56

The Plaintiffs respectfully submit this Return in response to the Rule 59(e) motions filed by Stonington, Lipscomb, Harrell, and Safko with respect to the Court's September 28, 2009 Order Granting Plaintiffs' Motion for an Order Holding Stonington and its Members in Contempt of Court. The Plaintiffs respectfully submit that the motions should be denied because:

1. The arguments presented by Stonington, Lipscomb, Harrell, and Safko are the same arguments that were presented (a) at the April 14, 2009 Rule to Show Cause hearing and (b) after the Plaintiffs' counsel submitted the proposed order the Court signed and was filed on September 28, 2009.
2. The Court has already considered and denied the arguments presented.
3. Therefore, no further consideration is necessary.

BELSER & BELSER, P.A.



Clinch H. Belser, Jr.

H. Freeman Belser

1901 Main St., Suite 1550 (29201)

Post Office Box 96

Columbia, South Carolina 29202

Attorneys for the Plaintiffs

(803) 929-0096

Columbia, South Carolina

October 20, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	Case Number 2005-CP-40-3736
Glenn Y. Hollis, Jr.,	)	
John E. Hollis, Joseph	)	
R. Robinson, Janette H.	)	
Robinson,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	MEMORANDUM OPPOSING PLAINTIFFS'
	)	MOTION FOR ATTORNEYS' FEES AND COSTS
Stonington Development,	)	
LLC,	)	
	)	
Defendant.	)	
_____	)	

INTRODUCTION

In response to the Plaintiffs' Motion for Attorneys' Fees and Costs, Stonington Development, LLC (Stonington) and Stephen E. Lipscomb (Mr. Lipscomb) assert South Carolina law does not allow Plaintiffs to recover such attorneys' fees and costs.

DISCUSSION

I. PLAINTIFF DID NOT PRESENT AN ATTORNEY-CLIENT FEE AGREEMENT

This Court should not award attorneys' fees and costs to Plaintiff because Plaintiff did not provide an attorney-client fee agreement. A plaintiff may not receive attorneys' fees and costs when the plaintiff does not present an attorney-client fee agreement. Williamson v. Middleton, 26689 (S.C. 7-27-2009). In Williamson, plaintiffs "...presented records showing attorneys' fees totaling approximately \$106,000, the trial judge awarded \$35,000. ..." Id. at 2. The defendant appealed the award of attorney fees. Id. At deposition, plaintiff's attorney testified that he never sent plaintiff any statements of attorneys' fees and they did not have an attorney-client fee

agreement. Id. at 3. However, Plaintiff's attorney did keep "...extensive and diligent records detailing the amount of time spent on the case and by whom the work was done." Id. at 4. The South Carolina Supreme Court denied attorneys' fees because there was "...no competent evidence to support the finding that [plaintiff] incurred attorney's fees." Id.

This Court should not award Plaintiff attorneys' fees and costs, just like Williamson, because Plaintiffs failed to produce an attorney-client fee agreement. Plaintiffs' attorney "...estimate[s] that several attorneys spent 131 hours on enforcement of the Injunction. ..."

(Aff. of H. Freeman Belser ¶ 7). Plaintiffs' attorney also states that his firm's legal fee rates are "...\$200/hour for [H. Freeman Belser], to \$185/hour for Michael J. Polk, to \$250/hour for Clinch H. Belser, Jr." (Aff. of H. Freeman Belser ¶ 8). However, no such fee agreement was presented stating the Plaintiffs and the attorneys agreed upon these rates, nor was there a fee agreement stating that the attorneys would bill on a fixed hourly rate, nor have the Plaintiffs provided any such fee agreement in connection to any of their case files with Belser & Belser, P.A. Therefore, Plaintiffs, just as in Williamson, did not provide competent evidence to support a finding that Plaintiffs incurred attorney's fees and costs because there is no fee agreement.

Plaintiffs may argue that a fee agreement was reached because their attorneys kept an hourly time log of the work performed for the Injunction matter. This argument fails, however, because, as stated in Williamson, having extensive and diligently prepared time records by itself, does not satisfy the requirement of having a fee agreement. Williamson, 26689 at 3. Here, there is no record that Plaintiffs agreed to pay the amounts their attorneys' suggest are the established hourly rates.

On the other hand, a fee agreement would not be necessary in the instant case if the attorneys "regularly represented" the Plaintiffs and an agreed upon rate of payment was already established. SCRPC Rule 1.5(b). However, neither Plaintiffs nor the Plaintiffs' attorneys have shown that Belser & Belser, P.A. "regularly represents" the Plaintiffs. It may be true that Plaintiffs have used Belser & Belser, P.A. for several actions against Stonington Development and Belser & Belser, P.A. may be thought of as "regularly representing" the Plaintiffs in these matters, but all of these legal actions spurned from the same incident. Plaintiffs' attorney admits that his firm is working on this Injunction matter as well as "...several different matters within this file. ..." (Aff. of H. Freeman Belser ¶ 7). There is no proof that Plaintiffs and Belser & Belser, P.A. had any relationship prior to Hollis, et al. v. Stonington Development, LLC, and Plaintiffs cannot be considered "regularly represented clients" of Belser & Belser, P.A. Therefore, it is not proper for this court to award attorneys' fees and costs to Plaintiff without a the presentment of a valid fee agreement.

II. PLAINTIFFS DID NOT PRESENT A FEE INVOICE DESCRIBING THE SERVICES PERFORMED BY THEIR ATTORNEY AND THE TIME SPENT FOR SUCH SERVICES.

This Court should not award attorneys' fees and costs to Plaintiffs because Plaintiffs have not presented a legal fee invoice which itemizes billable hours along with the legal services provided. When determining the amount of attorney's fees to award, the court should consider the time necessarily devoted to the case. Glasscock v. Glasscock, 304 S.C. 158, 161 (1991). A court should not award attorneys' fees and costs in a contempt action when the "...record lacks sufficient evidence from which the circuit court could determine the appropriate amount of attorneys' fees required. ..." Ex Parte Cannon, 4570 at 7 (S.C.Ct.App. 6-23-2009). An award of

attorneys' fees to a plaintiff is improper when their lawyer fails to send billing statements to that plaintiff/client. Williamson, 26689 at 3.

Here, Plaintiffs failed to present a legal fee invoice allocating the services and time spent on this action. Plaintiffs also failed to present any legal fee statements that Plaintiffs' attorney sent to Plaintiffs requesting payment. Plaintiffs' attorney vaguely states he "...estimate[s] that the several attorneys spent 131 hours working on enforcement of the Injunction on those 74 days investigating the facts, preparing documents to be submitted to or filed with the Court, researching applicable law, scheduling hearings, and communicating with adversary counsel. ..."

(Aff. of H. Freeman Belser ¶ 7). Also, "[Belser & Belser, P.A.] tracks billable time on a daily basis for each attorney by file only, not by task." (Aff. of H. Freeman Belser ¶ 7). This speculation regarding who performed particular services and how much time was spent for each service is not "competent evidence" to show such services were necessary, or whether they actually occurred. It is impossible to know if such time and service was necessary or even reasonable for this case without a legal fee invoice.

Awarding Plaintiffs attorneys' fees and costs, without presenting a legal fee invoice, would unjustly enrich Plaintiffs. Plaintiffs' attorney admits that while their "...firm worked on enforcement of the Injunction, time was also spent working on other matters in the file." (Aff. of H. Freeman Belser ¶ 7). If this is so, Plaintiffs may be attempting to have Defendants pay for services that Plaintiff would have paid otherwise for one of the "several different matters within this file that are not related to enforcement of the Injunction." (Aff. of H. Freeman Belser ¶ 7). This would be an unjust enrichment to Plaintiffs and an undue burden on the Defendants. Furthermore, as stated above, Plaintiffs' attorney admits that "[Belser & Belser, P.A.] tracks

billable time on a daily basis for each attorney by file only, not by task.” (Aff. of H. Freeman Belser ¶ 7). Plaintiffs’ attorney’s vague, uncertain, and speculative explanation of the allocation of time and services rendered is not competent evidence to find for an award for attorneys’ fees and costs. A legal fee invoice, which is commonly used in the practice of law in South Carolina and in the United States, is a proper method to prove the allocation of attorneys’ fees costs. Plaintiffs have failed to produce such a document, and therefore, this Court should not award attorneys’ fees and costs to Plaintiffs.

III. THE NATURE, EXTENT AND DIFFICULTY OF THE SERVICES RENDERED IN THIS CASE DO NOT AMOUNT TO AN AWARD OF ATTORNEYS FEES AND COSTS

This Court should not award attorneys’ fees and costs to Plaintiffs because the instant case does not rise to the level of difficulty that Plaintiffs’ attorney suggests. In determining the amount of attorney’s fees to award, the court should consider the nature, extent, and difficulty of the case. Glasscock, 304 S.C. at 161. Here, Plaintiffs’ attorney states that this case was made more complicated and has required more work because Defendants willfully disregarded the Injunction Order. (Aff. of H. Freeman Belser ¶ 5(j)). This argument is not persuasive. First, Plaintiff’s attorney admits that other matters not related to the Injunction are included within this file. (Aff. Of H. Freeman Belser ¶ 7). This means a lot of the work completed for other matters were used for this Injunction matter. That would actually make this Injunction matter less complicated because a lot of the work was already done. Second, Plaintiffs’ attorneys did not have to analyze any damage reports showing continuing damage to the pond because Plaintiffs never hired any such experts to perform those services. Third, the only evidence Plaintiff’s attorney presented in an attempt to prove willful disregard of the Defendants at the Rule to Show

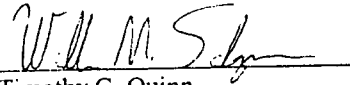
Cause hearing was his client's testimony and dated photographs of the pond. Gathering this information could not have made this case "more complicated." Lastly, it is difficult to determine how complicated handling this Injunction matter was for Plaintiffs' attorneys without an accurate legal fee invoice stating these supposedly difficult services performed made this case so complex. Neither Plaintiffs nor Plaintiffs' attorneys presented a legal fee invoice. In conclusion, Plaintiffs have not shown that this matter rises to a level of complexity where attorneys' fees and costs should be awarded.

IV. THE DECISION TO AWARD ATTORNEYS' FEES AND COSTS IS NOT RIPE

This Court should not award attorneys' fees and costs to Plaintiffs because the issue is not ripe for decision. First, the Order for this Rule to Show Cause, dated September 28, 2009, is currently awaiting a 59(e) Motion hearing to alter or amend this Order. Second, the original case which found Stonington Development liable for damages is currently awaiting appeal. Therefore, a decision to award attorneys' fees and costs is premature. This Court should await the rulings of the 59(e) Motion hearing and appeal before a decision to award attorneys' fees and costs is made.

CONCLUSION

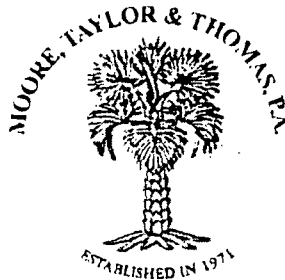
This Court should not award attorneys' fees and costs to Plaintiffs. When looking at the totality of the circumstances, the Plaintiffs have not shown that they are entitled to "more than \$27,695.00[,]" in attorneys fees and costs, if any, which Plaintiffs' attorney suggests. (Aff. of H. Freeman Belser ¶ 9). Plaintiffs have not provided a fee agreement or legal fee invoice, nor has Plaintiffs shown the complexity of this case warrants an award of attorneys fees and costs. Also, the decision to award attorneys' fees and costs is premature. Therefore, this Court should not award attorneys' fees and costs to Plaintiffs.



Timothy G. Quinn
William M. Saltzman
Law Offices of Quinn & Quinn, P.A.
2309 Devince Street
Post Office Drawer 12589
Columbia, South Carolina 29211
(803) 771-0936
Fax: (803) 254-7751
Attorneys for Defendants
Stonington Development, LLC and
Stephen E. Lipscomb

October 23, 2009

S. JAHUE MOORE
J. MARK TAYLOR*
DAVID L. THOMAS†
C. VANCE STRICKLIN, JR.
JAMES EDWARD BRADLEY
SHEILA McNAIR ROBINSON
ROBERT D. HAZEL
CHRISTIAN G. SPRADLEY††
C. DAVID SAWYER, JR.††
WILLIAM H. EDWARDS
STANLEY L. MYERS



1700 SUNSET BOULEVARD (HWY 178)
POST OFFICE BOX 5709
WEST COLUMBIA, SOUTH CAROLINA 29171
TELEPHONE (803) 796-9160
FAX (803) 791-8410

BARRY L. THOMPSON, II
MELISSA K. MOORE
S. JAHUE MOORE, JR.

OF COUNSEL:
JANE H. DOWNEY**

RETIRED:
BILLY C. COLEMAN††

October 28, 2009

The Honorable L. Casey Manning
Circuit Court Judge
P.O. Box 192
Columbia, SC 29202-0192

Re: Glenn Y. Hollis, Jr., John E. Hollis, Joseph R. Robinson, Janette H. Robinson vs.
Stonington Development, LLC
C/A No. 2005-CP-40-3736

Dear Judge Manning:

I am pleased to represent Lewie K. Harrell III in this matter. I have recently received Stonington Development LLC and Stephen E. Lipscomb's Memorandum Opposing Plaintiff's Motion for Attorneys' Fees and Costs. We join in the arguments made in that memorandum and do not believe an award of attorneys' fees and costs as requested by the Plaintiff is proper.

We do request a hearing before any ruling is made and do not believe a ruling is ripe at this time due to the pending 59(e) motions.

Thank you for your consideration.

Sincerely,

James Edward Bradley

/nh
cc: H. Freeman Belser, Esquire
William M. Saltzman, Esquire
George V. Hanna, IV, Esquire
L. K. Harrell, III, Esquire

*Fellow of the American Academy of Matrimonial Lawyers
**Certified Specialist in Bankruptcy & Debtor/Creditor Law
††Saluda Office: (661) 445-4544 or (866) 604-4544

HOWSER, NEWMAN & BESLEY, L.L.C.

R. DAVIS HOWSER
JAMES P. NEWMAN, JR.
WILLIAM G. BESLEY
BENJAMIN D. MCCOY
KELLEY SHULL CANNON
ANDREW E. HASELDER
GEORGE V. HANNA, IV *
MICHAEL COOPER JONES
KASSI B. SANDIFER
J. FRANK MOCK
KYLIE L. KEESLEY
JENNIFER E. THOMAS
ALBERT RICHARD PIERCE, JR. *
JAMES P. SULLIVAN

ATTORNEYS AND COUNSELORS AT LAW

POST OFFICE BOX 12009
COLUMBIA, SC 29211

1508 WASHINGTON STREET
COLUMBIA, SC 29201

TELEPHONE (803) 758-6000
FAX (803) 758-4445
TOLL FREE (866) 207-6209
WWW.HNBLAW.COM

CHARLESTON OFFICE
1110 QUEENSBOROUGH BLVD.
SUITE C
MT. PLEASANT, SC 29464
(843) 216-6940
FAX (843) 216-6942
TOLL FREE (877) 216-6970

REAL ESTATE PRACTICE
1340 BULL STREET
SUITE 250
COLUMBIA, SC 29201
(803) 252-7434
FAX (803) 252-7436

* ALSO ADMITTED IN NORTH CAROLINA

November 5, 2009

The Honorable L. Casey Manning
Circuit Court Judge
P. O. Box 192
Columbia, South Carolina 29202-0192

COPY

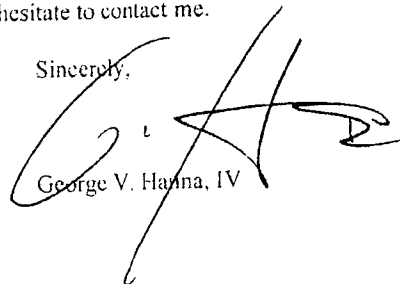
RE: Glenn Y. Hollis, Jr., et al vs. Stonington Development, LLC, et al.
Civil Action Number: 05-CP-40-3736

Dear Judge Manning:

You will recall that I represent Ron Saffo in this matter. Recently we have been served with Plaintiff's Motion for Attorneys Fees and Costs in this matter. We have also received Stonington Development, LLC's and Steven Lipscomb's Memorandum Opposing Plaintiff's Motion for Attorneys Fees and Costs. We would join in the arguments made in Stonington Development's Memorandum opposing the attorneys fees and costs requested by the plaintiffs. We would specifically request that prior to the Court making a ruling on this matter, that a hearing be held on the record. Finally, we have filed a Rule 59(e) Motion in reference to the recent ruling on the Rule to Show Cause matter. Therefore we believe that Plaintiff's Motion for Attorneys Fees and Costs is not ripe at this time.

Your consideration of this request is appreciated. If you should have any questions or comments regarding this correspondence, please do not hesitate to contact me.

Sincerely,


George V. Hanna, IV

GVH/jwh

CC: H. Freeman Belser, Esquire
Timothy G. Quinn, Esquire
James Edward Bradley, Esquire

RoA 000470

App. 470

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Glenn Y. Hollis, Jr., John E. Hollis,)
Joseph R. Robinson, Janette H. Robinson,)
)
Plaintiffs,)

C/A No. 2005-CP-40-3736

vs.)

**L.K. Harrell's Motion to Alter or Amend
Pursuant to Rule 59(e)**

Stonington Development, LLC.)
)
Defendant.)

2010 JAN 15 PM 12:21

YOU WILL PLEASE TAKE NOTICE that the undersigned, as counsel for L.K. Harrell, III, moves for an Order of this Court pursuant to Rule 59(e) of the SCRCP altering and amending the Judgment of this Court filed January 7, 2010 granting the Plaintiffs' Motion for Attorney Fees and Costs. The grounds for this Motion are as follows:

I. The Plaintiffs Did Not Present An Attorney-Client Fee Agreement To Support Their Motion for Attorneys' Fees And Costs.

The Plaintiffs did not provide an attorney-client fee agreement to support their motion for attorney fees and costs. A plaintiff may not recover attorneys' fees and costs without an attorney-client fee agreement. *Williamson v. Middleton*, 383 S.C. 490, 496, 681 S.E.2d 867, 876 (2009).

In *Williamson*, the plaintiff claimed approximately \$106,000 in attorney's fees. *Id.* at 494, 869. He was awarded \$35,000. *Id.* The defendant appealed the award and deposed the plaintiff's attorney regarding the fees. *Id.* at 495, 870. In his deposition, the plaintiff's attorney testified that he did not have an attorney-client fee agreement with the plaintiff. *Id.* Even though the plaintiff's attorney kept, "extensive and diligent records detailing the amount of time spent on the case and by whom the work was done," the South Carolina Supreme Court overturned the

award of attorney fees. *Id.* at 495-496, 870-871. Because there was no fee agreement, the Supreme Court found no competent evidence that the fees presented were actually incurred by the plaintiff. *Id.*

Similarly, in this case, the Plaintiffs did not present an attorney-client fee agreement to support their motion. The Plaintiffs' only provided their attorney's affidavit which set forth an estimate that "several attorneys spent 131 hours on enforcement of the injunction..." and the firms legal fee rates, "\$200/hour for H. Freeman Belser, \$185/hour for Michael J. Polk, \$250/hour for Clinch H. Belser. (Aff. H. Freeman Belser ¶¶ 7-8). No fee agreement was provided. No written proof was provided to show that the Plaintiffs were to be billed hourly for the time set forth at the rates set forth in the affidavit. There was nothing in writing stating the Plaintiffs agreed to incur any fees. Therefore, just like in *Williamson*, there is no competent evidence to support a finding that the Plaintiffs agreed to incur fees and costs.

The only evidence the Plaintiffs referenced to show an attorney-client fee agreement was an hourly time log of the work performed to enforce the injunction. This does not satisfy the requirement *Williamson*, where "extensive and diligent records of the amount of time spent on the case" were not sufficient evidence to support an attorneys' fees and cost award. *Williamson*, 383 S.C. at 495-496, 870-871. There is no record that the Plaintiffs actually agreed to pay the amount of fees suggested by their attorney's hourly rates.

Furthermore, the Plaintiffs provided no evidence to establish that their attorney "regularly represented" them at an established hourly rate under South Carolina Rule of Professional Conduct 1.5(b). *See* SCRPC 1.5(b). Although Belser & Belser, P.A., represent the Plaintiffs on several legal actions related to the subject of this action, no evidence was presented that the Plaintiffs had any prior relationship with Belser & Belser, P.A. The Plaintiffs cannot be

considered “regularly represented clients” of Belser & Belser, P.A. Therefore, the Plaintiffs were not entitled to an award of attorney’s fees and costs because they provided no attorney-client agreement to support their motion for attorney’s fees and costs. There is no evidence to prove that they agreed to incur the fees suggested by their motion.

II. The Plaintiffs Did Not Provide A Proper Fee Invoice Describing The Services Rendered And The Time Spent.

The Plaintiffs did not provide a detailed fee invoice describing the services rendered and the time spent by their attorney in support of their motion for attorney’s fees and costs. “The award of attorneys’ fees is not a punishment but an indemnification to the party bringing the action.” *Ex Parte Cannon*, 685 S.E.2d, (Ct. App. 2009). To award fees in a contempt action, the record must contain “sufficient evidence” from which the court can determine the appropriate amount of attorney’s fees required for reimbursement. *See Id.* “[T]he time necessarily devoted to the case” is a factor the court should consider in making a fee award. *Glasscock v. Glasscock*, 304 S.C. 158, 162, 403, S.E.2d 313, 314 (1991).

In this case, the Plaintiffs did not provide a legal fee invoice detailing the services and time spent on this action. The Plaintiffs’ attorney’s affidavit states only an “estimate that the several attorneys spent 131 hours working on enforcement of the injunction on those 74 days investigating facts, preparing documents to be submitted to or filed with the Court, researching applicable law, scheduling hearings, and communicating with adversary counsel....” (Aff. H. Freeman Belser ¶ 7). In addition, the Plaintiffs’ attorney’s affidavit states that Belser & Belser, P.A., “tracks billable time on a daily basis for each attorney by file only, not by task. *Id.*

The estimate of attorney’s fees provided by the Plaintiffs is not sufficient evidence from which the court can determine the appropriate amount of fees for reimbursement. The estimate is speculative of who performed which particular service, how much time was spent on it, and

how it was related to the enforcement of the injunction. There is no way of determining if each of the services performed were necessary and reasonable for this case. Therefore, there is no way of knowing the appropriate amount of attorney's fees for reimbursement specifically for the enforcement of the injunction.

Furthermore, the award of attorney's fees without a sufficiently detailed invoice unjustly enriches the Plaintiffs. The Plaintiffs attorney admits that while his "firm worked on enforcement of the injunction, time was also spent working on other matters in the file." (Aff. H. Freeman Belser ¶ 7). As stated, the Plaintiffs' attorney's firm bills time on a daily basis by the file, not the task. Since a detailed invoice was not provided to account for and distinguish the work performed to enforce the injunction, it very likely the Plaintiffs' attorney's fee estimate includes unrelated work performed for other matters in the file. As a result, the Plaintiffs are unjustly enriched the award.

Therefore, because the Plaintiffs did not provide a sufficiently detailed fee invoice, there is no way of determining, beyond speculation, the appropriate fee award in this case. In addition, there is no way of avoiding potential unjust enrichment to the Plaintiffs. The Plaintiffs were not entitled to an award of attorney's fees and costs.

III. The Nature, Extent And Difficulty Of The Services Rendered Do Not Amount To An Award Of Attorney's Fees And Costs.

The Plaintiffs have not shown that the nature, extent and difficulty of the services the Plaintiffs' attorney rendered amount to an award of attorney's fees and costs. In determining whether to award attorney's fees, the court should consider "the nature, extent, and difficulty of the case." *Glasscock*, 304 S.C. at 161, 403 S.E.2d at 313.

The Plaintiffs' attorney states in his affidavit that this case was complicated and labor intensive because the Defendants willfully disregarded the injunction. (Aff. H. Freeman Belser ¶ 5(j)). However, this argument is not persuasive.

First, the Plaintiffs' attorney admits that his firm was working on a number of different matters related to the subject of this case. He stated that there were other matters in the file unrelated to the injunction. (Aff. H. Freeman Belser). This means that the case would be less complicated because he was familiar with the case. In addition, it is very likely that work performed for other matters, for example inspecting the site, could be applied towards the enforcement of the injunction as well as other matters.

Second, the Plaintiffs' attorney did not hire an expert to provide any reports demonstrating continuing damage to the pond. Therefore, the Plaintiffs' attorney did not have to make any analysis of expert reports regarding damages.

Third, the Plaintiffs' attorney presented only limited evidence to prove the Defendant violated the injunction at the hearing. The Plaintiffs' attorney presented only the Plaintiffs' testimony and dated photographs of the pond. The gathering and preparation of such evidence certainly did not make the case difficult or complicated.

Fourth, the only basis for the attorney fees in this matter is the finding of contempt. That finding came from one hearing that took one half to three quarters of a day. The cost of \$52,695.00 is vastly out of proportion with the amount of legal work. No depositions were taken to justify the cost.

Finally, the Plaintiffs did not provide a legal fee invoice demonstrating the complexity of the services provided in the case. Therefore, because of the simple nature of the case and the

lack in difficulty of bringing it, the Plaintiffs are not entitled to an award of attorney's fees and costs.

IV. The Decision To Award Attorney's Fees And Costs Was Not Ripe.

The original case which found the Defendant liable for damages is currently awaiting appeal. Therefore, a decision to award attorney's fees and costs is premature.

Furthermore, there was no opportunity for the Defendant to put in evidence regarding the award of fees and costs. Instead, the Court unilaterally awarded fees and costs based solely upon the affidavit of Plaintiffs' counsel.

V. Conclusion.

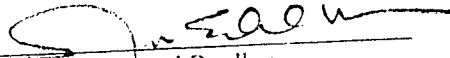
Thus, this Court should vacate its Order of January 7, 2010, for attorney's fees and costs, including, but not limited to, the following reasons:

- (1) The Plaintiffs did not present an attorney-client fee agreement to support their motion for attorney fees and costs;
- (2) The Plaintiffs did not provide a proper fee invoice describing the services rendered and the time spent;
- (3) The nature, extent and difficulty of the services rendered do not amount to an award of attorney's fees and costs; and
- (4) The decision to award attorney's fees and costs was not ripe.

Respectfully Submitted,

MOORE, TAYLOR & THOMAS, P.A.

By:



James Edward Bradley
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
ward@mttlaw.com

West Columbia, South Carolina

January 14, 2010

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND) C/A NUMBER: 05-CP-40-3736

Glenn Y. Hollis, Jr., John E. Hollis, Joseph
E. Robinson, Janette H. Robinson,

Plaintiffs,

vs.

Stonington Development, LLC,

Defendant.

**RON SAFKO'S NOTICE OF AND
MOTION TO ALTER OR AMEND
ORDER DATED JANUARY 7, 2010
GRANTING PLAINTIFFS' MOTION
FOR ATTORNEY'S FEES AND
COSTS**

2010 JAN 19 PM 3:18

PLEASE TAKE NOTICE that Ron Safko, by and through his undersigned attorneys, will move before the Honorable Judge L. Casey Manning, on the tenth (10th) day after service hereof or at such time and place as is convenient to the Court for an Order granting Ron Safko's ("Safko") Motion to Alter or Amend Judge Manning's Order dated January 7, 2010 Granting Plaintiff's Motion for Attorney's Fees and Costs, pursuant to Rule 59(c) of the South Carolina Rules of Civil Procedure. Counsel for Safko received written notice of the entry of said Order on January 8, 2010. This motion is based upon the following grounds.

I. PLAINTIFFS FAILED TO PRESENT AN ATTORNEY CLIENT FEE AGREEMENT

In South Carolina, a Plaintiff may not recover attorneys' fees and costs without an attorney-client fee agreement. Williamson v. Middleton, 383 S.C. 490, 496, 681 SE2d 867, 876 (2009). Plaintiffs' did not present an attorney-client fee agreement in support of their motion for attorneys' fees and costs, and as such, there is no competent evidence to support a finding that Plaintiffs' agreed to incur fees and costs. Therefore, the Court's award of attorneys' fees and costs is improper and should be set aside.

II. PLAINTIFFS FAILED TO PRESENT A FEE INVOICE DESCRIBING THE SERVICES RENDERED AND THE TIME SPENT

In a contempt action in South Carolina, a Court should not award attorneys' fees and costs when "... the record lacks sufficient evidence from which the circuit court could determine the appropriate amount of attorneys' fees required." Ex Parte Cannon, 685 S.E.2d 814 (Ct.App. 2009). Plaintiffs' failed to present a detailed fee invoice setting forth the services and time spent on this action. Rather, Plaintiffs' attorney's affidavit set forth a vague "estimate that the several attorneys spent 131 hours working on enforcement of the injunction" over a 74 day period. (See, *Affidavit of Freeman Belser at ¶ 7*). Additionally, the Plaintiffs' attorney's affidavit admits his firm "tracks billable time on a daily basis for each attorney by file only, not by task." (See, *Affidavit of Freeman Belser at ¶ 7*). The affidavit further admits that his "firm is actively working on several different matters within this file that are not related to enforcement of the Injunction." (See, *Affidavit of Freeman Belser at ¶ 7*).

The estimate of attorney's fees produced by the Plaintiffs is insufficient evidence from which the court can determine the appropriate amount of fees for reimbursement. The evidence presented is speculative at best as to who performed what service and how much time was spent. There is also no way beyond speculation to know if the particular task was even related to the enforcement of the injunction as opposed to the several other matters the firm was working on that were unrelated to the injunction. Therefore, the Courts award of attorneys' fees and costs is improper and should be set aside.

III. THE NATURE, EXTENT AND DIFFICULTY OF THE SERVICES RENDERED DO NOT JUSTIFY AN AWARD OF ATTORNEY'S FEES.

In South Carolina, in determining whether to award attorney's fees, the Court should consider "the nature, extent and difficulty of the case." (*Glascock v. Glascock*, 304 SC 158, 403 SE2d 313 (1991)). The Plaintiffs' attorney's affidavit makes a conclusory statement that the case was complicated and labor intensive because the Defendants allegedly willfully disregarded the injunction. (See, *Affidavit of Freeman Belser at ¶ 5(j)*). This argument is without merit. First, Plaintiffs' attorney admits that his firm was working on several matters in the same file that were unrelated to the Injunction. (See, *Affidavit of Freeman Belser at ¶ 7*). This means the case is less complicated because much of the work was likely duplicative or overlapped in some way making things easier, not harder. Second, Plaintiffs' attorney did not have to analyze expert reports related to continuing damages to the pond, because no such expert was retained. Third, the only evidence presented at the hearing by Plaintiff's counsel was testimony from one of his clients and some old photographs. The limited nature of the evidence presented was certainly not indicative of a complicated or difficult case, rather it tends to show the exact opposite. Finally, because the Plaintiffs' failed to present a detailed legal fee invoice, there is no evidence upon which to base a finding that the services rendered were difficult or complex.

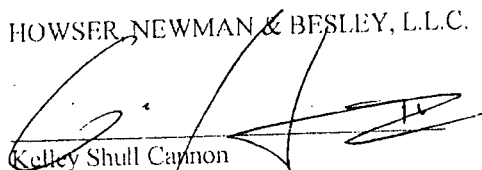
IV. THE DECISION TO AWARD ATTORNEY'S FEES WAS NOT RIPE

The original case which found Defendant Stonington liable to the Plaintiffs is currently on Appeal. In addition, despite specific requests for a formal hearing from all three individual former and current members of the Defendant, the Court unilaterally awarded attorney's fees and costs based solely on the affidavit of Plaintiffs' counsel. There was no opportunity for the

individuals effected by the Motion for Attorney's fees and costs to put in evidence of their own or cross-examine the Plaintiffs' on this issue.

This motion is further based upon the pleadings, the deposition testimony of the witnesses, discovery responses of all parties, and any affidavits or memorandum of law to be filed by Salko.

HOWSER, NEWMAN & BESLEY, L.L.C.



Kelley Shull Cannon
George V. Hanna, IV
1508 Washington Street
Post Office Box 12009
Columbia, South Carolina 29211
(803) 758-6000
Attorney for Ron E. Salko

January 19, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	Case Number 2005-CP-40-3736
Glenn Y. Hollis, Jr.,	)	
John E. Hollis, Joseph	)	
R. Robinson, Janette H.	)	
Robinson,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' MEMORADUM IN
	)	OPPOSITION TO RULE 59(a)
v.	)	MOTIONS OF SAFKO AND HARRELL
	)	
Stonington Development,	)	
LLC,	)	
	)	
Defendant.	)	
_____	)	

The Plaintiffs respectfully submit their Memorandum in Opposition to the Rule 59(e) Motions of Safko and Harrell to Alter or Amend the Court's January 7, 2010 Order Granting Plaintiffs' Motion for Attorney's Fees and Costs. For the reasons set forth below, the Motions should be denied.

Case History

The Court's January 7, 2010 Order originates from an April 2007 jury trial between the Plaintiffs and Stonington Development, LLC.

The relevant events after the trial are as follows:

1. June 26, 2008: the Court issued the Order Granting the Plaintiffs' Restated and Renewed Post-Trial Motion for an Injunction Against Stonington Development, LLC. This Order has not been appealed and is the law of the case.
2. September 11, 2008: the Plaintiffs filed a Motion for an Order Holding Stonington Development, LLC and its Members in Contempt of Court.
3. April 14, 2009: the Court held a Rule to Show Cause Hearing on the Plaintiffs' September 11, 2009 Motion.

4. September 28, 2009: the Court issued the Order Holding Stonington Development, LLC and Its Members in Contempt of Court.
5. October 8, 2009: counsel for the Plaintiffs filed a Motion for Attorney's Fees and Costs.

Thereafter, Stonington, Lipscomb, Harrell, and Safko filed Rule 59(e) Motions.
6. October 20, 2009: counsel for the Plaintiffs filed a return to the Rule 59(e) Motions concerning the Contempt Order.
7. October 23, 2009: Stonington, Lipscomb, Harrell, and Safko filed memoranda in opposition to my motion for attorney's fees.
8. January 7, 2010: the Court issued an Order denying the Rule 59(e) motions and granting the Plaintiffs' Motion for Attorney's Fees.
9. January 19, 2010: Harrell and Safko filed Rule 59(e) motions on the portion of the Jan. 7, 2010 Order awarding attorney's fees.
10. February 5, 2010: Stonington, Lipscomb, Harrell, and Safko filed Notices of Appeal of the Contempt Order, subject to the Jan. 19 Rule 59(e) motions concerning attorney's fees.

Argument

1. The Court did not abuse its discretion in approving the Plaintiffs' application for attorney's fees.
 - a. There was sufficient evidence in the record for an award of attorney's fees and costs.

Both Safko and Harrell argue that there was "no competent evidence" of an attorney-client fee agreement. Therefore, Safko and Harrell argue, the Court's approval of the plaintiffs' application for attorney's fees and costs was an abuse of discretion.

Safko and Harrell are wrong because the Affidavit of plaintiffs' counsel outlines in extensive detail the work

actually performed and the attorney's fees and costs actually incurred by the plaintiffs in enforcing the injunction. The Affidavit from the plaintiffs' counsel, an officer of the Court, provides substantial and credible evidence from which the Court exercised its discretion in awarding attorney's fees and costs.

Safko and Harrell incorrectly rely on Williamson v. Middleton, 383 S.C. 490, 681 S.E.2d 861 (2009), for the proposition that without a written fee agreement there can be no award of attorneys fees.

In Williamson, unlike here, there was no expectation of payment on behalf of the attorneys. In fact, the attorney applying for attorney's fees and costs in Williamson admitted that the client would have only a moral obligation to pay.

In this case, there is an expectation of payment. The plaintiffs have more than the moral obligation to pay the fee. The firm has billed the plaintiffs at these rates for a number of years. The plaintiffs do not have a choice as to whether to pay. Further, the plaintiffs have made partial payments on other bills related to this firm's representation.

Safko and Harrell also incorrectly rely on Ex Parte Cannon, 685 S.E.2d 814 (Ct.App.2009), in support of their argument that the record lacks sufficient evidence for the award of attorney's fees and costs.

Cannon is distinguishable from the case at bar because the trial judge in Cannon ordered "the payment into [the circuit] court of \$50,000.00 to be applied towards the payment of attorneys' fees as incurred by the various parties . . ." Id., 685 S.E.2d at 820. The Court of Appeals remanded the issue of attorney's fees back to the trial court for a finding of fact. Id., 685 S.E.2d at 827.

In this case, the Court has made a finding of fact based on its review of the Affidavit of the plaintiffs' counsel. Therefore, the Court did not abuse its discretion.

Safko and Harrell also incorrectly rely on Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991), in support of their argument that the amount of the attorney's

fee award is not justified in light of the nature, extent, and difficulty of the work performed.

The reason that Safko and Harrell have been ordered to pay the plaintiffs' a substantial award of attorney's fees is that they have done nothing to comply with the Court's orders. When citizens respect and obey the law, there is less work for lawyers. Where, as here, citizens willfully disregard their obligations, it takes time, effort, and expense to call those citizens to task. Therefore, Safko and Harrell have no one but themselves to blame.

- b. The pendency of an appeal on a collateral matter has no impact on the Court's award of attorney's fees.

The plaintiffs obtained an injunction requiring the defendants to stop the siltation into the plaintiffs' pond on June 26, 2008. That order was not appealed and is the law of the case.

The April 2007 jury verdict is under appeal, but that appeal has no effect on the injunction.

- c. The Court was not required to hold a hearing prior to approving the Plaintiffs' application for attorney's fees.

Rule 59(f), SCRCP, gives the Court to discretion to deny a Motion to Alter or Amend on briefs filed by the parties without oral argument. The Court retained the authority to approve the Plaintiffs' application for attorney's fees and costs without an additional hearing. Therefore, the Court did not abuse its discretion in approving the plaintiffs' application for attorney's fees.

Conclusion

For the reasons set forth above, the Court should deny the Rule 59(e) motions filed by Safko and Harrell.

[Signature on following page.]

BELSER & BELSER, P.A.



Clinch H. Belser, Jr.

H. Freeman Belser

1901 Main St., Suite 1550 (29201)

Post Office Box 96

Columbia, South Carolina 29202

(803) 929-0096

Attorneys for the Plaintiffs

Columbia, South Carolina

March 9, 2010

RECEIVED
THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Judge, Circuit Court Judge

Case No. 2005-CP-40-3736

Glenn Y. Hollis, Jr., John E. Hollis, Joseph R. Robinson
Janette H. Robinson, ... Respondents,

vs.

Stonington Development, LLC, ... Appellant,

FINAL BRIEF OF APPELLANT

Timothy G. Quinn
1421 Calhoun Street
PO Drawer 12589
Columbia, South Carolina 29211
(803) 771-0936
Fax (803) 254-7751
Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities.....	iii
Statements of Issue on Appeal.....	1
Statement of the Case.....	2
Argument.....	3
I. The Trial Court erred in failing to grant Stonington's Motion for a directed verdict as to punitive damages	3
II. The Trial Court erred by entering the Jury Room	8
III. The Jury's award of punitive damages that is approximately nine times the actual damages awarded violates the Appellant's rights to Due Process under the Fourteenth Amendment of the United States Constitution and reversal is required	10
IV. The Trial Court erred in failing to grant Stonington's Motions for Summary Judgment Notwithstanding the Verdict, New Trial Absolute and/ or New Trial Nisi Remittitur	14
Conclusion.....	16

TABLE OF AUTHORITIES

CASES

<u>Cole v. Raut</u> , No. 26503 (S.C. June 9, 2008)	3
<u>Proctor v. Dept. of Health and Envtl. Control</u> , 68 (S.C. 279, 628 S.E.2d 496 (Ct. App. 2006))....	3
<u>Dixon v. Ford</u> , 362 S.C. 614, 608 S.E.2d 879 (Ct. App. 2005).....	4
<u>Crenshaw v. Southern Ry. Co.</u> , 214 S.C. 553, 53 S.E.2d 789 (1949).....	4
<u>State v. Pruitt</u> , 187 S.C. 58, 196 S.E. 371 (1938).....	4
<u>State v. Elmore</u> , 279 S.C. 417, 308 S.E.2d 781 (1983).....	8
<u>Testa v. Seidler</u> , 81 A.D.2d 715 (NY App. Div.).....	9
<u>Nissan Motor Corp. v. Padilla</u> , 545 So. 2d 274 (Fla. Ct. App.).....	9
<u>BMW v. Gore</u> , 517 U.S. 559, 116 S. Ct. 1589 (1996).....	10
<u>TXO Production Corp. v. Alliance Resources Corp.</u> , 509 U.S. 443, 113 S. Ct. 2711 (1993).....	10
<u>Continental Trend Resources v. OXY USA, Inc.</u> , 101 F.3d 634 (10th Cir. 1996) <i>cert. denied</i> 117 S.Ct. 1846 (1996).....	11
<u>Cooper Indus., Inc. V. Leatherman Tool Group, Inc.</u> , 532 U.S. 424, 121 S. Ct. 1678, 149 L.Ed.2d 674 (2001).....	11
<u>F.D.I.C. v. Hamilton</u> , 122 F.3d 854 (10th Cir. 1997).....	12
<u>Exxon Shipping Company et al., v. Grant Baker, et al.</u> , 554 U.S. _____ (2008).....	13
<u>State Farm Mut. Automobile Ins. v. Campell</u> , 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d (2003).....	13

OTHER AUTHORITIES

<u>Ralph King Anderson, Jr., South Carolina Requests to Charge Civil</u> , 2002, §13-21.....	3

STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court err in failing to Grant Stonington's Motion for a directed verdict as to punitive damages.
2. Did the Trial Court err by entering the Jury Room.
3. Did the Jury err by awarding approximately nine times the actual damages awarded and does this violate the appellant's right of due process under the fourteenth amendment of the United States Constitution and is reversal required.
4. Did the Trial Court err in failing to grant Stonington's Motions for Judgment Notwithstanding the Verdict, New Trial Absolute and New Trial Nisi Remittitur

STATEMENT OF THE CASE

This matter was commenced by the filing of a Complaint July 25, 2005, which set forth actions of negligence, trespass, private nuisance and unfair trade practices.

The Defendant, Stonington filed an Answer which generally denied the Plaintiffs' claims.

The matter was tried before a Richland County jury beginning on April 2, 2007 and concluding on April 6, 2007, at which time the jury rendered verdicts as follows:

"On the charge of private nuisance, we the jury find for the Plaintiff against Stonington Development in the amount of \$400,000.00 in actual damages and \$3,500,000.00 punitive damages".

"On the charge of trespassing, we the jury find for the Plaintiff against Stonington Development in the amount of \$400,000.00 in actual damages and \$3,500,000.00 punitive damages".

"On the charge of negligence, we the jury find for the Plaintiff against Stonington Development in the amount of \$400,000.00 in actual damages and \$3,500,000.00 punitive damages".

Stonington made post-trial motions for Judgment Notwithstanding the Verdict, New Trial Absolute, and New Trial Nisi Remittitur. These motions were denied by the Trial Court Order dated November 12, 2007.

The Plaintiffs subsequently elected to rely on the cause of action alleging private nuisance.

Notice of Appeal was duly filed on December 13, 2007 with the Circuit Court and this appeal follows.

ARGUMENTS

I

THE TRIAL COURT ERRED IN FAILING TO GRANT STONINGTON'S MOTION FOR A DIRECTED VERDICT AS TO PUNITIVE DAMAGES

A) "And in this case we have actual damages and we have punitive damages as to both Defendants." (R. p. 765, line 22-24). This statement by way of a charge from the Court set the error for the jury's verdict which following a five day trial was reached in less than two hours.

It is contended that this erroneous jury charge is grounds for reversal as it clearly resulted in prejudice to Stonington. Cole v. Raut No. 26503 (S.C. June 9, 2008). This affirmative statement by the Trial Court is not one of the isolated portion of the entire charge as deemed "harmless" as was the case in Proctor v. Dept. of Health and Env'tl. Control, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006)). Essentially this is a Trial Court making a finding of fact for the jury and it appears that the verdict bears this out.

A proper jury charge is suggested to be that in Anderson's South Carolina Requests to Charge §13-21.

Contrary to the instant "direction" to the jury, Anderson's suggested charge begins: "In this case the Plaintiff seeks punitive damages in addition to actual damages." It then goes on to elaborate the reasons for punitive damages, the standards for punitive damages, the necessary factors for such a finding and the potential impact upon the Defendant upon such a finding. Subsequent portions of the Trial Court's charge go into more detail regarding punitive damages (R. pp. 768-773). These elaborations should not have been done at the end of the lengthy charge, but done at the on-set. The on-set is when a typical jury is more focused and vigilant.

The Trial Court's charge stated affirmatively that in this case we have actual damages and we have punitive damages. The Trial Court is telling the jury that we have both types of

damages. This fact should be solely within the provenance of the jury. This again is a direction to the jury by the presiding Judge.

At the very least, the Trial Court's affirmative acknowledgment of the issue of damages left the jury very confused and certainly had the potential to guide as a specific direction to the jury. The above resulted in prejudice to Stonington as evidenced by the verdict itself. This should constitute a reversible error as contended in Cole v. Rast.

Similar to the instance posed in Dixon v. Ford 362 S.C. 614, 608 S.E.2d 879 (Ct. App. 2005), the Trial Court "took" from the jury its responsibility to evaluate Stonington's actions. In Dixon in order to prevail on their claim, at least as to punitive damages, the Plaintiff's had to establish "clear and convincing" proof. Judge Anderson states, "the erroneous charge here is the quintessential prejudicial charge because it establishes as a legal conclusion that the Dixons could not prevail on an element of their cause of action". Conversely, in the instant case, the erroneous charge established a legal conclusion that the Plaintiffs had prevailed on their claim for damages.

This statement from the Trial Court would seem to fall within the prohibitions expressed in Crenshaw v. Southern Ry. Co. 214 S.C. 553, 53 S.E.2d 789 (1949) which cited State v. Pruitt 187 S.C. 58, 196 S.E. 371 (1938) which stated:

It has been long recognized that even a slight remark, apparently innocent in its language, may, when uttered by the Court, have a decided weight in shopping the opinion of the jury. Vested as the trial court is with superior authority, disinterested, and possessing experience not available to the ordinary laymen, jurors, as a rule, are anxious to catch his view, upon which to find their conclusions.

Stonington contends that this juridical error justifies reversal.

B) It would appear that there was sufficient evidence of siltation to the Hollis pond to

submit the matter to the jury, but it appears that there was insufficient evidence to submit the issue of punitive damages to the jury.

In trial it is undisputed that the watershed surrounding the Hollis pond area is comprised of approximately 775 acres, of this 775 acres Stonington comprises 125 acres. This 125 acres is approximately 15 percent. (R. pp. 646-647). Although the watershed flows through the Stonington property, there was no showing that it all went through the alleged culprit, the Stonington detention pond. (R. p. 647). While Stonington could be chargeable for neglect for fifteen (15%) percent of the Plaintiffs' damage, it would seem that a charge of punitive damages would not hold even as to an assumed wrongdoer in view of such minimal participation. The participation, if any of Stonington was even less when they sold 25 acres of property to Landstone Company (R. pp. 1243-1244). This sale reduced Stonington's presence of the watershed to thirteen (13%) percent. At no time did the Plaintiffs present any evidence as to the effect of Stonington solely attributing to their damages. To the contrary, when the Plaintiffs' expert witness Michael E. Meadows was asked, "can you tell me what, in your expert opinion, Stonington did wrong to cause sediment to go into the Hollis Pond?" (R. p. 305, lines 9-13), the answer was "okay, I don't know— again, as I've mentioned before, I did not follow close on the individual functions of the different contractors, Stonington or contractors. To me they were all one quantity, one entity, okay." (R. p. 305, lines 16-20). Dr. Meadows continues "but if we are talking about the Stonington Development site, I'm talking about the team." (R. p. 306, lines 1-4). "In my opinion, you know, Stonington has ultimate responsibility for everybody's actions." (R. p. 306, lines 10 and 11). We are casting one hundred percent (100%) of the blame on a fifteen percent (15%) shareholder. The burden of proof for punitive damages is to have clear and convincing evidence. It is submitted that the culpability of Stonington was never

shown by the greater weight of the evidence and by no means was such shown by clear and convincing evidence. The Plaintiff's did not produce any evidence that Stonington was the sole cause for their alleged damages and Stonington should not be held responsible for other players, contractors and subcontractors work and/or land ownership.

Stonington is a small player in this project. Stonington does not build houses on lots it sells to other builders, it has no control over those builders. (R. p. 531, lines 1-8). The other "players" or potential contributors to the Hollis' problems are in part the owners of Phase III of Stonington. This entire phase of the development was sold to another developer/builder, yet no degree of fault was assessed against that entity. As stated by the Plaintiff's expert, he considered all of them as Stonington which would seem to preclude any degree of clear and convincing proof as it is contrary to law. Stonington was effectively charged with the acts and/or omissions of others.

Stonington's post trial motions should have been granted and the Trial Court committed error by failing to dismiss the punitive damages aspect. There was no showing of willful, wanton or reckless conduct on the part of Stonington and therefore should have been allowed to stand.

C) Stonington complied with the plans and specifications prepared by expert independent contractors and with applicable rules and regulations.

The plans and specifications were prepared by Power Engineering (R. p. 484, lines 15-17). There was much ado made over the acknowledgment that Stonington did not follow the Power "Road Map" as to the "detention/retention" pond which was field modified. However, the testimony of Dr. Meadows reveals that the field modification of the detention/retention pond was larger than designed and was in fact, constructed better than as was designed by Powers. (R. p.

200, lines 14-18 and R. p. 227, lines 15-16). The Plaintiffs own witness acknowledged that "not following the road map" resulted in a better plan. This would seem to refute any element that would lead to a charge of punitive damages.

The fact that Power Engineering received a defense verdict would also imply that the jury found no fault with the Power Engineering plans and specifications. It would seem to correspondingly follow that Stonington's improvement of the Power Engineering plans would lead to a conclusion that there was no wantonness or recklessness on the part of Stonington and certainly no malice nor willfulness.

One of the monitoring agencies of all subdivision development plans is Richland County. Richland County sent Stonington a letter commending Stonington for its "above average effort" in implementing sediment and erosion control practices regarding this subdivision. (R. pp. 1122-1123).

It is also important to note that of the various monitoring agencies, the Corps of Engineers, Richland County, the Department of Health and Environmental Control and the Department of Natural Resources, none of them ever issued a fine or other Civil Penalty against Stonington for their work. (R. p. 543, line 20 and p. 545, line 3) (R. p. 654, lines 9-13).

It would appear that Stonington never fell below the 80/20 standard which was the mandatory requirement of Richland County. Argument was made for a water quality standard of 0.5 milliliter. It was within the authority of Richland County to set the standards, all of which Stonington met. A Power Engineering representative stated that the sediment issues exceeded those required by Richland County. Mr. Johnson stated "I know of no engineer that's ever run a 0.5 milliliter, so it has not become a usable bar by which to measure things" (R. p. 616, lines 20-p.621, line 5).

To let stand a finding of actual damages under circumstances when Stonington was within regulatory standards would seem to be contrary to one's sense of justice but to allow a finding of punitive damages would seem to offend one's sense of justice. Even under these circumstances, the Trial Court charged the jury as to the 0.5 milliliter standard which was not promulgated until July of 2005, after the damage was alleged to have occurred which was in the year 2001. The pleadings in this case were not filed until July 29, 2005. (R. p. 501, lines 5-11).

It also must be noted that the Hollis pond is served by Hawkins branch and an unnamed tributary. At no time was the effluent siltation from either of these two sources eliminated.

II THE TRIAL COURT ERRED BY ENTERING THE JURY ROOM

The Trial Court should have granted the Defendant, Stonington's motion for a judgment notwithstanding the verdict or a new trial due to the Court's invasion of the sanctity of the jury room. The Trial Court erred by entering the jury room to answer a juror's question (R. p. 299, lines 11-16). This was a case in which the jury had an affinity to the Trial Court as evidenced by gifts to the Court of bunnies and other humorous drawings (R. p. 672, lines 3-10) and the Court exhibits (R. pp. 785-792 and pp. 1252-1257). These facts coupled with the Court's initial charge to the jury, "and in this case we have actual damages and we have punitive damages as to both Defendants". (R. p. 765, lines 22-24) create, at least the illusion that the Trial Court is instructing the jury to find in favor of the Plaintiffs.

In the matter of State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781 (1983), our Supreme Court stated per curiam, that "We hold this conduct to be reversible error..."

Even though Elmore was a death penalty case, there would seem to be no discernable reasons that a civil Defendant should not be afforded the same protections against judicial

interference as would a criminal Defendant. Admittedly, Stonington's counsel made no objection to the Trial Court's entry into the jury room, but there is no indication that there was any prior notice that he was going to do so. Stonington did not raise this issue to the Trial Court, however the Trial Court's explanatory statement in open court was not explicit as to the fact that the jury room was visited, nor the details of what the Trial Court actually "spoke". It would appear that the Stonington had a right to have such issues presented in open court and that the failure to do so constitutes reversible error.

Other states have specifically addressed this very issue. The New York case of Testa v. Seidler, 81 A.D.2d 715 (NY App. Div.) stated:

The entry of the Trial Justice into the jury room during its deliberations is highly unusual, fraught with dangers and should be avoided in the future.

In Testa, the Appellate Court found that the Trial Justice's entry into the jury room was not reversible error because:

The occurrence was prompted by the following communication from the jury: "Would like to see Judge for clarification on question sheet before coming out." The parties consented to have the Trial Justice respond, defendant's attorney asked that the discussion be recorded by the court reporter and plaintiff's counsel requested that, upon conclusion, the stenographer read the transcript of what transpired.

The issue was similarly addressed in a Florida case of Nissan Motor Corp. v. Padilla, 545 So. 2d 274 (Fla. Ct. App.) which stated:

The sole issue on appeal was whether the trial judge's communication with the jury in the absence of the attorneys after the jury had retired to deliberate warranted a new trial. In the first instance, the judge went into the room where the jury was deliberating and retrieved a box lunch, and no verbal exchange occurred. In the second instance, the jury asked the judge if they could ask questions, and the judge replied affirmatively. The judge

explained the exchange to the attorneys and appellant's counsel failed to object to either communication until after the jury's verdict was returned. On review the court found that while the mere presence of the judge, unaccompanied by counsel, in the same room as the jury after they retired to deliberate constituted an improper communication even though there was no conversation between them, counsel for appellant failed to object to either communication and thereby waived the right to object or request a new trial on that ground.

In the instant matter, there is no indication that Stonington's counsel had any notice that the Trial Court was going into the jury room alone and thus had no opportunity to object. It is urged that this act unduly influenced the jury and/or had a potential to influence the jury.

Stonington respectfully submits that this error of the Trial Court constitutes reversible error.

III.
**THE JURY'S AWARD OF PUNITIVE DAMAGES THAT IS APPROXIMATELY NINE
TIMES THE ACTUAL DAMAGES AWARDED VIOLATES THE APPELLANT'S
RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE
UNITED STATES CONSTITUTION AND REVERSAL IS REQUIRED.**

"The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." BMW v. Gore, 517 U.S. 559, 116 S. Ct. 1589 (1996) (citing TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711 (1993)). The economic penalties that a State inflicts on those who transgress its laws must be supported by the State's interest in protecting its consumers and economy. An award of punitive damages violates due process when it can fairly be categorized as grossly excessive in relation to the State's legitimate interests in punishing unlawful conduct and deterring its repetition. BMW, 517 U.S. at 568, 116 S. Ct. at 1595.

A defendant must receive fair notice of the severity of the penalty that a State may impose on tortious conduct. The three "guideposts" for determining whether adequate notice of

the size of the sanction that a state might impose for misconduct:

- (1) First and "perhaps most important" is the degree of reprehensibility of the conduct;
- (2) Second is the ratio of the sanction to the actual harm inflicted on the plaintiff; and
- (3) Third is comparing the punitive damages award to civil or criminal penalties that could be imposed for similar misconduct. Continental Trend Resources v. OXY USA, Inc., 101 F.3d 634 (10th Cir. 1996) *cert. denied* 117 S. Ct. 1846 (1996) (citing BMW). An appellate court must apply the *de novo* standard of review when considering the constitutionality of a punitive damage award. Cooper Indus., Inc. V. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678, 149 L.Ed.2d 674 (2001).

Reprehensibility. "Purely economic harm may warrant less punishment than harm to health or safety of individuals. But infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." When determining the reprehensibility of the conduct "the questions that we ask are whether a defendant's behavior: causes economic rather than physical harm; would be considered unlawful in all states; involves repeated acts rather than a single one; is intentional; involves deliberate false statements rather than omissions; and is aimed at a vulnerable target." OXY, 101 F.3d at 638 (internal quotes omitted) (citations omitted). In rejecting the award in BMW the Supreme Court noted that there was "no suggestion that [the plaintiff] or any other BMW purchaser was threatened with any additional potential harm." BMW, 517 U.S. at 582, 116 S. Ct. at 1602. The Trial Court intimated that there were veiled threats made by a Stonington agent regarding a proposed sewer line when the agent stated we can have it condemned (R. p. 507, lines 18-25 and p. 508, lines 1-6). It is submitted that in placing a utility easement the appropriate governmental entity, here the City of Columbia, does

have rights of eminent domain. This was a fact not a threat as would rise to a level of reprehensible conduct.

The record does not contain sufficient evidence that Stonington's conduct was so reprehensible as to warrant a "substantial penalty"; there is little or no evidence of the many of the indicia of reprehensibility. The plaintiff suffered only economic harm. Additionally, the cause of action is based upon a single set of circumstances and not a pattern of conduct which involved the Hollis pond. To the contrary, the record is replete with instances of Stonington offering to clear out the pond (R. p. 545, lines 3-15) and actively sought to protect the Hollis property from undue siltation.

Ratio to Actual Damages. The ratio of punitive damages to the actual harm inflicted on the plaintiff is the second guidepost to be considered in evaluating the severity of the sanction. A punitive damages award that is four times the amount of compensatory damages is "close to the line" of constitutional impropriety. BMW, 517 U.S. at 581, 116 S. Ct. at 1602. Where the harm is solely economic and the injury not hard to detect, "the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio." OXY, 101 F.3d at 639. However, this ratio is the constitutional maximum and the evaluations of the other "guideposts" may warrant that a ratio of less than 10:1 be used. See generally F.D.I.C. v. Hamilton, 122 F.3d 854 (10th Cir. 1997); OXY, 101 F.3d 634. In any event, an award of punitive damages must bear a "reasonable relationship to the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." BMW, 517 U.S. at 581, 116 S. Ct. at 1602 (emphasis original) (quoting TXO). "[L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards..." BMW, 517 U.S. at 582, 116 S. Ct. at 1602. As stated above, the Court in BMW rejected the punitive damages award, in part, because there was no suggestion that the

plaintiff or any other BMW purchaser may suffer additional potential harm; thus the harm likely to result was very low.

In the present matter, the jury's award of \$3,500,000.00 in punitive damages is approximately 8.75 times the actual damages award of \$400,000.00. Appellant maintains that the record does not support the reasonable conclusion that its conduct was so egregious as to warrant an punitive penalty that reaches the constitutional maximum. The award of punitive damages alone would equate to a value of \$1,635,514.00 per acre for the entire 2.14 acre Hollis tract. Surely such an award is sufficient to "shock the conscience of any prudent person".

Furthermore, the compensatory damage award of \$400,000.00 which equates to a per acre value of \$186,915.88 is more than sufficient to provide adequate compensation to the Plaintiffs.

BMW has recently been followed by the decision in Exxon Shipping Company et al., v. Grant Baker, et al. 554 U.S. ____ (2008). Therein, the Court affirmatively cites State Farm Mut. Automobile Ins. v. Campell, 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d (2003).

Although we have consistently rejected the notion that the constructional line is marked by a simple mathematical formula," id., at 582, we have determined that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," State Farm, 538 U.S., at 425; "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," id.

Exxon at page 40 points to a median ratio of punitive to compensatory damages of 0.65:1 and states that a 1:1 ratio, which is above the median award is a fair upper limit in such maritime cases. The Court then goes on to apply a reasonable ratio to non-maritime cases, citing State Farm, and stating "[w]hen compensatory damages are substantial then a lesser ratio, perhaps

only equal to compensatory damages can reach the outermost limit of the due process guarantee.
538 US at 425.

In the instant case, the sum of \$400,000.00 is indeed a substantial damage award and such is more than ample to compensate the Plaintiffs when their maximum damages, if any, were in the range of \$266,000.00.

In this instance, the upholding of the jury award as it stands would seemingly violate due process standards.

Comparable Penalties. The final guidepost provided by the Court in BMW is a comparison of the civil and criminal penalties for comparable acts. The Department of Health and Environmental Control have the ability to levy fines and penalties in the event Stonington violated any regulations. The fact that neither did so enforces the contention that Stonington committed no compensable wrong and certainly not to the extent of the jury verdict.

The fundamental question is whether Stonington had reasonable notice that its compliance with regulatory standards of (80/20) could result in such a large punitive award. OXY, 101 F.3d at 641, particularly so when there were no monetary penalties by regulatory agencies.

The regulatory agencies could impose penalties of \$1,000.00 per day for violations yet even at that rate, Stonington would have had to have been in violation for 3,900 days to equate to the jury verdict.

IV

THE TRIAL COURT ERRED IN FAILING TO GRANT STONINGTON'S MOTIONS FOR SUMMARY JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL ABSOLUTE AND/OR NEW TRIAL NISI REMITTITUR

For reasons as previously expressed, the Trial Court erred in failing to grant Stonington's

Motions for Judgment Notwithstanding the Verdict, New Trial Absolute and New Trial Nisi Remittitur.

The facts argued which support this contention are as follows:

- A) Stonington was not shown to solely be at fault. Siltation was shown to have come from the 25 acres that was from Phase III which was previously sold to Landstone Company, Inc., and no longer belonged to Stonington.
- B) Siltation was alleged to have come from Hawkins branch which serves the 775 acre watershed and the unnamed tributary.
- C) Siltation was shown to have come from lots no longer owned by Stonington but were owned by various builders.
- D) Siltation was shown to have been caused by Newman Construction Company and CDG Developers.
- E) Stonington was in compliance with County and State Regulations.
- F) The Plaintiffs' witnesses did not single out Stonington as being the culprit, but lumped the entire watershed and the overall property into Stonington Development, LLC since they were owners of fifteen percent of the property.
- G) Stonington was not shown to be the proximate cause of damage to the Hollis property and certainly not the sole cause.

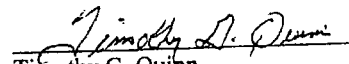
CONCLUSION

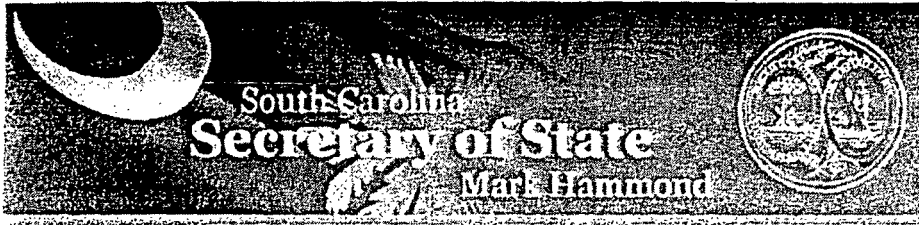
In conclusion it is argued that no showing of proximate cause was made and the aforementioned errors of the Trial Court were such that the verdict of the jury should be reversed in its entirety.

Secondly, the award of punitive damages was not appropriate in this instance and for this reason alone, Stonington should be entitled to have a judgment reversal and/or a new trial granted.

April 24, 2009

Respectfully submitted,


Timothy G. Quinn
1421 Calhoun Street
PO Drawer 12589
Columbia, South Carolina 29211
(803) 771-0936
Fax (803) 254-7751
Attorney for Appellant

**STONINGTON DEVELOPMENT, LLC**

*Note: This online database was last updated on 5/15/2010 6:04:00 PM.
See our Disclaimer.*

DOMESTIC / FOREIGN:	Domestic
STATUS:	Good Standing
STATE OF INCORPORATION	SOUTH CAROLINA
/ ORGANIZATION:	Profit

REGISTERED AGENT INFORMATION

REGISTERED AGENT NAME:	AGENT RESIGNED
ADDRESS:	
CITY:	
STATE:	
ZIP:	
SECOND ADDRESS:	
FILE DATE:	01/13/2000
EFFECTIVE DATE:	01/13/2000
DISSOLVED DATE:	//

Corporation History Records

CODE	FILE DATE	COMMENT	Document
No Agent	12/10/2008	AGENT RESIGNED	
Amendment	12/10/2008	MEMBER DISSOCIATION OF L.K.HARRELL, III	
Amendment	12/10/2008	MEM DISSOCIATED RONALD J. SAFKO	
Amendment	01/17/2007	MEMBERS DISSOCIATION	
Amendment	03/21/2006	MEMBER DISSOCIATION	
LLC Annual Report	07/18/2003	LLC ANNUAL REPORT/2002 TYE 12/31	Image
LLC Annual Report	07/18/2003	LLC ANNUAL REPORT-2003 TYE: 12/31	Image
Amendment	07/25/2001	ANNUAL REPORT-2001	Image
Domestic LLC	01/13/2000	DOMESTIC LIMITED LIABILITY (AT WILL)	Image

Disclaimer: The South Carolina Secretary of State's Business Filings database is provided as a convenience to our customers to research information on business entities filed with our office. Updates are uploaded every 48 hours. Users are advised that the Secretary of State, the State of South Carolina or any agency, officer or employee of the State of South Carolina does not guarantee the accuracy, reliability or timeliness of such information, as it is the responsibility of the business entity to inform the Secretary of State of any updated information. While every effort is made to insure the reliability of this information, portions may be incorrect or not current. Any person or entity who relies on information obtained from this database does so at his own risk.

Physical Address // Edgar Brown Building - 1205 Pendleton Street Suite 525 Columbia, SC 29201
Postal Address // P O. Box 11350 Columbia, SC 29211

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736

Ex parte:

Stephen E. Lipscomb, Ron Safko, and

L.K. Harrell, III, ... Appellants,

In Re:

Stonington Development, LLC, ... Appellant,

v.

Glenn Y. Hollis, Jr., John E. Hollis,

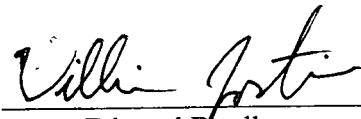
Joseph R. Robinson, and Janette H.

Robinson..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other materials.

August 10, 2010



James Edward Bradley

William B. Fortino

Moore, Taylor & Thomas, P.A.

1700 Sunset Boulevard

P.O. Box 5709

West Columbia, SC 29171

Tel: 803-796-9160

Fax: 803-791-8410

Attorneys for Appellant L.K. Harrell, III

IN THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Common Pleas

L. Casey Manning

2005-CP-40-3736

Ex parte:

Stephen E. Lipscomb, Ron Safko, and
L.K. Harrell,
III.....Appellants,

In Re:

Stonington Development,
LLC.....Appellant,

v.

Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, and Janette H.
Robinson.....Respondents.

PROOF OF SERVICE

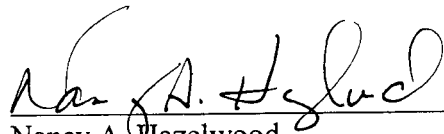
I certify that I have served the Appellant L.K. Harrell, III's Initial Reply Brief on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid on August 16, 2010, addressed to their attorneys of record as follows:

H. Freeman Belser, Esquire
William C. Dillard, Jr., Esquire
P.O. Box 96
Columbia, SC 29202

Timothy Quinn, Esquire
William M. Saltzman, Esquire
P.O. Drawer 12589
Columbia, SC 29211

George V. Hanna, IV, Esquire
Kelley Shull Cannon, Esquire
Caroline H. Raines, Esquire
P.O. Box 12009
Columbia, SC 29211

August 16, 2010



Nancy A. Hazelwood
Assistant to James Edward Bradley

18840

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736

RECEIVED

SEP 03 2010

SC Court of Appeals

ORIGINAL

Ex Parte: Stephen E. Lipscomb, Ron Safko,
And L. K. Harrell, III,.....Appellants,

In Re:
Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, Janette H. Robinson.....Respondents.

v.

Stonington Development, LLC.....Appellant,

APPENDIX

H. Freeman Belser
William C. Dillard, Jr.
P.O. Box 96
Columbia, SC 29202
(803) 929-0096
Attorneys for Respondents

George V. Hanna, IV
Kelley Shull Cannon
Caroline H. Raines
P.O. Box 12009
Columbia, SC 29211
(803) 758-6000
Attorneys for Appellant Ron E. Safko

James Edward Bradley
William B. Fortino
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Attorneys for Appellant L. K. Harrell, III

Timothy G. Quinn
William M. Saltzman
P.O. Drawer 12589
Columbia, SC 29211
(803) 771-0936
Attorneys for Appellants Stephen E.
Lipscomb and Stonington Development,
LLC

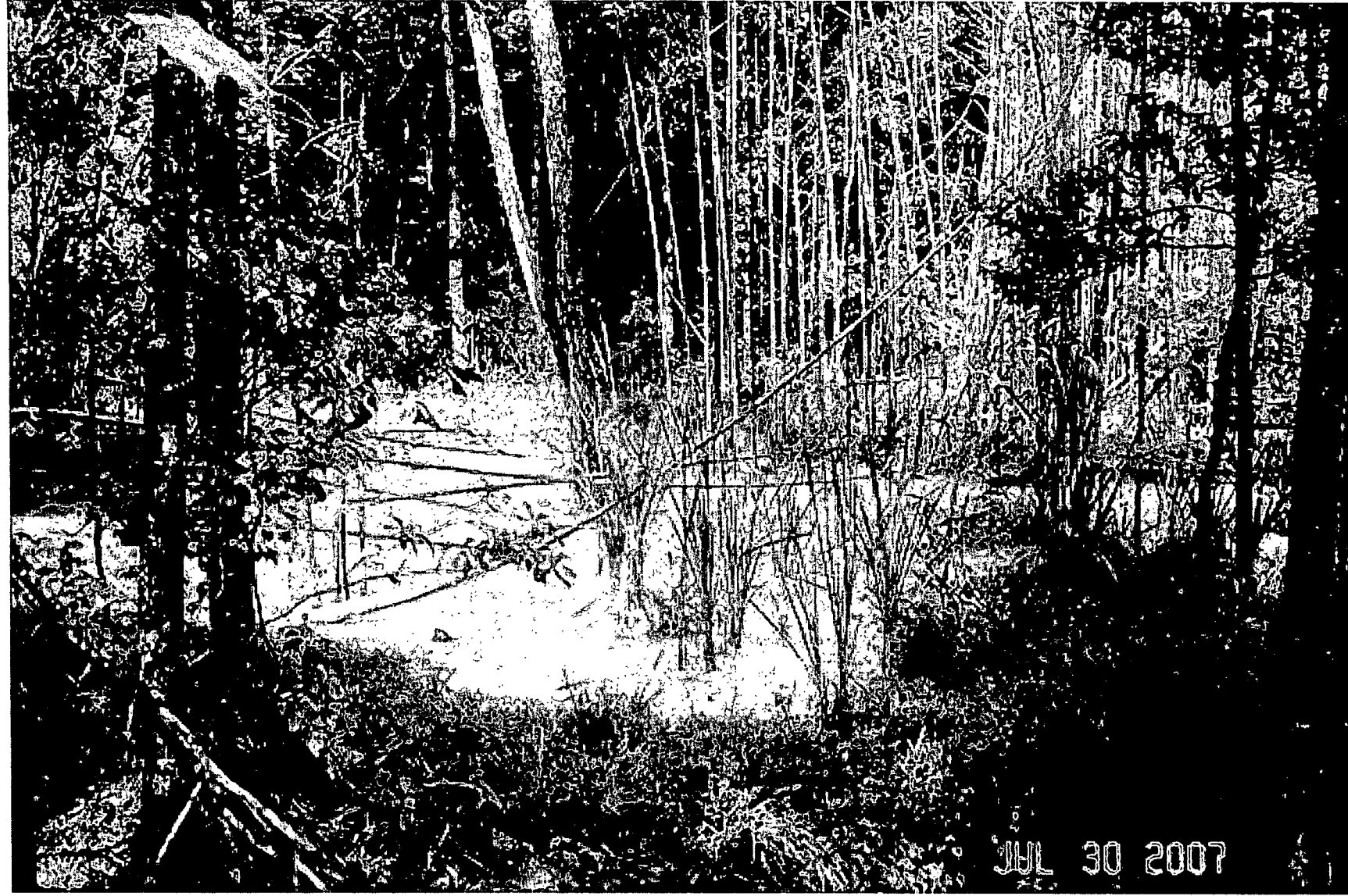
INDEX

Plaintiff's Photographic Exhibits from April 14, 2009 Hearing (with color photographs)	2
Exhibit 2 (Group of 16 Photographs)	2
Exhibit 3 (Affidavit of Janette H. Robinson dated August 21, 2007, with photographs attached)	17
Exhibit 4 (Affidavit of Janette H. Robinson dated September 11, 2008, with photographs attached).....	25















APR 11 2002





APA 5-238













STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND) Case Number: 05-CP-40-3736

Glenn Y. Hollis, Jr.,)
John E. Hollis, Joseph)
R. Robinson, Janette H.)
Robinson,)

Plaintiffs,)

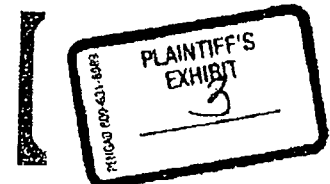
v.)

AFFIDAVIT OF
JANETTE H. ROBINSON

Stonington Development,)
LLC, Power Engineering)
Company, Inc.,)
Ecological Associates,)
Inc., Newman)
Construction, Inc., and)
CGD Developers, Inc.,)
Defendants.)

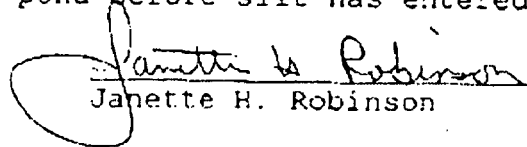
PERSONALLY APPEARED BEFORE ME, JANETTE H. ROBINSON,
deposes and says that:

1. My name is Janette H. Robinson.
2. I was one of four family members who were plaintiffs in the case of Glenn Y. Hollis, Jr., et al. v. Stonington Development, LLC, et al., Case Number 2005-CP-40-3736. A trial was held on my family's case during the week of April 2, 2007 and on April 6, 2007 the jury returned a verdict for me and my family in the amount of \$3,900,000.00, actual and punitive damages.
3. I reside on one piece of the property that was the subject of the lawsuit and my house overlooks my family's upper and lower ponds. I access my house using a dirt ingress/egress easement commonly known as Hollis Pond Road. I drive on Hollis Pond Road several times a day to run errands and to return home. The residential subdivision owned by Stonington



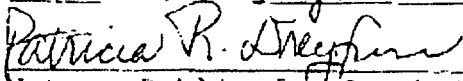
Development, LLC is visible from the road and I occasionally drive on public roads through Stonington.

4. The problem with siltation and increased runoff from Stonington onto our properties and into our ponds has continued since the trial. Based on my personal observations of site conditions at Stonington since the trial, with only one exception, Stonington has made no visible effort to stabilize the soil on its property to prevent siltation and increased runoff from damaging my family's properties and ponds. The only occasion where I saw silt fences being installed was on or about July 9, 2007, when I saw a crew installing silt fences parallel to the ingress/egress easement that I use to access my property and parallel to the property line. The foreman told me that he was employed by Carolina Erosion and Sediment Control, LLC.
5. Included with this Affidavit are seven photographs that I took on July 30, July 31, and August 12, 2007. Photograph 1, dated July 31, 2007 was taken from the middle dam and shows heavy siltation in my family's upper pond. Photograph 2, taken July 30, 2007, shows a plume of silt entering into my family's upper pond. Photograph 3, dated July 30, 2007, shows heavy siltation in the unnamed tributary that runs through Phase II of Stonington Development directly into my family's upper pond. Photographs 4, 5, and 6, all dated July 30, 2007, were taken in Phase II of Stonington Development and show the failure and/or absence of BMP devices along Roundtree Road. Photograph 7, dated August 12, 2007, is taken from the west side of my family's ponds and shows the distinct difference in color between the muddy upper pond and the black lower pond before silt has entered into it.


Janette H. Robinson

SWORN TO and SUBSCRIBED BEFORE me this

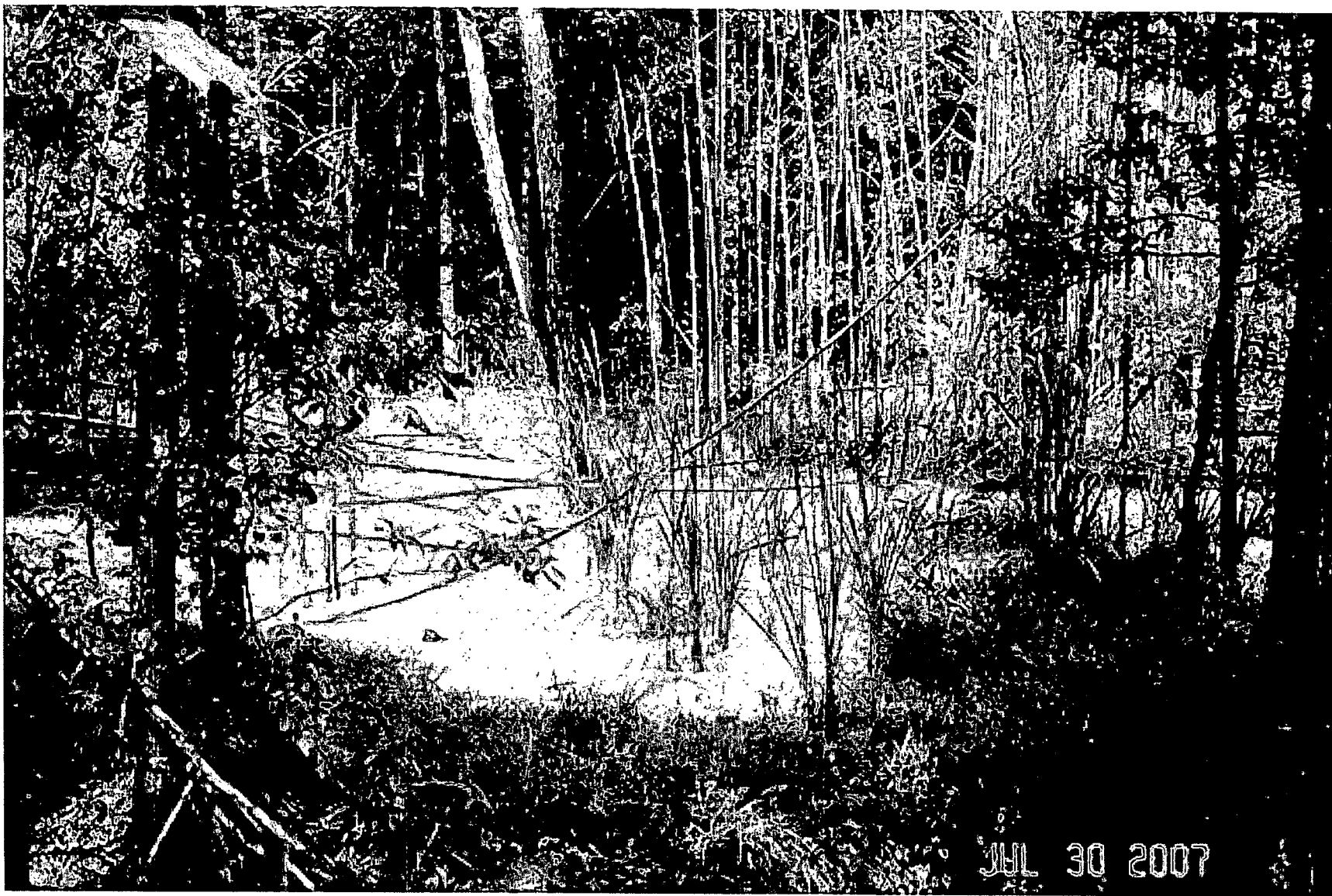
21st day of August, 2007



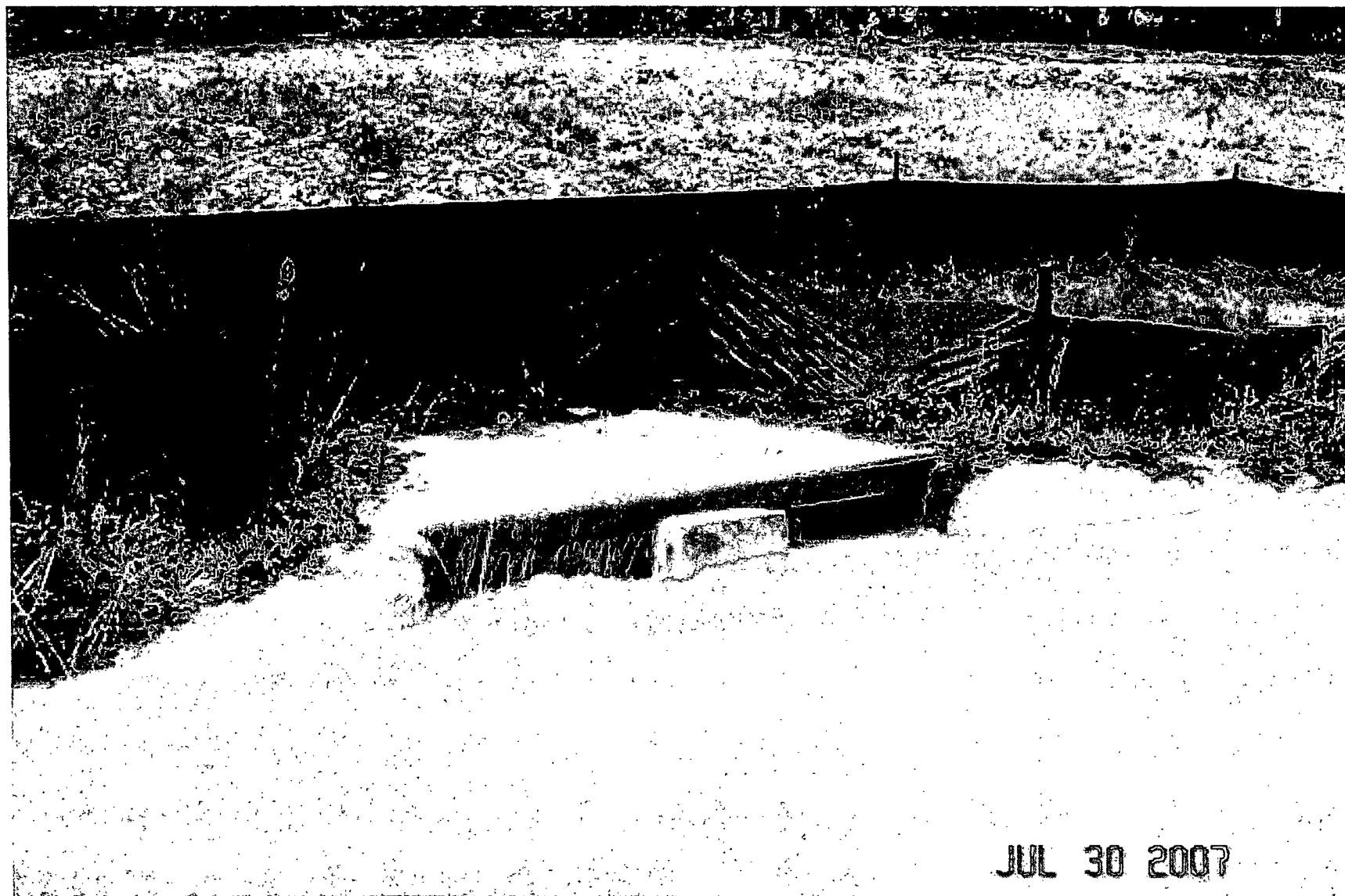
Notary Public for South Carolina

My Commission Expires: 5-23-13





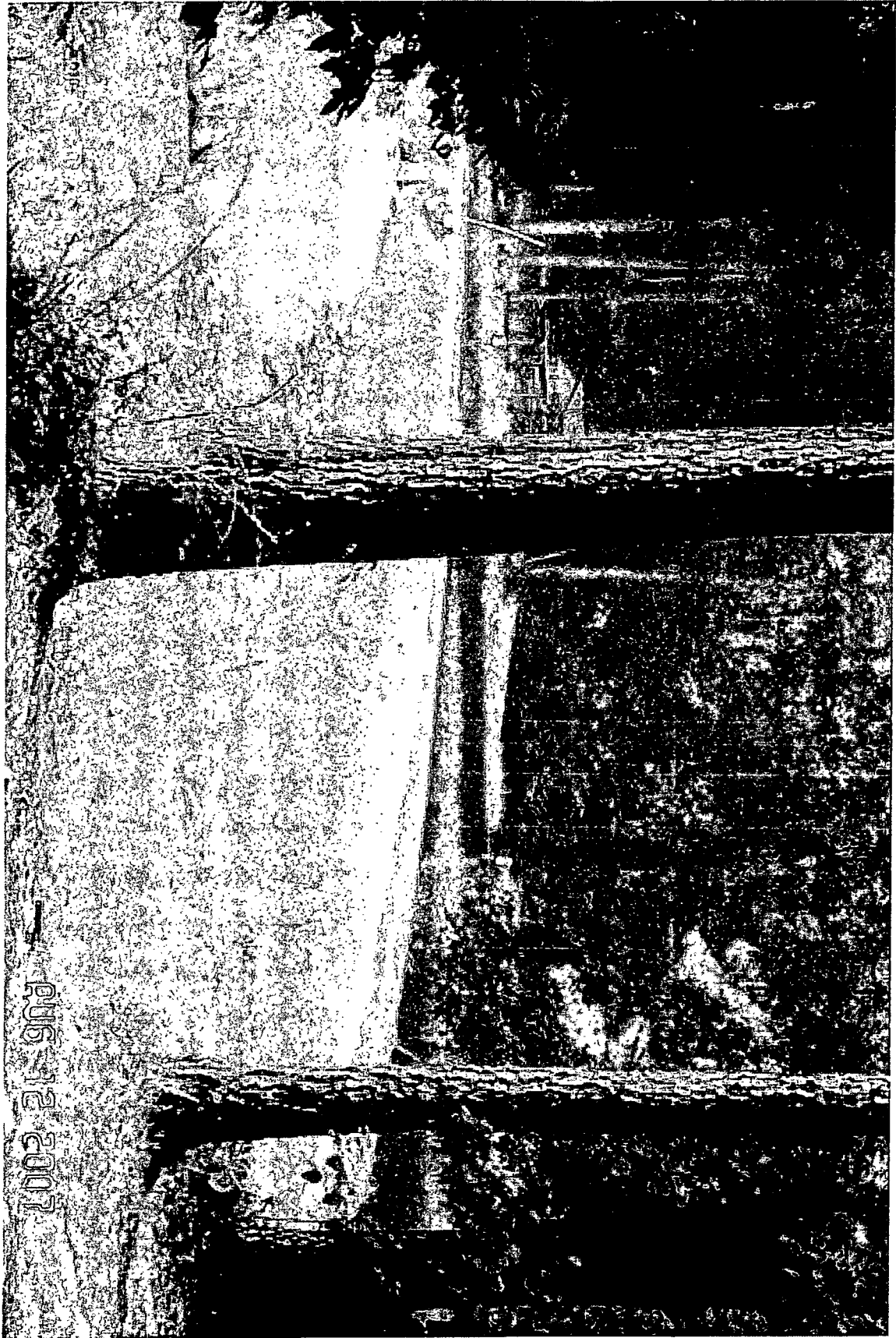
JUL 30 2007



JUL 30 2007







STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)

IN THE COURT OF COMMON PLEAS
 IN THE FIFTH JUDICIAL CIRCUIT
 Case Number 2005 CP 40-3736

Glenn Y. Hollis, Jr.,)
 John E. Hollis, Joseph)
 R. Robinson, Janette H.)
 Robinson,)

Plaintiffs)

v.)

Stonington Development,)
 LLC,)

Defendant.)

APPIDAVIT OF
 JANETTE H. ROBINSON

FILED
 2006 SEP 11 PM 2:52
 DANIEL J. SCOTT
 C.C. & G.S.

PERSONALLY APPEARED BEFORE ME, JANETTE H. ROBINSON,
 deposer and says that:

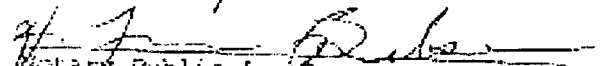
1. My name is Janette H. Robinson.
2. I was one of four family members who were plaintiffs in the case of Glenn Y. Hollis, Jr., et al. v. Stonington Development, LLC, et al., Case Number 2005-CP-40-3736. A jury trial was held on my family's case during the week of April 2, 2007, and on April 6, 2007, the jury returned a verdict for me and my family in the amount of \$3,300,000.
3. As shown by the record of this case, on June 26, 2008 Judge Manning signed and the Clerk of Court filed an Order Granting Plaintiffs' Repeated and Renewed Post-Trial Motion for an Injunction Against Stonington Development, LLC and the Order was served the same day on Stonington and its members: Stephen E. Lipscomb, Ron Salko, and L. K. Harrell, III.
4. I reside on one piece of the property that was the subject of the lawsuit. My house overlooks my family's upper and lower ponds. I access my house using a dirt ingress/egress easement commonly known as Hollis Pond Road. I drive on Hollis Pond Road several times a day to run errands and to return home. The residential subdivision owned by Stonington Development, LLC is visible from the road and I occasionally drive on public roads through Stonington.



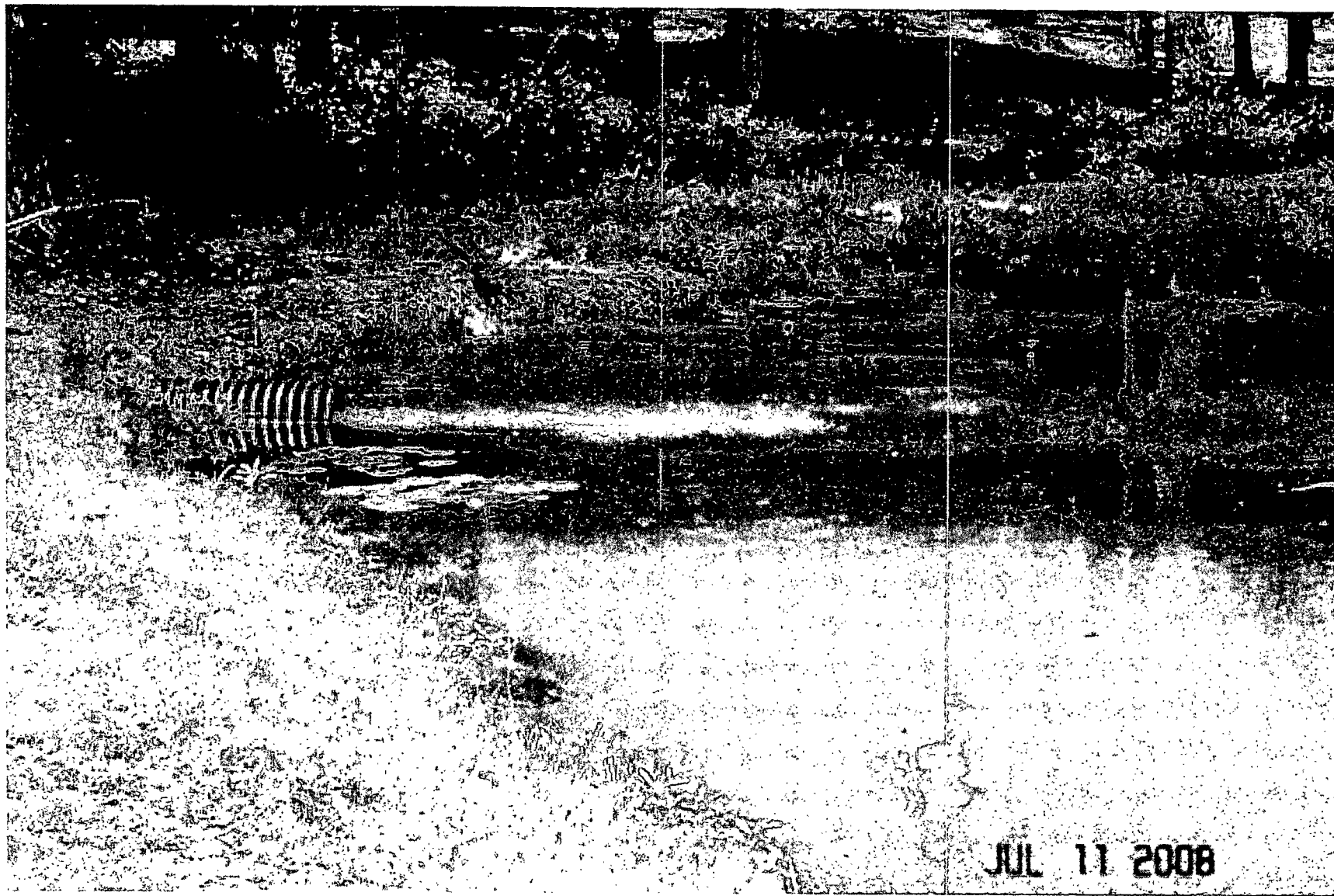
4. Both since the trial and since June 26, 2008, the problem with siltation and increased runoff from Stonington onto my family's properties and into our ponds has continued. Based on my personal observations of site conditions at Stonington since June 26, 2008, Stonington and its members have made no visible effort to prevent siltation and increased runoff from damaging my family's properties and ponds.
5. Attached to this Affidavit are 9 photographs that I took on July 13, 2008, August 13, 2008, and September 10, 2008. All of the photographs were taken by me on my family's property to show the sediment-laden stormwater being discharged from Stonington onto our properties and into our ponds.


Janette H. Robinson

SWORN TO and SUBSCRIBED BEFORE me this
16th day of September, 2008


Notary Public for South Carolina,
My Commission Expires: 5/30/12



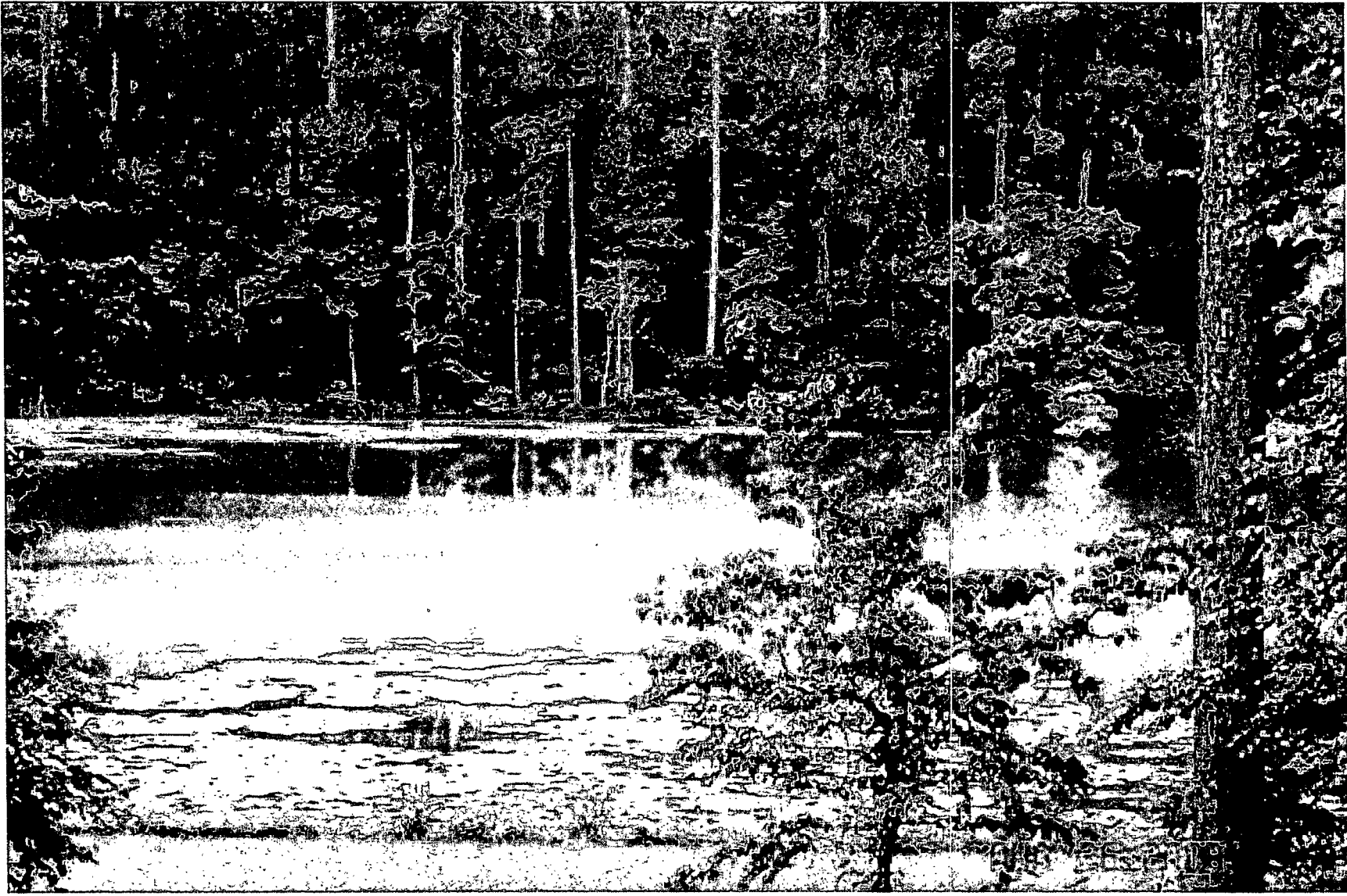


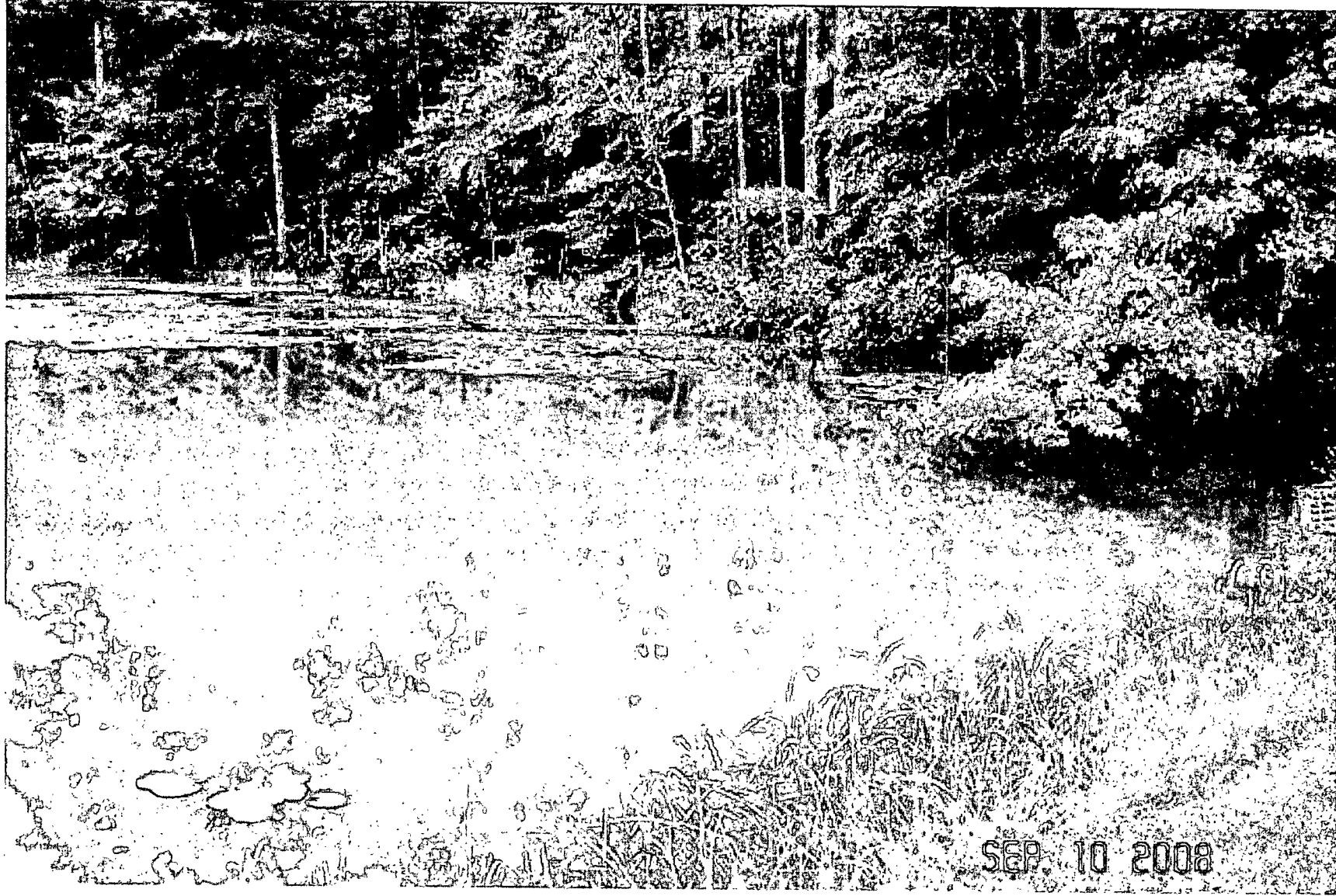












THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736

Ex Parte: Stephen E. Lipscomb, Ron Safko,
And L. K. Harrell, III, ...Appellants,

In Re:

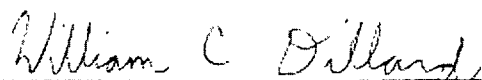
Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, Janette H. Robinson Respondents.

v.

Stonington Development, LLC Appellant,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appendix to the Record on Appeal contains only those materials for inclusion of which the Appellants' counsel have provided written consent.



H. Freeman Belser
William C. Dillard, Jr.
Belser & Belser, P.A.
1901 Main St., Suite 1550 (29201)
P.O. Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Respondents

September 1, 2010

Belser & Belser, P.A.

C. HEYWARD BELSER, SR.
(1918-1994)
CLINCH H. BELSER, JR.
MICHAEL J. POLK
H. FREEMAN BELSER
WILLIAM C. DILLARD, JR.
ROBERT YOUNG, P.A.
OF COUNSEL

ATTORNEYS AND COUNSELORS AT LAW
POST OFFICE BOX 98
COLUMBIA, SOUTH CAROLINA 29202
FACSIMILE 803-929-0196
TELEPHONE 803-929-0096
www.belserpa.com

OFFICE LOCATION:
BANK OF AMERICA PLAZA
1901 MAIN STREET
SUITE 1550
COLUMBIA, SC 29201

August 20, 2010

Timothy G. Quinn, Esq.
William M. Saltzman, Esq.
Quinn & Quinn
1421 Calhoun Street
Columbia, South Carolina 29211

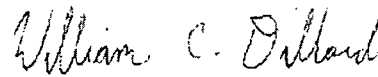
Re: Glenn Y. Hollis, et al, v. Stonington Development, LLC
Case No. 2005-CP-40-8736
Case Tracking No. 2010-151167

Dear Tim and Will,

I am writing to request your consent to our supplementation of the Record on Appeal in the above referenced matter. In particular, we would like to include color copies of the photographs we designated for inclusion. Currently, the Record on Appeal only includes black and white copies.

If you consent, I would ask that you please sign below. Thank you for your assistance in this matter.

With best regards,


William C. Dillard

I hereby consent to the Respondents' request to supplement
the Record on Appeal:

 (signature)
Attorney for Appellants Stephen E. Lipscomb and Stonington
Development, LLC

WCD/sra

Belser & Belser, P.A.

C. HEYWARD BELSER, SR.
(1919-1994)

CLINCH H. BELSER, JR.

MICHAEL J. POLK

H. FREEMAN BELSER

WILLIAM C. DILLARD, JR.

ROBERT YOUNG, P.A.
OF COUNSEL

ATTORNEYS AND COUNSELORS AT LAW

POST OFFICE BOX 96

COLUMBIA, SOUTH CAROLINA 29202

FACSIMILE 803-929-0196

TELEPHONE 803-929-0006

www.belserpa.com

OFFICE LOCATION
BANK OF AMERICA PLAZA
1901 MAIN STREET
SUITE 1550
COLUMBIA, SC 29201

August 20, 2010

James Edward Bradley, Esq.
William B. Fortino, Esq.
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
West Columbia, South Carolina 29169

Re: Glenn Y. Hollis, et al, v. Stonington Development, LLC
Case No. 2005-CP-40-3736
Case Tracking No. 2010-151167

Dear James and Bill,

I am writing to request your consent to our supplementation of the Record on Appeal in the above referenced matter. In particular, we would like to include color copies of the photographs we designated for inclusion. Currently, the Record on Appeal only includes black and white copies.

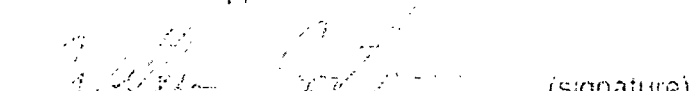
If you consent, I would ask that you please sign below. Thank you for your assistance in this matter.

With best regards,



William C. Dillard

I hereby consent to the Respondents' request to supplement
the Record on Appeal.


(signature)
Attorneys for Appellant L.K. Harrell III

WCD/sra

Belser & Belser, P.A.

C. HEYWARD BELSER, SR.
(1918-1994)
CLINCH H. BELSER, JR.
MICHAEL J. POLK
H. FREEMAN BELSER
WILLIAM C. DILLARD, JR.
ROBERT YOUNG, PA.
OF COUNSEL

ATTORNEYS AND COUNSELORS AT LAW
POST OFFICE BOX 96
COLUMBIA, SOUTH CAROLINA 29202
FACSIMILE 803-929-0196
TELEPHONE 803-929-0096
www.belserpa.com

OFFICE LOCATION:
BANK OF AMERICA PLAZA
1901 MAIN STREET
SUITE 1550
COLUMBIA, SC 29201

August 20, 2010

George V. Hanna, IV, Esq.
Howser, Newman & Besley, LLC
1508 Washington Street
Columbia, SC 29211

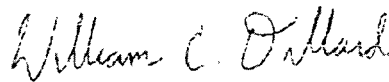
Re: Glenn Y. Hollis, et al, v. Stonington Development, LLC
Case No. 2005-CP-40-3736
Case Tracking No. 2010-151167

Dear George,

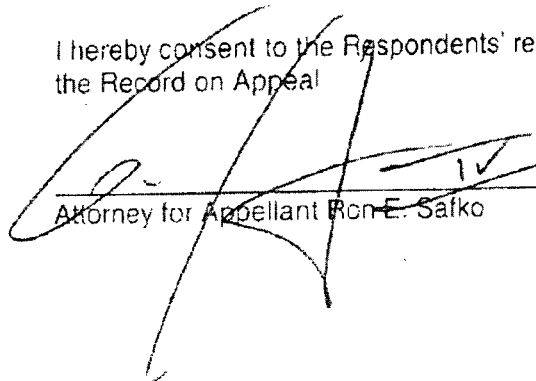
I am writing to request your consent to our supplementation of the Record on Appeal in the above referenced matter. In particular, we would like to include color copies of the photographs we designated for inclusion. Currently, the Record on Appeal only includes black and white copies.

If you consent, I would ask that you please sign below. Thank you for your assistance in this matter.

With best regards,


William C. Dillard

I hereby consent to the Respondents' request to supplement
the Record on Appeal



Attorney for Appellant Ron E. Safko (signature)

WCD/sra

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736

RECEIVED
SEP 03 2010
SC Court of Appeals

Ex Parte: Stephen E. Lipscomb, Ron Safko,
And L. K. Harrell, III,.....Appellants,

In Re:
Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, Janette H. Robinson.....Respondents.

v.

Stonington Development, LLC.....Appellant,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appendix to the Record on Appeal contains only those materials for inclusion of which the Appellants' counsel have provided written consent.

William C. Dillard

H. Freeman Belser
William C. Dillard, Jr.
Belser & Belser, P.A.
1901 Main St., Suite 1550 (29201)
P.O. Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Respondents

September 1, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736
Tracking Number 2010-151167

RECEIVED
SEP 03 2010
SC Court of Appeals

Ex Parte: Stephen E. Lipscomb, Ron Safko,
And L. K. Harrell, III, ...Appellants,

In Re:
Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, Janette H. Robinson.....Respondents.

v.

Stonington Development, LLC.....Appellant,

PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondents** and **Appendix to the Record on Appeal** on Stephen E. Lipscomb, Ron Safko, L. K. Harrell, III, and Stonington Development, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on September 3, 2010, addressed to attorneys of record as follows:

Timothy Quinn, Esquire
Quinn & Quinn, Attorneys at Law
P.O. Drawer 12589
Columbia, SC 29211

George V. Hanna, Esquire
Howser, Newman & Belsey, LLC
P.O. Box 12009
Columbia, SC 29211

J. Edward Bradley, Esquire
Moore Taylor & Thomas, P.A.
P.O. Box 5709
West Columbia, SC 29171

September 3, 2010

William C. Dillard

H. Freeman Belser
William C. Dillard, Jr.
Belser & Belser, P.A.
1901 Main St., Suite 1550 (29201)
P.O. Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Respondents

ORIGINAL

IN THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning

2005-CP-40-3736

RECEIVED

AUG 23 2010

SC Court of Appeals

ORIGINAL

Ex parte: Stephen E. Lipscomb, Ron Safko,
and L. K. Harrell, III. Appellants,

In Re:
Glenn Y. Hollis, Jr., John E. Hollis, Joseph R.
Robinson, Janette H. Robinson, ... Respondents,

v.

Stonington Development, LLC Appellant.

FINAL BRIEF OF APPELLANT

Kelley Shull Cannon
George V. Hanna, IV
Caroline H. Raines
HOWSER, NEWMAN & BESLEY,
L.L.C.
1508 Washington Street
P.O. Box 12009
Columbia, SC 29211
(803) 758-6000
ATTORNEYS FOR RONE SAFKO

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	4
ARGUMENT.....	5
1. Did The Circuit Court Err In Concluding That It Had Jurisdiction Over Safko Where Safko Was Never Made A Party To The Underlying Action?.....	5
2. Did The Circuit Court Err In Determining That Safko Was Individually Bound By The Injunction Issued Against Stonington, LLC And Its Members?.....	6
3. Did The Circuit Court Err In Failing To Find That South Carolina Law Provides A Corporate Shield To Protect Former Individual Member Safko From The Obligations Of Stonington, LLC?.....	10
4. Did The Circuit Court Err In Holding Safko In Contempt For Violating An Injunction Order Where The Injunction Order Does Not Sufficiently Set Forth The Act To Be Enjoined?.....	11
5. Did The Circuit Court Err In Finding That Safko Intentionally Violated The Terms Of The Injunction?.....	12
6. Did The Circuit Court Err In Failing To Find That The Respondents Failed To Provide Notice As Required By S.C. Code Ann. § 15-43-120?.....	14
7. Did The Circuit Court Err In Finding Safko Individually Liable For Violations Of Richland County Ordinance § 26-273(b) And S.C. Code Ann. § 48-14-140?.....	14
8. Did The Circuit Court Err In Failing To Find That The Order Of Contempt Unjustly Enriches The Respondents?.....	15
9. Did The Circuit Court Err In Awarding Attorneys' Fees Where The Respondents Failed To Present An Attorney Client Fee Agreement.....	17
10. Did The Circuit Court Err In Awarding Attorneys' Fees Where The Respondents Failed To Present A Fee Invoice Describing The Services Rendered And The Time Spent?.....	18

11.	Did The Circuit Court Err In Awarding Attorneys' Fees Where The Respondents Failed To Show That The Nature, Extent, And Difficulty Of The Services Rendered Justify An Award Of Attorneys' Fees?.....	19
12.	Did The Circuit Court Err In Failing To Find That The Award Of Attorneys' Fees Was Not Ripe?.....	19
CONCLUSION.....		20

TABLE OF AUTHORITIES

Cases Cited

<u>Cheap-O's Truck Stop, Inc. v. Cloyd</u> , 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002).....	13, 15, 16
<u>Chisolm v. Caines</u> , 147 F.Supp. 188 (D. S.C. 1954).....	7
<u>Durlach v. Durlach</u> , 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004).....	13
<u>Ex Parte Cannon</u> , 685 S.E.2d 814 (Ct. App. 2009).....	18
<u>Floyd v. Floyd</u> , 365 S.C. 56, 615 S.E.2d 456 (Ct. App. 2005)	12, 13
<u>Glasscock v. Glasscock</u> , 304 S.C. 158, 403 S.E.2d 313 (1991)	19
<u>Grosshuesch v. Cramer</u> , 377 S.C. 1, 659 S.E.2d 112 (2008).....	8
<u>Haselwood v. Sullivan</u> , 283 S.C. 29, 320 S.E.2d 499 (Ct. App. 1984).....	12
<u>Schmidt v. Lessard</u> , 414 U.S. 479 (1974).....	12
<u>State Record Co., Inc. v. State</u> , 332 S.C. 346, 504 S.E.2d 592 (1998).....	5
<u>Universal Benefits, Inc. v. McKinney</u> , 561 S.E.2d 659, 349 S.C. 179 (Ct. App. 2002).....	5
<u>Whaley v. CSX Transp., Inc.</u> , 362 S.C. 456, 609 S.E.2d 286 (2005).....	5
<u>Whetstone v. Whetstone</u> , 309 S.C. 277, 420 S.E.2d 877 (Ct. App. 1992).....	13
<u>Williamson v. Middleton</u> , 383 S.C. 490, 681 S.E.2d 867 (2009).....	17

Statutes, Rules & Other Authority

S.C. Code Ann. §15-43-120.....	14, 20
S.C. Code Ann. §33-44-303.....	10, 11
S.C. Code Ann. §48-14-140.....	14, 15, 20
Rule 4, SCRCPP.....	5
Rule 19, SCRCPP.....	5
Rule 65, SCRCPP.....	4, 5, 6, 7, 11, 20
Richland County Ordinance § 26-273.....	14 15, 20
42 Am.Jur.2d Injunctions § 299.....	8

STATEMENT OF ISSUES ON APPEAL

- 1. Did The Circuit Court Err In Concluding That It Had Jurisdiction Over Safko Where Safko Was Never Made A Party To The Underlying Action?**
- 2. Did The Circuit Court Err In Determining That Safko Was Individually Bound By The Injunction Issued Against Stonington, LLC And Its Members?**
- 3. Did The Circuit Court Err In Failing To Find That South Carolina Law Provides a Corporate Shield To Protect Former Individual Member Safko From The Obligations Of Stonington, LLC?**
- 4. Did The Circuit Court Err In Holding Safko In Contempt For Violating An Injunction Order Where The Injunction Order Does Not Sufficiently Set Forth The Act To Be Enjoined?**
- 5. Did The Circuit Court Err In Finding That Safko Intentionally Violated The Terms Of The Injunction?**
- 6. Did The Circuit Court Err In Failing To Find That The Respondents Failed To Provide Notice As Required by S.C. Code Ann. § 15-43-120?**
- 7. Did The Circuit Court Err In Finding Safko Individually Liable For Violations Of Richland County Ordinance § 26-273(b) And S.C. Code Ann. § 48-14-140?**
- 8. Did The Circuit Court Err In Failing To Find That The Order Of Contempt Unjustly Enriches The Respondents?**
- 9. Did The Circuit Court Err In Awarding Attorney's Fees Where The Respondents Failed To Present An Attorney Client Fee Agreement?**
- 10. Did The Circuit Court Err In Awarding Attorney's Fees Where The Respondents Failed To Present A Fee Invoice Describing The Services Rendered And The Time Spent?**
- 11. Did The Circuit Court Err In Awarding Attorney's Fees Where The Respondents Failed To Show That The Nature, Extent, And Difficulty Of The Services Rendered Justify An Award Of Attorney's Fees?**
- 12. Did The Circuit Court Err In Failing To Find That The Award Of Attorney's Fees Was Not Ripe?**

STATEMENT OF THE CASE

The Respondents, Glenn Y. Hollis, Jr., John E. Hollis, Joseph R. Robinson, and Janette H. Robinson ("Respondents" or "Plaintiffs"), commenced the underlying action against Stonington Development, LLC ("Stonington") and sought actual and punitive damages and injunctive relief under various causes of action arising from the discharge of sediment-laden stormwater onto the Respondents' property. (R. pp. 40-55). On April 6, 2007, a Richland County jury rendered a verdict in favor of the Respondents and the Respondents later elected a remedy under the private nuisance cause of action. Appellant Ron Safko ("Safko") was not a party to this action. (R. pp. 40-55). The Court filed the Orders on November 12, 2007 and December 4, 2007. Stonington filed a Notice of Appeal on December 13, 2007, and that appeal is currently pending. Additionally, the Respondents have filed a separate action against Stonington and Stephen E. Lipscomb ("Lipscomb"), to pierce the corporate veil, which is also currently pending. In the corporate veil action Lipscomb brought in Safko, and L.K. Harrell, III, ("Harrell") as third-party Defendants. On June 26, 2008, the Circuit Court issued an order ("Injunction Order") enjoining Stonington and "its officers, agents, employees, and members" "from discharging sediment-laden stormwater onto the plaintiffs' property." (R. p. 26).

This appeal is from the Circuit Court Orders issued on September 28, 2009 ("Contempt Order"), and January 7, 2009 ("Attorneys' Fees Order"), which held Stonington, Lipscomb, Safko and Harrell in contempt for failing to comply with the June 26, 2008 Injunction Order, awarded compensatory contempt in the amount of \$25,000 to the Respondents, and awarded attorneys' fees and costs to the Respondents in the amount of \$27,695. (R. pp. 28-33; R. pp. 34-35). The Injunction Order is captioned, "Order

Granting [the Respondents'] Restated And Renewed Post-Trial Motion For An Injunction Against Stonington Development, LLC," and states that it is binding on "Stonington Development, LLC and its officers, agents, employees, and members." (R. p. 27). On September 11, 2008, Respondents filed a motion seeking an order from the Court holding Stonington and its members in contempt of court for failing to comply with the Injunction Order. A Rule to Show Cause hearing was held on April 14, 2009, and on September 28, 2009, the Circuit Court held Stonington, Lipscomb, Safko and Harrell in contempt of court for failing to comply with the Injunction Order. (R. p. 32).

In the Contempt Order, the Court also found Stonington, Lipscomb, Safko and Harrell jointly and severally liable for compensatory contempt in the amount of \$25,000, to be paid to the Respondents, and for reasonable attorneys' fees and costs. (R. p. 32). On October 7, 2009, Safko filed a motion to alter or amend the Contempt Order. On October 8, 2009, counsel for Respondents filed a motion for attorneys' fees and costs, which the Circuit Court granted on January 7, 2010. (R. p. 34). In the Attorneys' Fees Order, the Court ordered judgment in the amount of \$52,695, including the \$25,000 in compensatory contempt previously awarded and \$27,695 in attorneys' fees and costs, entered against Stonington, Lipscomb, Safko and Harrell. (R. p. 35). The Attorneys Fees Order also denied Safko's October 7, 2009 motion to alter or amend the Contempt Order. (R. p. 34). On January 19, 2010, Safko filed a motion to alter or amend the Attorneys' Fees Order. On February 5, 2010, Safko filed and served a Notice of Appeal of the Contempt Order and the portion of the Attorneys' Fees Order denying Safko's motion to alter or amend the Contempt Order. On March 15, 2010, the Circuit Court denied Safko's motion to alter or amend the Attorneys' Fees Order. (R. p. 37). On April 14,

2010, Safko filed and served a Notice of Appeal of the Attorneys' Fees Order and the March 15, 2010 Order denying Safko's motion to alter or amend. Stonington, Lipscomb, and Harrell have also appealed the September 28, 2010 Contempt Order and the January 7, 2010 Attorney's Fees Order.

STATEMENT OF FACTS

On June 26, 2008, the Circuit Court issued an Order enjoining Stonington "henceforth from discharging sediment-laden stormwater onto the plaintiffs' property." (R. p. 26). The Circuit Court further ordered that "[i]n accordance with Rule 65(d) of the South Carolina Rules of Civil Procedure, this injunction is binding upon Stonington . . . and its officers, agents, employees, and members." (R. p. 27). The Circuit Court held Safko in contempt for failing to comply with the Injunction Order and further ordered that Safko was individually liable to pay compensatory contempt damages in the amount of \$52,695, including \$27,695 in attorneys' fees. (R. p. 32; R. p. 35). The only evidence offered by the Respondents at the Rule to Show Cause hearing was testimony from one of the Respondents and old photographs.¹ Although Safko was at one time a member of Stonington, he has since disassociated himself from the LLC, and was not a member of Stonington at the time the Circuit Court issued the Contempt Order. Furthermore, while a member of Stonington, Safko at no time possessed a controlling interest.

¹ The photographs introduced dated from April 15, 2007 through February of 2009. (Transcript, Rule to Show Cause Hearing, April 14, 2009, 26:1-25.) Co-counsel objected to these photographs on the grounds that many of them were taken prior to the June 26, 2008 Injunction Order and that sufficient foundation had not been laid to admit the rest of the photographs. Id.

ARGUMENT

1. Did The Circuit Court Err In Concluding That It Had Jurisdiction Over Safko Where Safko Was Never Made A Party To The Underlying Action?

In the original action giving rise to the Injunction Order, Safko was neither named as a Defendant nor served with a summons as required by Rule 4, SCRCP. (R. pp. 40-55) The sole Defendant in the original action is Stonington. (R. pp. 40-55.) In addition, the Plaintiffs never joined Safko pursuant to Rule 19, SCRCP. Therefore, the Court never obtained jurisdiction over Safko individually. Whaley v. CSX Transp., Inc., 362 S.C. 456, 474, 609 S.E.2d 286, 295 (2005) (proper service of process conveys the court with personal jurisdiction over a defendant). Without proper jurisdiction, the Circuit Court has no power to enforce the judgment rendered in the underlying action against Safko. Universal Benefits, Inc. v. McKinney, 561 S.E.2d 659, 661, 349 S.C. 179, 183 (Ct. App. 2002) (a judgment rendered without personal jurisdiction is void).

Likewise, because the Circuit Court did not have jurisdiction over Safko, Safko was not individually bound by the Injunction Order and could not have individually been in contempt of that Order. The Injunction Order did not mention Safko or require Safko individually to take any affirmative action or to refrain from taking any specific action. (R. pp. 25-27). Pursuant to Rule 65(d), SCRCP, a non-party may be restricted by an injunction order if the non-party is an agent of or in active concert with the party and the non-party receives actual notice² of the injunction. State-Record Co., Inc. v. State, 332 S.C. 346, 349-50, 504 S.E.2d 592, 594 (1998). However, in this instance, the Circuit Court found that Safko was liable for compensatory contempt damages simply by virtue

² Safko concedes that he had actual notice of the Injunction Order.

of his status as a member of Stonington. (R. p. 30). This finding is unprecedented and unsupported by Rule 65(d), SCRCPP. Absent a finding of agency or active concert, there is no authority for holding a member liable to pay compensatory contempt damages awarded against an LLC based solely on his status as a member. Although the contempt Order makes the bald statement that Safko is the agent of Stonington, the record provides no support for a finding that Safko acted as Stonington's agent in violating the injunction. (R. p. 30). The record fails to support both a finding that Safko violated the injunction and a finding that Safko acted as Stonington's agent in violating the injunction. Because Safko has not violated the injunction, the award of compensatory contempt is nothing more than a cloaked attempt to pierce the corporate veil and access Safko's private assets. At the Rule to Show Cause Hearing, the Respondents' attorney's question posed to a witness supports the conclusion that accessing the members' assets was a goal of the proceeding: "Mr. Lee, one more question. If the individual members of Stonington came up with the money to fix the problem, wouldn't that – fix your problem as well allow everybody to move forward?" (R. p. 157, lines 10-13). The Court, however, did not have personal jurisdiction over Safko in the suit against Stonington and therefore cannot force Safko to pay monetary damages from his personal assets.

2. Did The Circuit Court Err In Determining That Safko Was Individually Bound By The Injunction Issued Against Stonington, LLC And Its Members?

A valid injunction issued by a South Carolina court "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Rule 65(d), SCRCPP. This rule does not mention

members or shareholders. Although the Injunction Order states that it is binding on “Stonington Development, LLC and its officers, agents, employees, and members,” this statement is insufficient to expand the scope of the injunction to persons not contemplated in Rule 65(d), SCRCP. (R. p. 27).

The South Carolina Federal District Court has examined this issue in the context of Rule 65(d), FRCP, which contains the exact same language as Rule 65(d), SCRCP, and held that a non-party could not be in contempt for failing to comply with an injunction order because there was no evidence that the non-party was an officer, agent, servant, employee, attorney, or in active concert with the original party. Chisolm v. Caines, 147 F.Supp. 188, 191 (D. S.C. 1954). In Chisolm, the Plaintiff tried to enforce an injunction prohibiting trespassing on land against persons who were neither parties to the underlying injunction action, nor in active concert with the parties to that action. Id. In examining whether the language of the injunction order could extend the scope of the injunction to persons not contemplated in Rule 65(d), the Chisolm Court cited with approval the statement that “[a]lthough an injunction purports to bind persons not parties or in privity with them, whose rights have not been adjudicated, it cannot do so. The order cannot affect . . . a person not within the jurisdiction of the court. . . .” Id. (internal citation and quotation marks omitted).

At best, the original injunction may have bound Safko as an agent of Stonington or under an aider and abettor theory, however, the Circuit Court made no findings of fact and there is no evidence to support a finding that Safko acted as an agent or as an aider and abettor of Stonington. An injunction is generally binding on a party to the underlying action and that party’s agents, attorneys, and “anyone in active concert with [the enjoined

party] receiving actual notice of the injunction.” Grosshuesch v. Cramer, 377 S.C. 1, 29 659 S.E.2d 112, 121 (2008). Agents of the company are bound to an injunction to the extent they are acting on behalf of the company. 42 Am.Jur.2d Injunctions § 299. Parties who are “outside an injunction’s coverage subject themselves to its proscriptions should they aid or abet the named parties in a concerted attempt to subvert those proscriptions.” Id. at 300. The record is completely devoid of any evidence showing that Safko acted as an agent of or aided and abetted Stonington in violating the injunction. In fact, the Respondents’ theory of how Safko violated the injunction seems to be based on an alleged failure on the part of Safko to perform some action that was never specified in the Injunction Order:

Q What about Mr. Safko, he’s sitting on the second row?

A I have spoken with Mr. Safko before when - - when he was involved - - -

Q But you’ve never seen him on the site with any shovels or anything?

A No.

(R. p. 153, lines 11-16). Nowhere does the Injunction Order require anyone, including Safko to pick up a shovel. Nor is it clear what Safko or anyone else for that matter would do with that shovel if they did pick it up. In response to cross examination, Respondent Janette H. Robinson replied as follows:

Q Okay. And do you have a solution in your mind that will solve this problem for you?

A No, I don’t. It seems like this is where the problem is starting and when it leaves here it goes through there (indicating).

Q And have you sent any information to Mr. Lipscomb and/or to Stonington saying, this is what you guys need to do?

A It's not my property to fix, no - - -

Q I understand but - - -

A No.

Q Have you given them the opportunity to cure by giving them a plan to do a cure?

A They've had four years to cure the problem.

Q I understand that - - -

A No, we have not.

(R. p. 125, line 19 – p. 126, line 10). More importantly, the Circuit Court never provided guidance for what Stonington needed to do and as such the vague Injunction Order cannot provide a basis for a finding of contempt.

In addition to making no finding that Safko aided and abetted Stonington or violated the injunction by acting within the scope of his agency, the Circuit Court's Order also fails to show that Safko had the power to take any action as an agent of Stonington that could have brought Stonington into compliance. In fact, Safko subsequently withdrew from Stonington and no longer qualifies as an officer, agent or employee of Stonington. Therefore, at the time the Contempt Order was issued finding him in contempt, he did not have the authority to direct Stonington to do anything. Additionally, Safko never enjoyed a controlling interest in Stonington. Without such a controlling interest, Safko would have been incapable of bringing Stonington into compliance with the injunction issued by this Court. Furthermore, due to Stonington's pending foreclosure

and possible bankruptcy, even if Safko remained a member of the LLC, which he is not, and if he ever possessed a controlling interest in Stonington, which he never did, he would still be powerless to singlehandedly force Stonington to comply with the injunction.

For the above-stated reasons, without the requisite connection with Stonington, South Carolina law does not bind Safko to the terms of the injunction at issue.

3. Did The Circuit Court Err In Failing To Find That South Carolina Law Provides a Corporate Shield To Protect Former Individual Member Safko From The Obligations Of Stonington, LLC?

The Court appears to have found that Safko, a former member of Defendant Stonington, is in contempt of Court and jointly and severally liable to the Plaintiffs for the sum of \$25,000, plus \$27,625 in attorney's fees and costs, along with Stonington, Lipscomb, and Harrell. (R. p. 32; R p. 35). In making this ruling, the Court has disregarded the protections of the corporate shield applicable to individual members of LLC(s) found at S.C. Code Ann. § 33-44-303. South Carolina's Uniform Limited Liability Act (ULLA) provides the following regarding the personal liability of an LLC's individual members:

(a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

S.C. Code Ann. § 33-44-303(a). This provision further states that the "failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company."

Id. § 33-44-303(b).

The Court has also failed to address Safko's argument that in order for the Plaintiffs to establish Safko's liability they would have the burden of proof in an action to pierce the corporate veil. At this time, there is a separate action pending to try and pierce the corporate veil. The court therefore, is without jurisdiction in this Rule to Show cause matter to make rulings that have the effect of piercing the corporate veil. Furthermore, even if the Court has jurisdiction, there was no evidence or testimony offered to even make a prima facie case for piercing the corporate veil.

4. Did The Circuit Court Err In Holding Safko In Contempt For Violating An Injunction Order Where The Injunction Order Does Not Sufficiently Set Forth The Act To Be Enjoined?

Rule 65(d), SCRPC, requires that an injunction must set forth with reasonable detail the specific act or acts to be enjoined. Rule 65(d), SCRPC, provides that "[e]very order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail . . . the act or acts sought to be restrained." The Injunction vaguely enjoins the "discharging of sediment-laden stormwater onto the plaintiffs' property" and makes reference to certain South Carolina Regulations. (R. p. 25-27). However, the Injunction fails to set forth any specific standard that must be followed. A literal reading of the Injunction Order provides that the only act enjoined is the releasing of water. It is no where alleged that Safko went out to the site and physically released stormwater onto the plaintiffs' property.

The instant facts aptly illustrate the rationale behind the specificity requirement. The Circuit Court found Safko in contempt for failing to make an "effort . . . to stop the siltation and increased runoff problems" (R. p. 29) This finding begs the question, what

effort was required? The Injunction Order fails to answer this question. The purpose of the specificity requirement is “to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.” Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (internal citation omitted). Furthermore, “the requirement of specificity performs a second important function. Unless the trial court carefully frames its orders of injunctive relief, it is impossible for an appellate tribunal to know precisely what it is reviewing.” Id. at 477. Because the Injunction Order provides no specific instruction for compliance, it is impossible for Stonington to know how to comply and it is impossible for this Court to know what it is reviewing. Therefore, alleged failure to comply with a vague and unspecific injunction order provides no foundation for finding Safko in contempt.

5. Did The Circuit Court Err In Finding That Safko Intentionally Violated The Terms Of The Injunction?

There was no evidence presented at the hearing to show that Safko did anything to disobey the Injunction Order. Because the record completely lacks any evidentiary foundation to support a finding that Safko willfully disobeyed the Injunction Order, the finding of contempt must fail.

The standard of review of a contempt order is for abuse of discretion: “A determination of contempt is a serious matter and should be imposed sparingly; whether it is or is not imposed is within the discretion of the trial judge, and will not be disturbed on appeal unless it is without evidentiary support.” Haselwood v. Sullivan, 283 S.C. 29, 32-33, 320 S.E.2d 499, 501 (Ct. App. 1984) (internal citation omitted). Furthermore, “[i]n order to sustain a finding of contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based.” Floyd v. Floyd, 365 S.C. 56, 75, 615

S.E.2d 456, 475 (Ct. App. 2005). Civil contempt must be proved by clear and convincing evidence. Durlach v. Durlach, 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004). A finding of civil contempt is subject to reversal where the finding is without evidentiary support or where there has been an abuse of discretion. Whetstone v. Whetstone, 309 S.C. 277, 233, 420 S.E.2d 877, 880-81 (Ct. App. 1992). Additionally, the record must specifically show that the person in question willfully violated a court order. Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002). "A willful act is one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done." Floyd, at 74, 615 S.E.2d at 475 (internal citations and quotation marks omitted).

As previously mentioned, the only act prohibited by the injunction is "discharging sediment-laden stormwater onto the plaintiffs' property." (R. p. 26). There is not even an allegation—let alone a finding of fact—that Safko personally went up to the site and physically discharged stormwater onto the Respondents' property. It appears, to the contrary, that the Circuit Court found Safko in contempt for failing to take some action. Neither the injunction nor the Contempt Order, however, state what action Safko was supposed to take. As just mentioned, the Injunction Order only prohibits the discharge of stormwater. In the Contempt Order, the Circuit Court makes the following vague findings of fact regarding how the injunction was supposedly violated: "siltation and increased runoff problems . . . are continuing" (R. p. 29), "Stonington and Mr. Lipscomb have made minimal efforts but have not done enough" (R. p. 29), "the problems are continuing, and . . . whatever steps are being taken are insufficient" (R. p. 29), "Mr. Safko and Mr. Harrell have made no effort . . . to stop the siltation and increased runoff

problems” (R. p. 29). The Circuit Court held Safko in contempt for not making an effort to stop a problem without ever having specified what effort was required.

Safko could not have willfully violated the Injunction Order because the Injunction Order is too vague to provide reasonable notice of what must be done to comply and because there is no evidence showing that Safko took any action—or omitted to do something that he had the power to do—in violation of the Injunction Order. Therefore, the Court’s order finding Safko in contempt must fail.

6. Did The Circuit Court Err In Failing To Find That The Respondents Failed To Provide Notice As Required By S.C. Code Ann. § 15-43-120?

S.C. Code Ann. § 15-43-120 requires the Plaintiffs’ to provide ten days notice prior to filing a motion for abatement of a nuisance. Section 15-43-120 reads, “No proceeding against the owner of the real estate shall be commenced hereunder unless ten days’ written notice be given by the prosecuting attorney to such owner or his agent and upon his failure thereafter to abate the nuisance.” Id. This was not done, and therefore, to the extent that the injunction seeks abatement of a nuisance, the Contempt Order must fail.

7. Did The Circuit Court Err In Finding Safko Individually Liable For Violations Of Richland County Ordinance § 26-273(b) And S.C. Code Ann. § 48-14-140?

The Contempt Order purports to find Safko liable for violating Richland County Ordinance § 26-273(b) and South Carolina Code Ann. § 48-14-140. This is improper for numerous reasons, including but not limited to: 1) the Plaintiffs do not have standing to bring an action for violations of county ordinances and state law; 2) the Order misstates the wording of the ordinances; 3) Safko has never been formally accused, much less found in actual violation of any ordinance or statute; 4) the Order fails to set forth the

precise ordinance and/or code allegedly violated; 5) the original Injunction Order seeks to abate a nuisance, not enforce Codes, Ordinances and/or statutes; 6) the amount of the fine is arbitrary and it is improper for Plaintiffs to collect a compensatory award for violating county ordinances and/or state law. Therefore, to the extent that the Contempt Order purports to find Safko in violation of Richland County Ordinance § 26-273(b) and South Carolina Code Ann. § 48-14-140, this finding is wholly unsupported by the record and applicable law and must fail.

8. Did The Circuit Court Err In Failing To Find That The Order Of Contempt Unjustly Enriches The Respondents?

The Plaintiffs offered absolutely no testimony that could possibly support the Court's award of \$25,000³. The amount is arbitrary and clearly has no reasonable relation to the testimony actually offered at the hearing. Furthermore, the case of Cheapo's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 567 S.E.2d 514 (2002) cited by the Court in support of the damages awarded, actually provides support for the exact opposite conclusion, that the amount of damages awarded bears no reasonable relationship to the alleged contempt.

In Cloyd, the Court found that the Defendants willfully breached a settlement agreement in violation of the Court's order and that the imposition of a \$25,000 fine bore no reasonable relationship to the Defendants' willful violation of the Court's order. *Id.* at 608-9, 567 S.E.2d at 520. First, it must be noted that with regards to the finding that the Defendants willfully violated the court's order, the instant case is immediately distinguishable because Cloyd involved a willful violation of an order approving a

³ In total, the Contempt Order awarded the Respondents \$52,695, including attorneys' fees. The attorneys' fees portion of the award is addressed below.

settlement agreement containing specific terms, and this matter involves an alleged failure of a non-party to comply with a vague injunction. Id. Second, in the instant matter and in Cloyd, the amount of compensatory contempt awarded (\$25,000 in both instances) bears no reasonable relationship to the alleged contempt.

A compensatory award must be limited to the actual loss caused by the violation of the court's order. Id. at 519, 567 S.E.2d at 606. "The burden of showing what amount, if anything, the complainant is entitled to recover by way of compensation should be on the complainant." Id. at 519, 567 S.E.2d at 607. In Cloyd, the court approved settlement terms requiring the Defendants to pay a total of \$80,000, of which \$60,000 would be paid immediately, and \$20,000 would be paid two weeks later. Id. at 516, 567 S.E.2d at 601. The Cloyd court made specific findings of fact that the Defendant had, at least in part, the power to comply, that the Defendant admitted the settlement was accurate, that the Defendant failed to comply or provide excuse for noncompliance with the settlement terms, and that the Defendant engaged in other bad faith acts in an attempt to evade his lawful obligation. Id. at 520, 567 S.E.2d at 608. Despite such findings, the court found that the award of \$25,000 in compensatory damages was unreasonable. Id.

Here, the award of \$25,000 in compensatory damages also bears no reasonable relationship to any alleged contempt. First, unlike the situation in Cloyd, in this case, the Circuit Court failed to make any specific findings that Safko engaged in bad faith acts or that he had the power to comply with the Injunction Order. Second, the Respondents have already been awarded compensation in the underlying action against Stonington and there is no evidence on the record showing that a breach of the injunction caused

additional damages. On April 6, 2007, a Richland County jury awarded the Respondents \$3.9 million for negligence, trespass, and nuisance arising from siltation and increased runoff from Stonington. The Respondent's were awarded compensation for problems caused by the increased runoff and siltation. Couched as an award for compensatory contempt for violating a vague and unspecific injunction, the Court has simply awarded additional monetary compensation for problems caused by the alleged increased runoff and siltation. No damages can flow from an alleged failure to comply with the injunction because the injunction does not specify what it requires to be done. Furthermore, \$25,000 is a completely arbitrary and unreasonable award because the record fails to provide a basis for an award in this amount. There is simply no evidence showing that if it were possible for Safko to have complied with the injunction, which it was not, and Safko had complied, the Respondents would not have incurred \$25,000 in damages. As such, this award must fail.

9. Did The Circuit Court Err In Awarding Attorney's Fees Where The Respondents Failed To Present An Attorney Client Fee Agreement?

In South Carolina, a Plaintiff may not recover attorneys' fees and costs without an attorney-client fee agreement. Williamson v. Middleton, 383 S.C. 490, 496, 681 SE2d 867, 876 (2009). Plaintiffs' did not present an attorney-client fee agreement in support of their motion for attorneys' fees and costs, and as such, there is no competent evidence to support a finding that Plaintiffs' agreed to incur fees and costs. Therefore, the Court's award of attorneys' fees and costs is improper and should be set aside.

10. Did The Circuit Court Err In Awarding Attorney's Fees Where The Respondents Failed To Present A Fee Invoice Describing The Services Rendered And The Time Spent?

In a contempt action in South Carolina, a Court should not award attorneys' fees and costs when "... the record lacks sufficient evidence from which the circuit court could determine the appropriate amount of attorneys' fees required." Ex Parte Cannon, 685 S.E.2d 814 (Ct. App. 2009). Plaintiffs' failed to present a detailed fee invoice setting forth the services and time spent on this action. Rather, Plaintiffs' attorney's affidavit set forth a vague "estimate that the several attorneys spent 131 hours working on enforcement of the injunction" over a 74 day period. (R. p. 283). Additionally, the Plaintiffs' attorney's affidavit admits his firm "tracks billable time on a daily basis for each attorney by file only, not by task." (R. p. 283). The affidavit further admits that his "firm is actively working on several different matters within this file that are not related to enforcement of the Injunction." (R. p. 283).

The estimate of attorney's fees produced by the Plaintiffs is insufficient evidence from which the court can determine the appropriate amount of fees for reimbursement. The evidence presented is speculative at best as to who performed what service and how much time was spent. There is also no way beyond speculation to know if the particular task was even related to the enforcement of the injunction as opposed to the several other matters the firm was working on that were unrelated to the injunction. Therefore, the Courts award of attorneys' fees and costs is improper and should be set aside.

11. Did The Circuit Court Err In Awarding Attorney's Fees Where The Respondents Failed To Show That The Nature, Extent, And Difficulty Of The Services Rendered Justify An Award Of Attorney's Fees?

In South Carolina, in determining whether to award attorney's fees, the Court should consider "the nature, extent and difficulty of the case." Glasscock v. Glasscock, 304 SC 158, 403 S.E.2d 313 (1991). The Plaintiffs' attorney's affidavit makes a conclusory statement that the case was complicated and labor intensive because the Defendants allegedly willfully disregarded the injunction. (R. p. 283). This argument is without merit. First, Plaintiffs' attorney admits that his firm was working on several matters in the same file that were unrelated to the Injunction. (R. p. 283). This means the case is less complicated because much of the work was likely duplicative or overlapped in some way making things easier, not harder. Second, Plaintiffs' attorney did not have to analyze expert reports related to continuing damages to the pond, because no such expert was retained. Third, the only evidence presented at the hearing by Plaintiff's counsel was testimony from one of his clients and some old photographs. The limited nature of the evidence presented was certainly not indicative of a complicated or difficult case, rather it tends to show the exact opposite. Finally, because the Plaintiffs' failed to present a detailed legal fee invoice, there is no evidence upon which to base a finding that the services rendered were difficult or complex.

12. Did The Circuit Court Err In Failing To Find That The Award Of Attorney's Fees Was Not Ripe?

The original case which found Defendant Stonington liable to the Plaintiffs is currently on Appeal. In addition, despite specific requests for a formal hearing from all three individual former and current members of the Defendant, the Court unilaterally awarded attorney's fees and costs based solely on the affidavit of Plaintiffs' counsel.

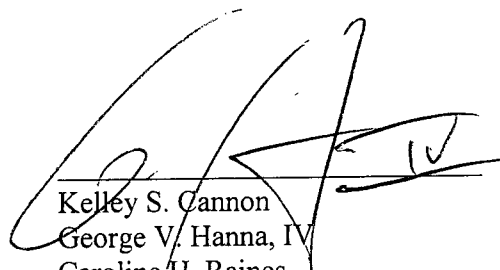
There was no opportunity for the individuals affected by the Motion for Attorney's fees and costs to put in evidence of their own or cross-examine the Plaintiffs' on this issue. Therefore, the award of attorneys' fees must fail.

CONCLUSION

The Circuit Court erred in finding Safko in contempt of the Injunction Order. First, the Circuit Court did not have jurisdiction over Safko and therefore could not force Safko to contribute his personal assets. Second, Safko was not individually bound by the injunction and did not take any actions on behalf of Stonington in violation of the Injunction. Third, under South Carolina law, Safko is protected by the corporate shield from being held individually responsible for Stonington's obligations. Fourth, the injunction fails to meet the specificity requirement of Rule 65(d) and as such provides no basis for a finding of contempt. Fifth, the record utterly fails to substantiate a finding that Safko willfully violated the injunction. Sixth, the Respondents' failed to provide notice as required by S.C. Code Ann. § 15-43-120. Finally, the Circuit Court erred in finding Safko individually liable for violations of Richland County Ordinance §26-273(b) and S.C. Code Ann. §48-14-140.

Because Safko was not in contempt of the Injunction Order, the compensatory contempt award, including the award of attorneys' fees must fail. In addition, the compensatory contempt award fails because it is arbitrary and unjustly enriches the Plaintiffs. The attorneys' fees award also fails on four additional grounds. First, the attorneys' fees award fails because the Respondents failed to present an attorney client fee agreement as required by South Carolina law. Second, the award fails because the Respondents failed to present a fee invoice describing the services rendered and the time

spent. Third, the award fails because the Respondents failed to show that the nature, extent and difficulty of the services rendered justify an award of attorneys' fees. Finally, the attorneys' fees award was not ripe. Therefore, for the forgoing reasons, Safko would request that this Court reverse the rulings of the Circuit Court and vacate the judgment entered against Safko for compensatory contempt, including the attorneys' fees award.

A large, stylized handwritten signature in black ink, appearing to read 'Kelley S. Cannon', is written over the printed names of the attorneys.

Kelley S. Cannon
George V. Hanna, IV
Caroline/H. Raines
HOWSER, NEWMAN & BESLEY, L.L.C.
1508 Washington Street
P.O. Box 12009
Columbia, SC 29211
(803)758-6000
ATTORNEYS FOR RON E. SAFKO

August 17, 2010

IN THE STATE OF SOUTH CAROLINA

In The South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L. Casey Manning

2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko,
and L. K. Harrell, III, ... Appellants,

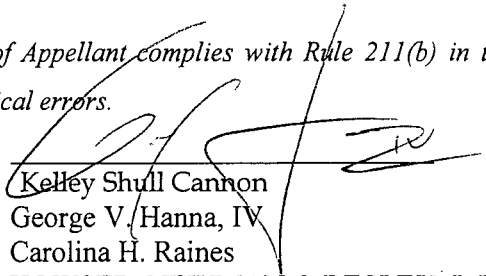
In Re:
Glenn Y. Hollis, Jr., John E. Hollis, Joseph R.
Robinson, Janette H. Robinson, ... Respondents,

v.

Stonington Development, LLC.....Appellant,

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

*I hereby certify that this Final Brief of Appellant complies with Rule 211(b) in that it
contains only corrections to obvious typographical errors.*


Kelley Shull Cannon
George V. Hanna, IV
Carolina H. Raines
HOWSER, NEWMAN & BESLEY, L.L.C.
1508 Washington Street
P.O. Box 12009
Columbia, SC 29211
(803) 758-6000
ATTORNEYS FOR RON E. SAFKO

August 17, 2010

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736

RECEIVED

SEP 01 2010

SC Court of Appeals

ORIGINAL

Ex parte: Stephen E. Lipscomb, Ron Safko, and
L.K. Harrell, III;

Appellants,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, and Janette H.
Robinson

Respondents

v.

Stonington Development,
LLC

Appellant.

FINAL BRIEF OF APPELLANT L.K. HARRELL, III

James Edward Bradley
William B. Fortino
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
Post Office Box 5709
West Columbia, SC 29171
Tel: 803-796-9160
Fax: 803-791-8410

Attorneys for Appellant L.K. Harrell, III

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	4
ARGUMENTS	9
I. JUDGE MANNING ERRED IN FINDING L.K. HARRELL, III, IN CONTEMPT OF COURT BECAUSE THE COURT DID NOT HAVE JURISDICTION TO SUBJECT HIM TO THE COURT'S CONTEMPT POWERS	9
A. Mr. Harrell Was Not Served A Summons In The Action Against Stonington Development, LLC	10
B. Mr. Harrell Was Not Joined As A Party In The Action Against Stonington Development, LLC	11
C. The Respondents Did Not Pierce Stonington Development, LLC's Veil To Subject Mr. Harrell To Individual Liability	12
D. Mr. Harrell Is Not Individually Liable For Stonington Development, LLC's Actions Under Rule 65(d) Of The South Carolina Rules Of Civil Procedure	14
II. JUDGE MANNING ERRED IN FINDING L.K. HARRELL, III, IN CONTEMPT OF COURT BECAUSE MR. HARRELL DID NOT VIOLATE THE TERMS OF THE INJUNCTION	15
A. Mr. Harrell Did Not Have The Authority Within Stonington Development, LLC, To Violate The Injunction	16
B. Mr. Harrell Cannot Be Held In Contempt Simply Because Of His Minority Interest In Stonington Development, LLC	17
C. There Is No Evidence That Mr. Harrell Willfully Violated The Terms Of The Injunction	18
D. The Respondents Did Not Prove That The Terms Of The Injunction Were Violated By Clear And Convincing Evidence	21

III.	JUDGE MANNING ERRED IN FINDING THE RESPONDENTS ENTITLED TO \$25,000 IN DAMAGES BECAUSE THERE IS NO EVIDENCE TO SUPPORT THE DAMAGE AWARD, AND IT ONLY SERVES TO UNJUSTLY ENRICH THE RESPONDENTS	23
IV.	JUDGE MANNING ERRED IN FINDING THE RESPONDENTS ARE ENTITLED TO THE ATTORNEY'S FEES AWARDED BECAUSE THE RESPONDENTS SHOULD NOT HAVE RECEIVED ATTORNEY'S FEES, AND THE AWARD WAS NOT SUPPORTED BY COMPETENT EVIDENCE OR THE APPROPRIATE FACTORS	25
A.	The Respondents Are Not Entitled To Attorney's Fees Because Judge Manning Erred In Finding The Injunction Was Violated	25
B.	The Respondents Are Not Entitled To The Attorney's Fees Awarded Because The Award Is Not Supported By Competent Evidence Or The Appropriate Factors	26
i.	Mr. Belser Did Not Support The Attorney Fee Award With An Attorney-Client Fee Agreement	26
ii.	Mr. Belser Did Not Support The Attorney Fee Award With A Detailed Invoice Describing The Substance Of The Time Spent On The Matter	27
iii.	The Amount Of The Attorney Fee Award Is Unreasonable Pursuant To The Appropriate Factors	29
a.	The Nature, Extent and Difficulty of the Respondent's Action Do Not Support the Attorney's Fee Award	29
b.	The Time Devoted to the Respondents' Action Was Unreasonable	30
	CONCLUSION	31

TABLE OF AUTHORITIES

CASES

<i>Abate v. Abate</i> , 377 S.C. 548, 660 S.E.2d 515 (Ct. App. 2008)	20
<i>Browder v. Browder</i> , 382 S.C. 512, 675 S.E.2d 820 (Ct. App. 2009)	20
<i>Brown v. Evatt</i> , 322 S.C. 189, 470 S.E.2d 848 (1996)	10
<i>Cheap-O's Truck Stop, Inc., v. Cloyd</i> , 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002)	18, 19
<i>Cooper v. Ridgeway Brands Mfg., LLC</i> , 666 S.E.2d 107 (N.C. 2008)	12
<i>Curlee v. Howle</i> , 277 S.C. 377, 287 S.E.2d 915 (1982)	23, 24
<i>Donahue v. Donahue</i> , 299 S.C. 353, 384 S.E.2d 741 (1989)	29
<i>Drury Dev. Corp. v. Foundations, Ins. Co.</i> , 380 S.C. 97, 668 S.E.2d 798 (2008)	13
<i>Durlach v. Durlach</i> , 359 S.C. 64, 596 S.E.2d 908 (2004)	21
<i>E.D.M. v. T.A.M.</i> , 307 S.C. 471, 415 S.E.2d 812 (1992)	25
<i>Ex Parte Cannon</i> , 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009)	17, 27, 28, 29
<i>Floyd v. Floyd</i> , 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005)	21, 23, 24
<i>Gillman v. City of Beaufort</i> , 368 S.C. 24, 627 S.E.2d 746 (Ct. App. 2006)	11
<i>Glasscock v. Glasscock</i> , 304 S.C. 158, 403 S.E.2d 313 (1991)	25, 29
<i>Jarrell v. Petoseed Company, Inc.</i> , 331 S.C. 207, 500 S.E.2d 793 (Ct. App. 1998)	23
<i>Louden v. Morgne</i> , 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997)	10
<i>Mid-South Mgmt. Co. v. Sherwood Dev. Corp.</i> , 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007)	12
<i>Miller v. Miller</i> , 375 S.C. 443, 652 S.E.2d 754 (Ct. App. 2007)	17, 21, 27
<i>Mosley v. All Things Possible</i> , Op. No. 4677 (Ct. App. 2010)	17
<i>Plowman v. Bagnal</i> , 316 S.C. 283, 450 S.E.2d 36 (1994)	16

<i>Rowell v. Whisnant</i> , 360 S.C. 181, 600 S.E.2d 96 (Ct. App. 2004)	28
<i>Sexton v. Sexton</i> , 310 S.C. 501, 427 S.E.2d 665 (1993)	25
<i>Spartanburg County Dept. of Soc. Servs. v. Padgett</i> , 296 S.C. 79, 370 S.E.2d 872 (1988)	21
<i>State v. Bevilacqua</i> , 316 S.C. 122, 447 S.E.2d 213 (Ct. App. 1994)	18
<i>State ex. rel. McLeod v. C&L Corp.</i> , 280 S.C. 519, 313 S.E.2d 341 (Ct. App. 1984)	16
<i>State ex. rel. Medlock v. Nest Egg Society Today, Inc.</i> , 290 S.C. 124, 348 S.E.2d 381 (Ct. App. 1986)	16
<i>Sturkie v. Sifly</i> , 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984)	13
<i>Thornton v. Alford</i> , 247 S.C. 1, 260 S.E.2d 179 (1979)	9
<i>Williamson v. Middleton</i> , 383 S.C. 490, 681 S.E.2d 867 (2009)	26, 27

STATUTES

S.C. Code Ann. § 13-5-530 (1976)	10, 11
S.C. Code Ann. § 33-44-303 (1976)	12

RULES

Rule 19, SCRCP	9, 11
Rule 65, SCRCP	3, 14, 15
Rule 1.5, SCRPC	27

TREATISES / OTHER AUTHORITIES

10A Fletcher Cyc. Corp. § 5073 (2009)	16
17 C.J.S. Contempt § 36 (2009)	14, 17
42 Am. Jur. 2d Injunctions § 299 (2010)	18
James F. Flanagan, <i>South Carolina Civil Procedure</i> 7 (2d ed. 1996)	10

STATEMENT OF ISSUES ON APPEAL

- I. Did Judge Manning err in finding L.K. Harrell, III in contempt of court when the court did not have jurisdiction to subject him to the Court's contempt powers?
- II. Did Judge Manning err in finding L.K. Harrell, III in contempt of court when Mr. Harrell did not violate the terms of the injunction?
- III. Did Judge Manning err in finding the Respondents are entitled to \$25,000 in damages when there is no evidence to support the damage award, and it only serves to unjustly enrich the Respondents?
- IV. Did Judge Manning err in finding the Respondents entitled to attorney's fees when the Respondents should not have received attorney's fees, and the award was not supported by competent evidence of the appropriate factors?

STATEMENT OF THE CASE

Judge L. Casey Manning held L.K. Harrell, III, in contempt of court for violating an injunction issued against Stonington Development, LLC, in a case in which Mr. Harrell was not named, sued or served. This appeal arises from that Order. (R. p. 5). Stonington Development, LLC, is a real estate development company. (R. p. 42). L.K. Harrell, III, was a passive investor in Stonington Development, LLC. (R. p. 279). He owned a 12.5 percent, minority interest in the company. (R. p. 278). He had no managerial authority or control over the actions of the company. (R. p. 278).

Stonington Development, LLC, began developing a residential subdivision in Richland County. (R. p. 42). On July 29, 2005, the Hollises and Robinsons sued Stonington Development, LLC. (R. p. 41). They alleged that their property was damaged by increased runoff and siltation from the development project. (R. p. 44). Mr. Harrell was not named as a party in the lawsuit. (R. pp. 41-42). He was not served personally as a defendant although he received service for Stonington Development,

LLC. (R. pp. 41-42). The lawsuit did not seek to pierce Stonington Development, LLC's corporate veil. (R. pp. 42-46). The lawsuit contained no allegations of wrongdoing on the part of Mr. Harrell. (R. pp. 41-47).

On May 2, 2006, the Respondents amended their complaint. (R. pp. 49-55). The complaint was amended to add two other corporate defendants involved with the construction of the subdivision, Newman Construction, Inc. and C.G.D. Developers, Inc. (R. p. 50). Mr. Harrell was not added, and this amended complaint contained no allegations against him. (R. pp. 49-55). Nor was the lawsuit amended to pierce Stonington Development, LLC's corporate veil. (R. pp. 52-55).

The lawsuit was tried in Richland County Circuit Court in April of 2007 before Judge Manning. Mr. Harrell did not participate. He did not testify, nor was he deposed. He was not present at the trial. On April 6, 2007, the Hollises and Robinsons received a jury verdict against Stonington Development, LLC. (R. p. 38). The verdict was for \$400,000 in actual damages and \$3.9 million in punitive damages. (R. p. 38). Stonington Development, LLC, filed its notice of appeal on December 13, 2007. (R. p. 252). The Hollises and Robinsons then filed a separate lawsuit against Stephen Lipscomb, Stonington Development LLC's majority shareholder, to pierce Stonington Development, LLC's corporate veil. (R. p. 66).

The Hollises and Robinsons then moved for an injunction against Stonington Development, LLC. (R. pp. 297-300). The Respondents sought to enjoin the company from further development until the problem was resolved. (R. pp. 297-300). They also sought to enjoin the company from "discharging sediment-laden stormwater" onto their

property. (R. pp. 297-300). Mr. Harrell was not named in their motion. (R. pp. 297-300). And, he was not served with their motion.

Judge Manning granted the Hollises and Robinsons' motion by form order on September 17, 2007. (R. p. 5). They then filed a restated and renewed post trial motion to obtain a detailed written order from the Court. (R. pp. 301-302). Judge Manning issued his Order enjoining Stoning Development, LLC, pursuant to Rule 65 of the South Carolina Rules of Civil Procedure, on June 26, 2009. (R. pp. 25-27). They did not serve Mr. Harrell with this motion, and he was not named in this motion. Again Mr. Harrell was not individually named in this Order. (R. pp. 25-27).

On September 11, 2008, the Hollises and Robinsons filed a motion to hold Stonington Development, LLC, and its members, Stephen Lipscomb, Ron Safko and L.K. Harrell, III, in contempt of court. (R. pp. 305-306). The Respondents alleged that Stonington Development, LLC, continued to discharge sediment-laden storm water onto their property. (R. pp. 305-306). Judge Manning issued a rule to show cause. (R. p. 39).

On December 10, 2008, L.K. Harrell, III, disassociated from Stonington Development, LLC. (R. p. 506). This was reflected by an amendment filed with the South Carolina Secretary of State. (R. p. 506).

Judge Manning heard oral arguments on the rule to show cause on April 14, 2009. (R. pp. 28-33). On September 28, 2009, Judge Manning issued an order holding Stonington Development, LLC, Mr. Lipscomb, Mr. Safko and Mr. Harrell in contempt of court. (R. pp. 28-33). At the time the Order was issued, Mr. Harrell was not even a member of Stonington Development, LLC. (R. 506).

Judge Manning's Order provided for a compensatory fine of \$25,000, a supplemental hearing for further damages and the opportunity for the Respondent's attorney to submit a motion for fees and costs. (R. pp. 28-33). Mr. Harrell filed his Rule 59(e) motion to alter or amend Judge Manning's Order on October 8, 2009. (R. pp. 451-457). Mr. Harrell's motion was denied without oral arguments on January 7, 2010. (R. pp. 34-35). Mr. Harrell then filed this appeal on January 26, 2010. (R. pp. 253-254).

On October 8, 2009, the Respondents filed their motion for attorney's fees and costs. (R. pp. 459). Judge Manning granted the Respondents' motion in his Order Denying Mr. Harrell's Rule 59(e) motion without oral arguments. (R. pp. 34-35). The Respondents were awarded \$27,695.00 in attorney's fees. (R. pp. 34-35). Mr. Harrell filed his Rule 59(e) motion to alter or amend Judge Manning's Order on January 15, 2010. (R. pp. 471-477). Mr. Harrell's motion was denied without oral arguments on March 15, 2010. (R. pp. 36-37). Mr. Harrell then filed this second appeal March 25, 2010. (R. pp. 259-260). The two appeals were consolidated by the Court of Appeals on March 26, 2010.

STATEMENT OF FACTS

L.K. Harrell, III, was a completely passive investor in Stonington Development, LLC. (R. p. 278). He held a 12.5 percent minority interest in the company. (R. p. 278). He invested in Stonington Development, LLC, with the hope of a return on his investment, nothing more. (R. p. 280).

Stephen Lipscomb was the company's majority shareholder and managing member. (R. p. 279). He held a 75 percent interest in the company and made all of its managerial and financial decisions. (R. p. 278). To the contrary, Mr. Harrell had no role

in the operation of the company. (R. p. 278). Nor did he handle the company's books. (R. p. 278). He did not have any contact with the home owners who purchased lots in the subdivision. (R. p. 162). He did not visit the subdivision or monitor its development. (R. p. 162). He did not even have a role in the company's refinance of the development property. (R. pp. 210-211). As a minority owner, he had no authority within the company and took absolutely no part in any of its managerial decisions. (R. p. 278).

Mr. Harrell is, however, a member of the South Carolina Bar. (R. p. 278). As such, he drafted the articles of organization for the company and filed them with the South Carolina Secretary of State. (R. p. 278). After this, the only responsibility he had with the company was as its registered agent. (R. p. 278). As registered agent, he did receive some of the pleadings for the Respondents' lawsuit. (R. p. 278). However, these were immediately forwarded to Mr. Lipscomb. (R. p. 279). Mr. Lipscomb managed the lawsuit, hired outside counsel and paid all of the legal fees. (R. p. 279).

Mr. Harrell took no part in the lawsuit and did not attend the trial. (R. p. 107). The Respondents did not sue him. (R. p. 106). He saw no reason to attend because he did not do anything to cause the problems with the property, and he was not a defendant in the lawsuit. (R. p. 107).

Even after the lawsuit was over, he did not go out to the property. (R. pp. 106-107). He had no idea of the extent of Stonington Development, LLC's compliance with the injunction. (R. p. 279). He has no expertise to determine how Stonington Development, LLC, could comply with the Injunction. (R. p. 279). If he had expertise, he did not have authority to devote any of the company's resources towards compliance with the injunction. (R. p. 279).

Mr. Lipsomb handled Stonington Development, LLC's compliance with the injunction. (R. p. 167). He took steps on behalf of Stonington Development, LLC, to comply with the injunction. (R. p. 167). He hired two engineering companies, Carolina Stormwater Services and Carolina Erosion Control, to install silt fences, construct a rock dam and provide weekly reports of the storm water and silt flow on the property. (R. pp. 99, 167-175). In addition, he met with DHEC, the Army Corps of Engineers and Richland County officials regarding the development site. (R. pp. 174-175). These entities had no problem with the silt flow.

The Respondents have not done anything on their own to stop siltation on their property. (R. pp. 92-94). They have not used any of the money recovered from the lawsuit to clean out the silt that is already on their property. (R. p. 103). They have not done anything since the jury verdict in 2007. The only thing they have done is make Stonington Development, LLC's abatement efforts more difficult. The Respondents forced Stonington Development, LLC's engineers take down silt fences that were put up to protect the property from siltation. (R. pp. 96-97). In addition, they have prevented the development of the site. Consequently, this has prevented the stabilization of the soil. (R. pp. 94-96).

According to the Court's Order of June 26, 2008, Stonington Development, LLC, was enjoined as follows:

Stonington Development, LLC, is enjoined henceforth from discharging sediment-laden stormwater onto the plaintiffs' property in violation of the common law of this State and the **stormwater discharge Regulations promulgated by the South Carolina Department of Health and Environmental Control, to wit, S.C. Regs. § 72-307(C)(5)(b).** (emphasis added).

(R. pp. 25-27). Stonington Development, LLC, was enjoined to limit the amount of sediment suspended in the stormwater it discharged onto the Respondents' property. (R. pp. 25-27).

At the hearing, the only evidence the Respondents presented of the alleged violation of the injunction was Respondent Janette Robinson's lay opinion. (R. pp. 285-290, 102-105). There was no testimony from anyone with any expertise in water siltation. (R. pp. 107-108). There was no evidence of any testing done of the Respondents' ponds to determine the amount of siltation flowing into them. (R. p. 108). There was no evidence showing that Stonington Development, LLC, caused siltation in excess of the DHEC standard set forth in the injunction. (R. p. 108). Aside from Ms. Robinson's testimony, the only other evidence offered consisted of photographs of various spots, ponds and waterways around the Respondents' property. (R. p. 120). Ms. Robinson alleged the photographs show muddy water and other evidence of siltation caused by Stonington Development, LLC. (R. p. 120). However, the photographs are inconclusive. Ms. Robinson did not even know whether any of the property photographed was owned by Stonington Development, LLC. (R. pp. 115, 117). In fact, she testified that some was definitely owned by other parties. However, she believes that Stonington Development, LLC should still be held responsible for all of the silt on her property regardless of who caused the discharge. (R. p. 116).

Prior to the trial, Stonington Development, LLC, sold a significant amount of the property located upstream from the Respondents. (R. pp. 108-111). Some of this property has been cleared and is being developed. (R. pp. 108-111). This may in fact be

the causing discharge. However, Stonington Development, LLC, does not own this property.

Judge Manning's Order of September 28, 2009, provided the Respondents' attorney Freeman Belser could make a motion for attorney's fees. (R. pp. 28-33). Mr. Belser made his motion on October 8, 2009, and submitted an affidavit for \$27,695.00 in attorney's fees. (R. pp. 305-306). Mr. Belser did not provide an attorney-client fee agreement. (R. pp. 281-284). Nor did he provide an itemized bill or any other breakdown detailing the time spent on the injunction and the tasks performed. (R. pp. 281-284). He provided only a rough estimate of the time spent for which he should be paid. (R. pp. 283-284). Even then, Mr. Belser's admits that his firm combined the time it spent on the injunction with time spent on other matters for the Respondents. (R. pp. 283-284). He could only "estimate that the several attorneys spent 131 hours working on enforcement of the Injunction. . . ." (R. pp. 283-284). This estimate is based off of a 178 hour total that was spent on all of the Respondents' matters. (R. p. 283). There is no way of knowing how much time was actually spent on the injunction.

According to Mr. Belser's affidavit, to accrue the 131 hours, or \$27,695.00 in fees, his firm drafted a motion, an affidavit and a memorandum, hired a process server, scheduled and rescheduled a hearing, prepared a proposed order, had contact with opposing counsel and attended a single, one half day hearing, calling only one witness. (R. pp. 281-283).

ARGUMENTS

I. JUDGE MANNING ERRED IN FINDING L.K. HARRELL, III, IN CONTEMPT OF COURT BECAUSE THE COURT DID NOT HAVE JURISDICTION TO SUBJECT HIM TO THE COURT'S CONTEMPT POWERS.

L.K. Harrell, III, should not have been held in contempt of court because the Court did not have jurisdiction over Mr. Harrell to bind him individually to the injunction and subject him to the Court's contempt powers. The Respondents' lawsuit did not include Mr. Harrell as an individual defendant. (R. pp. 41-42). Ms. Robinson stated that the Respondents did not sue Mr. Harrell. (R. pp. 106-107). He was not served with a summons. He was not added as a party under Rule 19 of the South Carolina Rules of Civil Procedure. The Respondents did not bring an action to pierce Stonington Development, LLC's corporate veil. (R. pp. 44-46). Furthermore, Mr. Harrell had nothing to do with the development project. He was never even on the property. He did nothing in concert with Stonington Development, LLC, to form the basis of the contempt finding. He was not an officer or agent of the company or in any kind of position with authority. (R. pp. 278-280). His only connection with the lawsuit, and subsequent alleged contempt, was as a passive investor and minority member in the limited liability company. (R. pp. 278-280).

The Court did not have jurisdiction over Mr. Harrell. Therefore, he was not subject to its contempt powers and cannot be found liable for contempt. *See Thornton v. Alford*, 247 S.C. 1, 3, 260 S.E.2d 179, 181 (1979) (holding that disobedience of an order issued without jurisdiction is not contempt).

A. Mr. Harrell Was Not Served A Summons In The Action Against Stonington Development, LLC.

A civil action is commenced when a summons and complaint are filed with the clerk of court and served on the defendant. S.C. R. Civ. Pro. 3(a). "Service of the summons brings the defendant within the court's jurisdiction and gives the court the power to render a personal judgment against the person served." *Louden v. Moragne*, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct. App. 1997) (citing James F. Flanagan, *South Carolina Civil Procedure* 7 (2d ed. 1996)). Otherwise, the court does not have personal jurisdiction over the defendant. See *Brown v. Evatt*, 322 S.C. 189, 194, 470 S.E.2d 848, 850-851 (1996). "A court may not enter a valid judgment against an individual over whom the court lacks personal jurisdiction." *Louden*, 327 S.C. at 468, 486 S.E.2d at 526.

Mr. Harrell was not served with a summons in this action. The Respondents did not name him as a party in their action against Stonington Development, LLC. (R. pp. 49-50). Nor was any other action filed against him. Thus, the Court did not have jurisdiction over Mr. Harrell to render a judgment of contempt against him.

In addition, the statute of limitations for bringing an action against Mr. Harrell individually has expired. See S.C. Code Ann. § 13-5-530 (1976). The Respondents did not commence any action against Mr. Harrell within the statute of limitations period. Therefore, the Respondents waived any claim they could have had against Mr. Harrell individually, by failing to serve him with a summons and complaint inside of the statute of limitations period.

B. Mr. Harrell Was Not Joined As A Party In The Action Against Stonington Development, LLC.

Rule 19 of the South Carolina Rules of Civil Procedure provides for the joinder of indispensable parties. *See* Rule 19, SCRPC. “The principle behind this Rule is that whenever possible persons materially interested in the action should be joined so that they may be heard and complete determination had.” Reporter’s Comments, Rule 19, SCRPC.

The Respondents had the opportunity to join Mr. Harrell as a party pursuant to Rule 19. (R. pp. 40-55). Joining Mr. Harrell would not have deprived the court of subject matter jurisdiction over the action. *See* Rule 19, SCRPC. However, the Respondents chose not to join Mr. Harrell in the action. (R. pp. 40-55). Thus, Mr. Harrell was not brought within the court’s jurisdiction over the matter.

In addition, the statute of limitations has run on the Respondent’s claim. *See* S.C. Code Ann. § 13-5-530 (1976). In their complaint, the Respondents allege their injury occurred in or around 2000 when the property was being developed. (R. pp. 41-55). Their lawsuit was filed on July 29, 2005. (R. pp. 41-47). Mr. Harrell was not served anything bringing him into this matter until well after the three year statute of limitations had expired. Therefore, the Court did not have jurisdiction over Mr. Harrell to render a judgment of contempt against him. Further, the Respondents waived any claim they had against Mr. Harrell by failing to join him within the statute of limitations period. *See Gillman v. City of Beaufort*, 368 S.C. 24, 627 S.E.2d 746 (Ct. App. 2006) (holding that parties joined under SCRPC 19 are not prohibited from raising affirmative defenses such as statute of limitations).

C. The Respondents Did Not Pierce Stonington Development, LLC's Veil To Subject Mr. Harrell To Individual Liability.

Mr. Harrell is a minority member of Stonington Development, LLC. (R. p. 278). Stonington Development, LLC, is a limited liability company. A limited liability company is an entity separate and distinct from its members. See S.C. Code Ann. § 33-44-303 (1976). South Carolina Code § 33-44-303 states, in part:

[T]he debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. **A member or manager is not personally liable for a debt, obligation or liability of the company solely by reason of being or acting as a member or manager.** (emphasis added).

S.C. Code Ann. 33-44-303(a) (1976).

The proper way to hold a member personally liable for the acts of a limited liability company is to pierce the company's veil. See e.g. *State ex. Rel. Cooper v. Ridgeway Brands Mfg., LLC*, 666 S.E.2d 107 (N.C. 2008) (holding that a limited liability company is subject to piercing under the same circumstances as a corporation). The burden is on the party seeking to hold the member personally liable to pierce the veil. See *Mid-South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007). The Respondents did not even attempt to pierce the company's veil in their action against Stonington Development, LLC. (R. pp. 44-46). The Respondents did nothing to establish that Mr. Harrell should have been held individually liable for any actions of Stonington Development, LLC. Thus, the Court did not have any basis to hold Mr. Harrell in contempt for the company's actions.

Even if the Respondents did attempt to pierce Stonington Development, LLC's veil, they have not presented any evidence to prove Mr. Harrell should be held personally liable for Stonington Development, LLC's actions. South Carolina applies a two prong test to pierce a corporate veil. *Drury Dev. Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 102, 668 S.E.2d 798, 800 (2008). The first prong analyzes the shareholder's relationship to the entity. *Id.* The second prong requires the party seeking to pierce the veil prove that a "fundamental unfairness" or injustice will occur if the court does not hold the shareholder personally liable. *Id.* This is shown by proving the shareholder was aware of the party's claim and acted in a self serving manner to avoid its consequences. *Sturkie v. Sifly*, 280 S.C. 453, 459, 313 S.E.2d 316, 320 (Ct. App. 1984).

The Respondents did not present any evidence proving Mr. Harrell had an improper relationship with Stonington Development, LLC. All the evidence presented shows that Mr. Harrell was nothing more than a passive investor. He was not involved in the company's operations. (R. pp. 211-212). He had no real knowledge of the claims or Stonington Development, LLC's compliance. (R. pp. 106-107). He has not even seen a return on any of the money he invested in the company. (R. p. 279). There is no evidence that any fundamental unfairness or injustice would result if Mr. Harrell was not held personally liable for Stonington Development, LLC's acts.

D. Mr. Harrell Is Not Individually Liable For Stonington Development, LLC's Actions Under Rule 65(d) Of The South Carolina Rules Of Civil Procedure.

The injunction against Stonington Development, LLC, cites and applies Rule 65(d) of the South Carolina Rules of Civil Procedure. Rule 65(d) states, in pertinent part, as follows:

Every order granting an injunction . . . is binding only upon the parties to the action, **their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them.** . . . (emphasis added).

Rule 65(d), SCRPC. Mr. Harrell was not a party to the Respondents' action. (R. pp. 41-42). He was not an officer, agent or employee of Stonington Development, LLC. (R. pp. 278-280). He had no authority in the company or control over its compliance. (R. p. 279). He did nothing on behalf of, or in concert with, Stonington Development, LLC, to form the basis of a contempt finding. The Respondents have offered no evidence to the contrary.

Mr. Harrell cannot be held liable under Rule 65(d) simply because he holds an interest in the company. Rule 65(d) does not bind shareholders without authority or control over corporate compliance. Rule 65(d), SCRPC. It binds officers, agents, servants and others who act on behalf of the organization and whose actions may be imputed to the organization. Without some level of control or participation, the associate cannot actually violate the court order. *See e.g.* 17 C.J.S. Contempt §36 (2009) (stating corporate associates are only liable for corporate contempt when they are personally connected with defying the court's order). Thus, the Court did not have a basis for

jurisdiction under Rule 65(d) to hold Mr. Harrell individually liable for Stonington Development, LLC's contempt.

II. JUDGE MANNING ERRED IN FINDING L.K. HARRELL, III, IN CONTEMPT OF COURT BECAUSE MR. HARRELL DID NOT VIOLATE THE TERMS OF THE INJUNCTION.

L.K. Harrell, III, should not have been held in contempt of court because he did not violate the terms of the injunction. Mr. Harrell was a minority member of Stonington Development, LLC. He had no authority or control over anything the company did or did not do. (R. p. 278). Mr. Harrell was not involved in the lawsuit against Stonington Development, LLC, or the subsequent efforts to remediate the runoff and siltation. (R. p. 280). He had no idea of the extent of Stonington Development, LLC's compliance with the injunction. (R. p. 279). He never even went onto the property. (R. pp. 106-107). If he had, he still does not have expertise to determine how Stonington Development, LLC, could comply with the injunction. (R. p. 279). Further, he did not have the authority to devote any of Stonington Development, LLC's resources towards compliance with the injunction. (R. p. 279). The Respondents have offered no evidence to prove Mr. Harrell violated the terms of the injunction.

Furthermore, the Respondents did not prove that the terms of the injunction were actually violated. The only evidence offered was in the form of a lay opinion and photographs. The photos may or may not have been of Stonington Development, LLC's property. (R. pp. 161-162, 114-117). There was no expert testimony offered by anyone with expertise in storm water siltation. (R. p. 58). There was no testing done to the Respondents' ponds to prove siltation was flowing into them. (R. p. 120). There was no evidence showing that the injunction was violated.

A. Mr. Harrell Did Not Have The Authority Within Stonington Development, LLC, To Violate The Injunction.

Mr. Harrell was not a controlling person within Stonington Development, LLC. “A controlling person is one who formulates and directs corporate policy or who is deeply involved in the important business affairs of the corporation.” *State ex rel. McLeod v. C&L Corp.*, 280 S.C. 519, 531, 313 S.E.2d 341 (Ct. App. 1984) (*overruled on other grounds*). A controlling person makes “policy and management decisions for the corporation.” *State ex rel. Medlock v. Nest Egg Society Today, Inc.*, 290 S.C. 124, 132, 348 S.E.2d 381, 386 (Ct. App. 1986). Because he is in charge of the affairs of the corporation, a controlling person may be held personally liable for corporate violations of an injunction. *See Plowman v. Bagnal*, 316 S.C. 283, 287, 450 S.E.2d 36, 39 (1994) (stating that in an FTC action, a controlling officer of a corporation can be held personally liable for violations of a restraining order).

A member of a corporate entity who does not have any control or authority in the corporation cannot be held personally liable for corporate violations. *See* 10A Fletcher Cyc. Corp. § 5073 (2009). If the member lacks the authority or opportunity to compel the entity to comply with the injunction, he cannot be found guilty of contempt. *Id.*

Mr. Harrell did not make any policy or management decisions for Stonington Development, LLC. (R. p. 278). He was not a controlling person within the company. He had no knowledge of the lawsuit or the terms of the injunction. (R. p. 278). He had no way of compelling Stonington Development, LLC, to comply with the injunction. (R. p. 279).

Mr. Lipscomb managed the lawsuit and the company’s compliance with the injunction. There is no evidence proving that Mr. Harrell had any involvement with

Stonington Development, LLC's compliance with the injunction. "If, through no fault of his own, the contemnor is unable to obey a court order, the contemnor cannot be held in contempt." *Ex Parte Cannon*, 385 S.C. 643, 661, 685 S.E.2d 814, 824 (Ct. App. 2009) (citing *Miller v. Miller*, 375 S.C. 443, 454, 652 S.E.2d 754, 760 (Ct. App. 2007)). If Stonington Development, LLC, did violate the injunction, Mr. Harrell should not be held responsible for the violation which was out of his control.

B. Mr. Harrell Cannot Be Held In Contempt Simply Because Of His Minority Interest In Stonington Development, LLC.

Mr. Harrell cannot be held personally liable for Stonington Development, LLC's contempt simply because he owns a minority interest in the company.

... [T]he court cannot punish for contempt an officer of a corporation who was not a party to the contumacious conduct. **Simply because a corporation has failed to comply with a court order, it does not necessarily follow that all corporate agents or officers are in contempt because of their agent status;** there must be evidence in the record that the corporate agent charged with contempt was somehow personally connected with defying the authority of the court or disobeying its lawful decrees. (emphasis added).

17 C.J.S. Contempt § 36 (2009). There is no evidence establishing that Mr. Harrell was personally involved in any of Stonington Development, LLC's alleged violations of the injunction. As such, Mr. Harrell cannot be held in contempt based only on his minority shareholder status.

In *Moseley v. All Things Possible*, the plaintiff sued a corporation and its president for fraud in connection with a real estate transaction. *Moseley v. All Things Possible*, Op. No. 4677 (Ct. App. 2010). The trial court determined that an employee of the corporation fraudulently concealed a drainage easement when selling a lot to the plaintiff. *Id.* In addition to finding the corporation vicariously liable for the employee's

actions, the trial court found the president of the corporation liable. *Id.* The Court of Appeals upheld the trial court's finding with respect to the corporation. *Id.* However, the Court of Appeals overturned the trial court's finding with respect to the corporate president. *Id.* The Court of Appeals found that the lot was owned by the corporation, and the employee who handled the transaction handled it exclusively from start to finish with no help from the president. *Id.* The Court of Appeals found that there was no evidence the corporate president had anything to do with the fraud. *Id.* Accordingly, the Court of Appeals reversed the trial court's finding that the president had committed fraud. *Id.* Similarly, in this case, there is no evidence Mr. Harrell had anything to do with the contempt. He is only connected to the case by virtue of owning a minority share in a limited liability company.

In addition, even if Mr. Harrell was involved in Stonington Development, LLC's compliance, "[a]n injunction issued against a corporation or association binds the agents of that organization to the extent they are acting on behalf of the organization." 42 Am. Jur. 2d Injunctions § 299 (2010). There is no basis, or evidence, to hold Mr. Harrell personally liable. He would only be liable to the extent he was acting on behalf of Stonington Development, LLC.

C. There Is No Evidence That Mr. Harrell Willfully Violated The Terms Of The Injunction.

"[C]ontempt results from willful disobedience of a court order; and before a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which the contempt is based." *Cheap-O's Truck Stop, Inc., v. Cloyd*, 350 S.C. 596, 608, 567 S.E.2d 514, 519 (Ct. App. 2002) (quoting *State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994)). "A willful act is defined as one

done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law.” *Id.* at 608-609, 521.

In *Cheap-O's Truck Stop, Inc., v. Cloyd*, the plaintiff entered into various business arrangements with the individual defendant, Chris Cloyd, and the other corporate defendants. *Cheap-O's Truck Stop, Inc.*, 350 S.C. at 600-601, 567 S.E.2d at 516. When a dispute arose between the parties, the plaintiff filed suit against all of the defendants. Cloyd was named as a party in the lawsuit. *Id.*

Before trial, the parties, including Cloyd, entered into a settlement agreement. *Id.* The agreement was placed on the record before the court. *Id.* The defendants did not honor the agreement and were brought back before the court on a rule to show cause. *Id.* The Defendants, including Cloyd, were held in contempt. *Id.* The trial court stated that “Cloyd acknowledged on the record the validity of the settlement amount. He simply ha[d] made no legitimate efforts to comply even though he admittedly had the power to comply at least in part.” *Id.* at 608, 520.

This case is factually distinct from *Cheap-O's Truck Stop, Inc.* In *Cheap-O's Truck Stop, Inc.*, Cloyd admitted to the court that he had the power to comply with the settlement agreement. *Id.* Cloyd willfully decided that he would not comply with the settlement agreement. *Id.* Here, no evidence has been presented demonstrating that Mr. Harrell had any power whatsoever to comply with the terms of the injunction. Mr. Harrell did not willfully violate the injunction. Unlike Cloyd who voluntarily entered into the agreement as a party to it, Mr. Harrell took no part in the proceedings leading up to the injunction or the Respondents’ motion for a post trial injunction. (R. p. 279).

Furthermore, Cloyd was a named party in the action leading to the contempt. Mr. Harrell was never named as a defendant in the Respondents' action or named in their motion. There is no evidence that Mr. Harrell willfully, or intentionally, decided not to comply with the injunction.

"A party seeking a contempt finding for a violation of a court order must show the order's existence and facts establishing the other party did not comply with the order." *Browder v. Browder*, 382 S.C. 512, 521, 675 S.E.2d 820, 825 (Ct. App. 2009) (citing *Abate v. Abate*, 377 S.C. 548, 553, 660 S.E.2d 515, 518 (Ct. App. 2008)).

In *Browder*, the court issued a temporary order requiring the husband defendant to account for the sale of a piece of marital property. 382 S.C. at 517, 675 S.E. 2d at 822. After the sale, the wife filed a contempt complaint and rule to show cause against the husband. *Id.* She alleged the husband was in willful contempt of court because he did not provide her with any documentation of how the proceeds from the sale were used. *Id.* at 522, 825. However, the wife could not meet her burden of proof for willful contempt simply by showing a lack of documentation. *Id.* At trial, the husband established that the documentation in question was out of his control. *Id.* The court did not find the husband in contempt. *Id.*

Similarly, in this case, there is no evidence in the record establishing that Mr. Harrell willfully failed to comply with anything the court ordered. The Respondents did not establish that Mr. Harrell had any authority within Stonington Development, LLC, to comply with the terms of the injunction. The only thing the Respondents alleged is that Stonington Development, LLC, did not comply with the injunction. They did not

establish that Mr. Harrell willfully or intentionally caused Stonington Development, LLC's non-compliance.

A trial court's finding of contempt of court should be overturned when there is no evidence supporting the finding. *Floyd v. Floyd*, 365 S.C. 56, 72, 615 S.E.2d 465, 72-73 (Ct. App. 2005). There is no evidence supporting the contempt finding against Mr. Harrell. The injunction did not specifically order Mr. Harrell to do anything. There is no evidence establishing that Mr. Harrell willfully and intentionally caused Stonington Development, LLC, to violate the injunction. There is no evidence whatsoever that he even had the power within Stonington Development to cause a violation of the injunction.

D. The Respondents Did Not Prove That The Terms Of The Injunction Were Violated By Clear And Convincing Evidence.

"Civil contempt must be proved by clear and convincing evidence." *Miller v. Miller*, 375 S.C. 443, 457, 652 S.E.2d 754, 762 (Ct. App. 2007) (citing *Durlach v. Durlach*, 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004)). "[T]he record must be clear and specific as to the acts or conduct upon which such finding is based." *Floyd*, 365 S.C. at 75-76, 615 S.E.2d at 475 (citing *Spartanburg County Dept. of Soc. Servs. v. Padgett*, 296 S.C. 79, 83, 370 S.E.2d 872, 874 (1988)).

The evidence offered in this case does not meet the clear and convincing standard. The injunction states that Stonington Development, LLC, could not discharge siltation in violation of the DHEC standard for siltation. (R. pp. 25-27). However, there was no testing done to determine if the stormwater discharged into the Respondents' ponds contained excessive siltation. (R. p. 108). The Respondents did not hire any experts to determine if Stonington Development, LLC, was in compliance. (R. pp. 107-108).

Aside from Ms. Robinson's lay opinion, the only other evidence offered in support was photographs. According to Ms. Robinson, the photographs prove there was excessive siltation running onto the property. (R. p. 120). She pointed out that the water in the photographs would have been darker if there was not excessive siltation flowing through it. (R. p. 120). Ms. Robinson has no expertise in water siltation. (R. pp. 107-108). A lay opinion of the color of water in a photograph is inadequate to support a contempt finding.

The basis for the Respondents' position is that Stonington Development, LLC, was found liable for excessive siltation at the original trial. (R. p. 108). However, since the trial, Stonington Development, LLC, has put up silt fences, constructed a rock dam and hired two engineering companies to prevent further siltation. (R. pp. 111-112, 167-175). In addition, Stonington Development, LLC, has sold off a significant portion of its property. (R. p. 110). This land has been clear cut and developed. (R. p. 110). This land could be causing a significant amount of the siltation. (R. pp. 111). In fact, with regard to the photographs in evidence, Ms. Robinson could not say which of the photographs actually showed property owned by Stonington Development, LLC. (R. pp. 115-117). There was no clear evidence that Stonington Development, LLC, was causing any of the siltation onto the Respondents' property. And the Respondents did not meet their burden of proof.

III. JUDGE MANNING ERRED IN FINDING THE RESPONDENTS ENTITLED TO \$25,000 IN DAMAGES BECAUSE THERE IS NO EVIDENCE TO SUPPORT THE DAMAGE AWARD, AND IT ONLY SERVES TO UNJUSTLY ENRICH THE RESPONDENTS.

The Court's Order of September 30, 2009, provided the Respondents with \$25,000 as compensation for Stonington Development, LLC's violation of the injunction. (R. pp. 28-33). However, the record does not support such a damage award. The Respondents did not present any evidence to show they have been damaged in this amount.

"[C]ompensatory contempt is intended to restore the injured party to his original position prior to the contemnor's action and, therefore is limited to the party's actual damages." *Floyd*, 365 S.C. at 79, 615 S.E.2d at 477. "The goal is to indemnify the [Respondents] directly for the harm the contemnor caused by breaching the injunction." *Jarrell v. Petoseed Company, Inc.*, 331 S.C. 207, 210, 500 S.E.2d 793, 794 (Ct. App. 1998) (quoting *Curlee v. Howle*, 277 S.C. 377, 387, 287 S.E.2d 915, 920 (1982)). The damage award is limited to a party's actual loss incurred as a result of the violation of the injunction. *Id.*

In *Jarrell*, the plaintiff watermelon growers sued the defendant for selling defective seeds. 331 S.C. at 208-209, 500 S.E.2d at 793-794. The plaintiffs settled the case for \$70,000. *Id.* Later, the plaintiffs learned the defendants failed to produce a set of highly damaging test results in discovery. *Id.* The plaintiffs brought an action for contempt based on the violation of the court's discovery order. *Id.* The plaintiffs alleged that they suffered \$50,000 in damages as a result of the non-disclosure. *Id.* The trial court found the defendant in contempt and awarded damages. *Id.*

The Court of Appeals overturned the trial court's ruling. *Id.* at 212-213, 795. The Court of Appeals found that the plaintiffs suffered no actual, out-of-pocket losses. *Id.* The plaintiffs' damages were only speculative and not based on returning the plaintiffs to the status quo. *Id.* There was no evidence in the record to support the damage award aside from possible use of test results. *Id.* In overturning the trial court, the Court of Appeals stated, "[w]here, as here, no expenses or out-of-pocket costs have been alleged, the indemnification policies promoted by civil compensatory contempt would be jeopardized," by upholding such a damage award. *Id.*

Similarly, in this case, the Respondents have suffered no actual, out-of-pocket damages. (R. p. 103). The pond which they allege Mr. Harrell damaged already contained silt from before the original trial. (R. p. 103). The Respondents have not spent one dollar to remediate the problem. (R. p. 103). In fact, the Respondents have actively impeded the remediation efforts. (R. p. 95-97).

"The burden of showing what amount, if anything, the complainant is entitled to recover by way of compensation should be on the complainant." *Floyd*, 365 S.C. at 80, 615 S.E.2d at 478 (citing *Curlee*, 277 S.C. at 386-387, 287 S.E.2d at 919-920). The Respondents have not met this burden. The \$25,000 damage award was not justified by any evidence.

IV. JUDGE MANNING ERRED IN FINDING THE RESPONDENTS ARE ENTITLED TO THE ATTORNEY'S FEES AWARDED BECAUSE THE RESPONDENTS SHOULD NOT HAVE RECEIVED ATTORNEY'S FEES, AND THE AWARD WAS NOT SUPPORTED BY COMPETENT EVIDENCE OR THE APPROPRIATE FACTORS.

The Respondents are not entitled to attorney's fees. Judge Manning erred in finding Mr. Harrell in contempt of court. Thus, Judge Manning erred in awarding the Respondents any attorney's fees.

However, even if the Respondents are entitled to attorney's fees, they are not entitled to the fees awarded because the fee award is not supported by competent evidence or the appropriate factors. Mr. Belser did not provide an attorney-client agreement. (R. pp. 281-284). Nor did he provide a detailed breakdown of the time spent on the injunction. (R. pp. 281-284). The entire fee award was based on an estimate of time spent that was commingled with other matters. (R. pp. 283-284). In addition, the 131 hours, or \$27,695.00 in fees billed, are unreasonable to support the one half day hearing held in this matter and the preceding scheduling and legal documents.

A. The Respondents Are Not Entitled To Attorney's Fees Because Judge Manning Erred In Finding The Injunction Was Violated.

"The beneficial result obtained by counsel is a factor essential to determining whether an attorney's fee should be awarded." *Sexton v. Sexton*, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993) (citing *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991)). Attorney's fees should not be awarded where the substantive results of a case are improper and should be reversed on appeal. *Id.*; See e.g. *E.D.M. v. T.A.M.*, 307 S.C. 471, 415 S.E.2d 812 (1992).

The substantive results of this case are improper. Judge Manning should not have held Mr. Harrell in contempt of court for violating the injunction. Thus, the Respondents are not entitled to attorney's fees.

B. The Respondents Are Not Entitled To The Attorney's Fees Awarded Because The Award Is Not Supported By Competent Evidence Or The Appropriate Factors.

The amount of the attorney's fees awarded to the Respondents is improper. They did not support the award with an attorney-client fee agreement or any type of invoice. Furthermore, the award does not comport with the appropriate factors to be considered in a fee award.

i. Mr. Belser Did Not Support The Attorney Fee Award With An Attorney-Client Fee Agreement.

No evidence was presented to prove the Respondents incurred any attorney's fees in this matter. Because Mr. Belser did not submit an attorney-client fee agreement in support of his motion, there is no evidence that the Respondents actually incurred an obligation to pay attorney's fees. *See Williamson v. Middleton*, 383 S.C. 490, 681 S.E.2d 867 (2009). Thus, the Respondents are not entitled to recover attorney's fees. *Id.*

In *Williamson*, the plaintiff was awarded \$35,000 in attorney's fees at trial. *Id.* at 496, 876. To support the award, the plaintiff's attorney presented "extensive and diligent records detailing the amount of time spent on the case and by whom the work was done." *Id.* However, no attorney client agreement was presented. *Id.* The defendant appealed the award. *Id.* The Court of Appeals found that even though the plaintiff's attorney kept detailed records, and likely did not volunteer his firm's time, there was no competent evidence the plaintiff incurred the fees. *Id.*

Similarly, in this case, Mr. Belser did not produce an attorney-client agreement. The only evidence presented was Mr. Belser's affidavit stating that several lawyers in his firm spent 131 hours on the enforcement of the injunction. (R. pp. 283-284). The affidavit also set forth Mr. Belser's firm's legal rates. (R. p. 284). Nothing was produced to prove that the Respondents had any obligation to pay the fees in Mr. Belser's affidavit. (See R. pp. 451-458).

Further, Mr. Belser presented no evidence to establish his firm regularly represented the Respondents at established rates under the South Carolina Rules of Professional Conduct. SCRPC 1.5(b). Although Mr. Belser's firm represents the Respondents on several matters related to the injunction, no evidence was presented to prove that his firm had a prior relationship with the Respondents.

At best, Mr. Belser's affidavit only established that the Respondents had a moral obligation to pay his firm for the work done. Nothing in his affidavit or motion establish that the Respondents incurred the fees described or had any obligation to pay them. As stated in *Williamson*, a moral obligation to pay fees does not support an award of attorney's fees. *Williamson*, 383 S.C. at 496, 681 S.E.2d at 876.

ii. Mr. Belser Did Not Support The Attorney Fee Award With A Detailed Invoice Describing The Substance Of The Time Spent On The Matter.

In a contempt action, "[t]he award of attorney's fees is not a punishment but an indemnification to the party bringing the action." *Ex Parte Cannon*, 385 S.C. 643, 667, 685 S.E.2d 814, 827 (Ct. App. 2009) (citing *Miller v. Miller*, 375 S.C. 443, 463, 652 S.E.2d 754, 764, 765 (Ct. App. 2007)). "[A] contemnor may be required to reimburse a complainant for the costs he incurred, including reasonable attorney's fees." *Miller*, 375

S.C. at 463, 652 S.E.2d at 765. As such, the record must contain "sufficient evidence" for the court to determine the appropriate amount of fees to award. *Ex Parte Cannon*, 685 S.E.2d at 827. An attorney fee affidavit "merely provid[ing] a general description of the tasks [] performed" does not suffice. *Rowell v. Whisnant*, 360 S.C. 181, 186, 600 S.E.2d 96, 99 (Ct. App. 1994) (overturning the amount of a fee award where the record did not detail the work performed to achieve the outcome in the case).

The Respondents did not provide sufficient evidence for the court to determine the appropriate amount of fees to award. Mr. Belser's affidavit did not include a legal fee invoice detailing the services and time spent on the matter. (R. pp. 281-284). The affidavit only provided an "estimate" that several attorneys worked 131 hours on the enforcement of the injunction over the course of 74 days. (R. pp. 281-284). The affidavit goes on to provide that Mr. Belser's firm only tracks time on a daily basis, "by the file, not the task." (R. pp. 283-284). Without a detailed fee invoice there is no way of telling which of these matters Mr. Belser's firm worked on during the course of the 74 days. Mr. Belser's affidavit admits, along with the enforcement of the injunction, "time was also spent working on other matters in the file." (R. pp. 283-284). In addition, Mr. Belser's affidavit does not distinguish which of his firm's attorneys worked on the injunction at different times. (R. pp. 281-284). This is significant because the attorneys bill at different hourly rates. (R. p. 284). Finally, without a detailed fee invoice, there is no way of determining whether the time spent on the individual tasks performed on the matter were reasonable and necessary.

Mr. Belser's estimate of the time his firm spent on the enforcement of the injunction is exactly that, an estimate. It is speculative and far from sufficient evidence

for the court to determine the appropriate amount of fees to award. *See Ex Parte Cannon*, 685 S.E.2d at 827. It includes time spent on matters unrelated to the enforcement of the injunction. Therefore, because Mr. Belser did not include a detailed fee invoice to support the award, the award based on Mr. Belser's affidavit is not appropriate.

iii. The Amount Of The Attorney Fee Award Is Unreasonable Pursuant To The Appropriate Factors.

Judge Manning awarded the Respondents \$27,695.00 in attorney's fees. This award is unreasonable pursuant to the factors set forth in *Glasscock v. Glasscock*. In determining the reasonable attorney's fee the court must examine:

- (1) the nature, extent and difficulty of the case;
- (2) the time necessarily devoted to the case;
- (3) the professional standing of counsel;
- (4) contingency of compensation;
- (5) beneficial results obtained; and
- (6) the customary legal fees charged for similar services.

Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (citing *Donahue v. Donahue*, 299 S.C. 353, 384 S.E.2d 741 (1989)).

a. The Nature, Extent and Difficulty of the Respondents' Action Do Not Support the Attorney's Fee Award.

The nature, extent and difficulty of the Respondents' contempt action do not support the attorney's fee award. Having tried the underlying case in this matter, Mr. Belser was very familiar with the factual circumstances surrounding the action. In addition, this matter was not complicated. There were no depositions taken. The Respondents did not hire any experts to analyze silt flow or the amount of siltation currently in the Respondents' ponds and on their property. There were no expert reports regarding damages. No expert testimony was presented at all.

The only evidence Mr. Belser presented was Ms. Robinson's testimony and the accompanying photographs she took around her property and the development site. The entire basis for Stonington Development, LLC's liability was the underlying trial. (R. pp. 102-103). Ms. Robinson stated that Stonington Development, LLC, and its members were liable for contempt because they were found to be liable at trial. (R. pp. 102-103). The evidence Mr. Belser presented was not complicated and did not require extensive preparation or analysis.

b. The Time Devoted to the Respondents' Action was Unreasonable.

For the work performed, Mr. Belser's estimate of 131 hours is an unreasonable amount of time to have been spent on this action. The hearing lasted about ½ of a day. No experts were hired by the Respondents at all. The only evidence consisted of Ms. Robinson's testimony and pictures. The only work cited in Mr. Belser's affidavit includes the drafting of the rule to show cause, Ms. Robinson's affidavit, a memorandum in support of the rule and a proposed order. (R. pp. 281-283). In addition, Mr. Belser's firm hired a process server, scheduled and rescheduled the hearing and had contact with the opposing counsel. (R. pp. 281-283).

Mr. Belser's firm now demands to be paid for 131 hours of work to prepare for and conduct a hearing which took them one day. At forty hours a week, Mr. Belser claims to have worked on nothing but this one day hearing for three weeks. This assertion is nonsense.

CONCLUSION

L.K. Harrell, III, respectfully asks this Court to overturn Judge Manning's order finding L.K. Harrell, III, in contempt of court, awarding compensatory damages and awarding attorney's fees for the following reasons:

- The Court did not have jurisdiction to subject L.K. Harrell, III, to the Court's contempt powers.
- The Respondents did not prove L.K. Harrell, III, violated the terms of the injunction.
- The Respondents did not prove they are entitled to compensatory damages.
- The Court's award of attorney's fees was inappropriate and not supported by competent evidence or the appropriate facts.

Respectfully submitted,

August 30, 2010.



James Edward Bradley
William B. Fortino
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
Tel.: 803-796-9160
Fax: 803-791-8410

Attorneys for Appellant L.K. Harrell, III

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko, and
L.K. Harrell, III, ...Appellants,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, and Janette H.
Robinson.....Respondents.

v.

Stonington Development,
LLC.....Appellant,

CERTIFICATE OF COUNSEL

I certify that this Final Brief of Appellant L.K. Harrell, III complies with Rule
211(b), SCACR.

August 30, 2010



James Edward Bradley
William B. Fortino
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
Tel: 803-796-9160
Fax: 803-791-8410
Attorneys for Appellant L.K. Harrell, III

IN THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Common Pleas

L. Casey Manning

2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko, and
L.K. Harrell, III, ...Appellants,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, and Janette H.
Robinson.....Respondents.

v.

Stonington Development,
LLC.....Appellant,

PROOF OF SERVICE

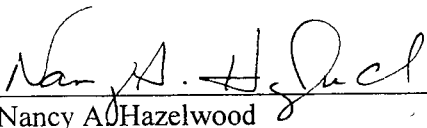
I certify that I have served the Appellant L.K. Harrell, III's Final Brief on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid on September 1, 2010, addressed to their attorneys of record as follows:

H. Freeman Belser, Esquire
William C. Dillard, Jr., Esquire
P.O. Box 96
Columbia, SC 29202

Timothy Quinn, Esquire
William M. Saltzman, Esquire
P.O. Drawer 12589
Columbia, SC 29211

George V. Hanna, IV, Esquire
Kelley Shull Cannon, Esquire
Caroline H. Raines, Esquire
P.O. Box 12009
Columbia, SC 29211

September 1, 2010



Nancy A. Hazelwood
Assistant to James Edward Bradley

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2005-CP-40-3736

ORIGINAL

RECEIVED

NOV 12 2010

SC Court of Appeals

Ex parte: Stephen E. Lipscomb, Ron Safko,
and L.K. Harrell, III,

Appellants;

In Re:

Glenn Y. Hollis, Jr., John E. Hollis, Joseph R.
Robinson, Janette H. Robinson,

Respondents;

v.

Stonington Development, LLC,

Appellant.

FINAL BRIEF OF APPELLANTS
STONINGTON DEVELOPMENT, LLC AND STEPHEN E. LIPSCOMB

Timothy G. Quinn
Law Offices of Quinn & Quinn
Post Office Drawer 12589
Columbia, South Carolina 29211
(803) 771-0936
Attorneys for Appellants:
Stonington Development, LLC
and Stephen E. Lipscomb

TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Facts.....	2
Arguments	
I. THE COURT ERRED BY ISSUING AN ORDER OF CONTEMPT WHEN AN APPEAL WAS PENDING.....	6
II. THE COURT ERRED BY FAILING TO RECOGNIZE THAT SOUTH CAROLINA LAW PROVIDES TEN DAYS' WRITTEN NOTICE TO AN OWNER OF REAL ESTATE BEFORE A PROCEEDING IS COMMENCED FOR FAILING TO ABATE A NUISANCE.....	8
III. THE COURT ERRED IN FINDING THAT STONINGTON, LLC AND MR. LIPSCOMB INTENTIONALLY DISREGARDED THE JUNE 26, 2008 ORDER.....	9
IV. THE COURT ERRED BY PIERCING THE CORPORATE VEIL.....	12
V. THE COURT ERRED IN FAILING TO FIND THAT RULE 65(d) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE DOES NOT BIND MR. LIPSCOMB INDIVIDUALLY TO THE INJUNCTION.....	13
VI. THE COURT ERRED BY ENFORCING A COURT ORDER THAT DOES NOT SUFFICIENTLY SET FORTH THE ACT ENJOINED.....	15
VII. THE COURT ERRED IN FINDING THAT STONINGTON, LLC AND MR. LIPSCOMB VIOLATED COUNTY ORDINANCES AND STATE STATUTES.....	16
VIII. THE COURT ERRED BY UNJUSTLY ENRICHING THE RESPONDENTS WITH THE ORDER OF CONTEMPT.....	18

IX.	THE COURT ERRED BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF AN ATTORNEY-CLIENT FEE AGREEMENT.....	20
X.	THE COURT ERRED BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF A FEE INVOICE DESCRIBING THE SERVICES RENDERED AND THE TIME SPENT.....	22
XI.	THE COURT ERRED BY FAILING TO FIND THAT THE NATURE, EXTENT AND DIFFICULTY OF THE SERVICES RENDERED DID NOT AMOUNT TO AN AWARD OF ATTORNEY'S FEES AND COSTS.....	23
XII.	THE COURT ERRED BY FAILING TO FIND THAT THE DECISION TO AWARD ATTORNEY'S FEES AND COSTS WAS NOT RIPE.....	24
	Conclusion.....	25

TABLE OF AUTHORITIES

CASES

<u>American Federal Bank, FSB v. Kateman</u> , 335 S.C. 273 (Ct. App. 1999)	15
<u>Arnal v. Fraser</u> , 371 S.C. 512, (2007).....	7
<u>Bigham v. Bigham</u> , 264 S.C. 101 (Ct.App. 1975).....	9
<u>Browder v. Browder</u> , 675 S.E. 830 (S.C. Ct.App 2009)	9
<u>Cheapo’s Truck Stop, Inc. v. Cloyd</u> , 350 S.C. 596 (2002)	19
<u>Drury Dev. Corp. v. Foundation Ins. Co.</u> , 380 S.C. 97 (2008).....	12
<u>Dumas v. InfoSafe Corp.</u> , 320 S.C. 188 (Ct.App. 1995).....	12
<u>Ex Parte Cannon</u> , 385 S.C. 643 (Ct.App. 2009).....	22
<u>Floyd v. Floyd</u> , 365 S.C. 56 (Ct.App. 2005).....	9
<u>Glasscock v. Glasscock</u> , 304 S.C. 158 (1991).....	22
<u>Mid-South Mgmt. Co. v. Sherwood Dev. Corp.</u> , 374 S.C. 588 (Ct. App. 2007)	12
<u>Spartanburg v. Kimbrell’s Inv. Co.</u> , 259 S.C. 203 (1972)	15
<u>Spartanburg Co. Dep’t of Soc. Servs. v. Padgett</u> , 296 S.C. 79 (1988).....	9
<u>State ex rel. Cooper v. Ridgeway Brands Mfg., LLC</u> , 666 S.E.2d 107 (N.C. 2008).....	12
<u>Sturkie v. Sifly</u> , 280 S.C. 453 (Ct. App. 1984).....	12
<u>Williamson v. Middleton</u> , 383 S.C. 490 (2009).....	20,21

STATUTES

Richland County Code of Ordinances § 26-36(a)(2).....	17
Richland County Code of Ordinance § 26-273(b).....	6,16,17,25
S.C. Code Ann. § 15-43-120.....	8
S.C. Code Ann. § 33-44-303(a).....	12
S.C. Code Ann. § 48-14-140.....	6,17,25

OTHER AUTHORITIES

85 A.L.R. 3d. 895, § 3 (1978).....	17
17 Am.Jur. 2d 54, Contempt. Sec. 52.....	15
42 Am.Jur. 2d. Injunctions § 299.....	13,15

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR BY ISSUING AN ORDER OF CONTEMPT WHEN AN APPEAL WAS PENDING?
2. DID THE COURT ERR BY FAILING TO RECOGNIZE THAT SOUTH CAROLINA LAW PROVIDES TEN DAYS' WRITTEN NOTICE TO AN OWNER OF REAL ESTATE BEFORE A PROCEEDING IS COMMENCED FOR FAILING TO ABATE A NUISANCE?
3. DID THE COURT ERR IN FINDING THAT STONINGTON, LLC AND MR. LIPSCOMB INTENTIONALLY DISREGARDED THE JUNE 26, 2008 ORDER?
4. DID THE COURT ERR BY PIERCING THE CORPORATE VEIL?
5. DID THE COURT ERR IN FAILING TO FIND THAT RULE 65(d) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE DOES NOT BIND MR. LIPSCOMB INDIVIDUALLY TO THE INJUNCTION?
6. DID THE COURT ERR BY ENFORCING A COURT ORDER THAT DOES NOT SUFFICIENTLY SET FORTH THE ACT ENJOINED?
7. DID THE COURT ERR IN FINDING THAT STONINGTON DEVELOPMENT, LLC AND MR. LIPSCOMB VIOLATED COUNTY ORDINANCES AND STATE STATUTES?
8. DID THE COURT ERR BY UNJUSTLY ENRICHING THE RESPONDENTS WITH THE ORDER OF CONTEMPT?
9. DID THE COURT ERR BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF AN ATTORNEY-CLIENT FEE AGREEMENT?
10. DID THE COURT ERR BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF A FEE INVOICE DESCRIBING THE SERVICES RENDERED AND THE TIME SPENT?
11. DID THE COURT ERR BY FAILING TO FIND THAT THE NATURE, EXTENT AND DIFFICULTY OF THE SERVICES RENDERED DID NOT AMOUNT TO AN AWARD OF ATTORNEY'S FEES AND COSTS?
12. DID THE COURT ERR BY FAILING TO FIND THAT THE DECISION TO AWARD ATTORNEY'S FEES AND COSTS WAS NOT RIPE?

STATEMENT OF THE CASE

On June 26, 2008, the Trial Court issued an Order enjoining Stonington Development, LLC (Stonington) from "... from discharging sediment-laden stormwater onto the [Respondents'] property." (R. p. 26).

On September 11, 2008, Respondents filed a Motion for an Order Holding Stonington and its Members in Contempt of Court for failing to comply with the June 26, 2008 Order. (R. pp. 305-306).

A Rule to Show Cause hearing was heard on April 14, 2009.

On September 28, 2009, the Court entered an Order Granting Plaintiffs' Motion for an Order Holding Stonington and its Members in Contempt. (R. pp. 28-33).

On October 7, 2009, Respondents, Stonington and Stephen E. Lipscomb filed a Rule 59(e) Motion as to the September 28, 2009 Order. (R. pp. 428-445).

On January 7, 2010, the Trial Court filed an Order denying Respondents' Rule 59(e) Motion and awarded attorney's fees to Respondents. (R. pp. 34-35).

On February 5, 2010, Respondents, Stonington and Mr. Lipscomb filed a Notice of Appeal as to the Trial Court's September 28, 2009 and January 7, 2010 Orders. (R. pp. 257-258).

FACTS

On April 6, 2007, a Richland County jury rendered a verdict in favor of the Respondents against Stonington in the amount of \$400,000.00 in actual damages and \$3.5 million in punitive damages, for a total of \$3.9 million, for a private nuisance arising from alleged siltation and

increased runoff that damaged the Respondents' properties and ponds. (R. p. 38). The Trial Court filed the Orders on November 12, 2007 and December 4, 2007. (R. pp. 6-24). Stonington filed a Notice of Appeal on December 13, 2007. (R. p. 252). That Appeal was briefed, filed, and is pending. (R. pp. 487-505). Also, Respondents' separate action to pierce the corporate veil of Stonington, LLC is pending.

On June 26, 2008, the Trial Court issued an Order enjoining Stonington "... from discharging sediment-laden stormwater onto the plaintiffs' property." (R. p. 26). On September 11, 2008, the Respondents filed a Motion for an Order Holding Stonington Development, LLC and its Members in Contempt of Court for failing to comply with the June 26, 2008 Order. (R. pp. 305-306). This Motion was filed without any prior notice to Stonington or Mr. Lipscomb.

A Rule to Show Cause hearing was heard on April 14, 2009. The Court heard the sworn testimony of Respondent, Janette H. Robinson, Kevin Lee of the Stonington Homeowners' Association, and of Appellant, Mr. Lipscomb. The Trial Court also reviewed numerous photographs identified by the witnesses.

At this hearing, Ms. Robinson testified that the Respondents have done nothing to repair their property. (R. p. 94, lines 1-5; p. 102, lines 19-22; p. 103, lines 6-17). She said the Respondents have collected approximately \$500,000.00 in settlements from several cases that relate to the instant case which involve insurance companies. (R. p. 92, line 26 - p. 93 line 11). Despite this \$500,000.00 settlement, Respondents admit they have not removed any of the silt from the pond, they have not hired engineers to help diagnose or fix the silt and runoff problem, and Respondents have not assisted Stonington in any way to find a solution for the alleged issues. (R. p. 93, lines 14-21; p. 94, lines 1-5; p. 102, lines 19-22; p. 103, lines 6-17; p. 114, lines 18-21;

p. 126, lines 6-10). Ms. Robinson also acknowledged on cross examination that the engineers she consulted all state that siltation will likely continue until the upper area is developed. (R. p. 127, lines 16-22). Mr. Lipscomb and Mr. Lee testified that it was the continued actions of the Respondents that are preventing the development of the upper land areas. (R. p. 144, line 19 - p. 145, line 5; p. 146, lines 8-12; p. 186, lines 10-25).

Respondents did not prove what caused the silt and runoff problem, if any. Respondents admit that Phase III of the Stonington subdivision was not owned by Stonington at the time of the jury trial, and not at the time of the Rule to Show Cause hearing. (R. p. 111, lines 3-13). Respondents also admit that the drainage system from Phase III flowed through the property owned by Stonington. (R. p. 110, lines 2-19). However, Respondents did not bring any evidence showing Stonington caused the alleged silt and runoff from Phase III to enter Respondents' property. Respondents also did not show that additional harm was done to their property since the June 26, 2008 Order was filed, nor did they present any testimony as to monetary damage caused by any additional siltation and no testimony that their damage, if any, could not be cured by their earlier settlement monies.

At the Rule to Show Cause Hearing, Appellants showed that Stonington and Mr. Lipscomb took remedial measures to solve the silt and runoff issues. (R. p. 167, line 25 - p. 168, line 4; p. 172, line 12 - p. 173, line 9; p. 178, line 17 - p. 179, line 10). On cross-examination, Ms. Robinson testified that she saw Mr. Lipscomb, as well as several other workers, setting up silt fences and hay bales along her property. (R. p. 78, lines 17-20; p. 78, line 26 - p. 79, line 1; p. 80, lines 15-18; p. 99, line 11 - p. 100, line 1; p. 101, lines 13-24; p. 113, lines 19-22; p. 113, line 25 - p. 114, line 5; p. 114, lines 6-17). On direct examination of Mr. Lipscomb, Mr.

Lipscomb testified that he hired three separate engineers to inspect the property and find a solution for any problems if they existed. (R. p. 167, line 25 - p. 168, line 4). Mr. Lipscomb also hired Carolina Storm Water Services to: monitor the property, check on the silt fences, set up a rock dam, and give Mr. Lipscomb reports regarding the condition of the property. (R. p. 168, lines 5-14; p. 169, lines 10-20; p. 172, line 12 - p. 173, line 9). Carolina Storm Water Services monitored the property every week for over one year. Id. Mr. Lipscomb also testified that DHEC and the Army Corps of Engineers went to the property and they have never found any violations, nor has Mr. Lipscomb ever been cited for not being in code compliance. (R. p. 174, line 5 - p. 175, line 2).

On September 28, 2009, the Court entered an Order Granting Plaintiffs' Motion for an Order Holding Stonington Development, LLC and its Members in Contempt. (R. pp. 28-35). The Order states a Findings of Fact. First, the Order states "[t]he siltation and increased runoff problems that were the subject of the underlying lawsuit between the plaintiffs and Stonington are continuing[,]" and Plaintiffs proved these damages "beyond question" by showing photographs of the property and the testimony of Ms. Robinson. (R. p. 29). However, the photographs were taken on days right after it rained and Respondents would not allow Appellants onto the property to make similar observations.

Second, the Order states "Stonington and Mr. Lipscomb have made minimal efforts but have not done enough to stop the siltation and increased runoff problems" Id. However, "Mr. Lipscomb testified that he had hired a consultant to periodically inspect Stonington's property." Id. Lastly, the Order wrongfully states that Appellants ". . . failed to show cause why they should not be held in contempt of Court[,]" and that the ". . . damages will need to be

remediated after the siltation is stopped” (R. p. 30).

Under the Conclusions of Law section, the Order found Stonington, Mr. Lipscomb, Mr. Safko, and Mr. Harrell in Contempt of Court. (R. pp. 30-32). The Order found the Appellants violated § 26-273(b) of the Richland County Code of Ordinances and S.C. Code Ann. § 48-14-140. (R. p. 31). The Order then awards compensatory damages to Respondents. (R. pp. 31-32).

The Orders of the Court section found Stonington, Mr. Lipscomb, Mr. Safko and Mr. Harrell individually liable for civil contempt. (R. pp. 32-33). The Appellants were found joint and severally liable for the amount of \$25,000.00 in compensatory damages to the Respondents, and Appellants are joint and severally liable for the Respondents’ attorney’s fee and costs. (R. p. 32). Finally, the Order demands that the Appellants pay to remediate the silt and runoff problems. (R. pp. 32-33).

Appellants, Stonington and Mr. Lipscomb filed a Rule 59(e) Motion on October 7, 2009 as to the September 28, 2009 Order. (R. pp. 428-445). In an Order filed on January 7, 2010, the Trial Court denied said Motion and awarded attorney’s fees and costs to Respondents. (R. pp. 33-35). Appellants, Stonington and Mr. Lipscomb then filed a Notice of Appeal on February 5, 2010 as to the Orders dated September 28, 2009 and January 7, 2010. (R. pp. 257-258).

ARGUMENTS

I. THE COURT ERRED BY ISSUING AN ORDER OF CONTEMPT WHEN AN APPEAL WAS PENDING

An order for contempt is not proper when an appeal is pending. Rules 205 and 225 of the South Carolina Appellate Court Rules terminates the Circuit Court’s jurisdiction over a Contempt hearing when the issue under review is pending in the Appellate Court. Rule 205 states that “[u]pon the service of the notice of appeal, the appellate court shall have exclusive

jurisdiction over the appeal[.]” Rule 205, SCACR. Rule 225 states:

. . .the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 225, SCACR. In Arnal v. Fraser, 371 S.C. 512, 521 (2007), a final divorce order gave a father specific parameters for child visitation. The father appealed a portion of the order concerning the visitation. Id. While the appeal was pending, the Family Court issued several orders modifying the visitation schedule. Id. The father argued the Family Court could not modify the divorce order while an appeal was pending. Id. The Supreme Court of South Carolina agreed with the father and held that the Appellate Court had exclusive jurisdiction over the matter, rather than the lower court. Id.

Here, just as in Arnal, the lower court is attempting to enforce a matter that is pending with the Appellate Court. Stonington is appealing whether it is liable in the underlying case. (R. pp. 503-504). The trial court’s order originally found Stonington liable for \$3.9 million and required Stonington to stop any further silt and runoff from entering Plaintiffs’ property. (R. pp. 6-22; pp. 23-24; p. 5). When Appellants’ Notice of Appeal was filed, the matters issued in these orders were automatically stayed, in accordance with Rule 225, SCACR. However, the trial court issued an injunction against the Appellants on June 26, 2008 without effectively lifting the stay. The injunction orders Appellants to stop any silt or runoff from entering Respondents’

property. (R. p. 26). This was a matter stayed for appeal. Allowing the Circuit Court to enforce this injunction would infringe the Appellate Court's jurisdiction. Therefore, under Rules 205 and 225, SCACR, the Circuit Court lacks jurisdiction to enforce the injunction. The Appellate Court has exclusive jurisdiction over this matter.

II. THE COURT ERRED BY FAILING TO RECOGNIZE THAT SOUTH CAROLINA LAW PROVIDES TEN DAYS' WRITTEN NOTICE TO AN OWNER OF REAL ESTATE BEFORE A PROCEEDING IS COMMENCED FOR FAILING TO ABATE A NUISANCE.

Respondents failed to provide Appellants with a ten day notice before filing the Rule to Show Cause. South Carolina law provides ten days' written to an owner of real estate before a proceeding is commenced for failing to abate a nuisance. S.C. Code Ann. § 15-43-120. South Carolina Civil Remedies and Procedures provides the following, regarding notice to an owner before an action is brought against him:

No proceeding against the owner of the real estate shall be commenced hereunder unless ten days' written notice be given by the prosecuting attorney to such owner or his agent and upon his failure thereafter to abate the nuisance.

Id. In the instant case, on September 11, 2008, Respondents filed a Motion for an Order Holding Stonington and its Members in Contempt of Court because Appellants allegedly failed to abate a nuisance. (R. pp. 305-306). Respondents filed this motion without providing prior notice to Appellants. Under South Carolina law, when a defendant is accused of failing to abate a nuisance, ten days notice must be given to a defendant before an action is commenced. S.C. Code Ann. § 15-43-120. Therefore, Respondents' motion for contempt is not viable because Respondents did not comply with S.C. Code Ann. § 15-43-120.

III. THE COURT ERRED IN FINDING THAT STONINGTON, LLC AND MR. LIPSCOMB INTENTIONALLY DISREGARDED THE JUNE 26, 2008 ORDER.

Stonington and Mr. Lipscomb did not intentionally disregard the June 26, 2008 Order.

Stonington and Mr. Lipscomb in fact complied with the June 26, 2008 Order of injunction and sought to abate the nuisance. "Contempt results from the willful disobedience of a court order." Browder v. Browder, 675 S.E. 820, 825 (S.C. Ct.App 2009) (citing Bigham v. Bigham, 264 S.C. 101, 104 (Ct.App. 1975)). "Willful disobedience requires an act to be 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" Id. (quoting Spartanburg Co. Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-3 (1988)). "Civil contempt must be proven by clear and convincing evidence." Floyd v. Floyd, 365 S.C. 56, 74 (Ct.App. 2005).

In Browder, a divorce order was issued requiring the husband to provide an accounting of proceeds collected from the sale of property. Browder, 675 S.E. at 822. The wife accused the husband of being in contempt for failing to provide the accounting. Id. However, the husband testified that he repeatedly requested the accounting records to no avail. Id. at 825. He also explained that the records were sent to the marital residence and he could not locate the information that was requested. Id. Instead, the husband tried to explain the accounts to the best of his knowledge. Id. The Court did not hold the husband in contempt because his actions to comply with the order were adequate. Id.

Here, just as in Browder, Stonington and Mr. Lipscomb's actions were adequate enough to find they were complying with the June 26, 2008 Order. Mr. Lipscomb, acting on behalf of Stonington, hired consultants and workers to monitor the Respondents' property and to set up

fencing, rock dams and hay bales where there was a possibility of siltation and runoff. (R. p. 167, line 25 - p. 168, line 4; p. 168, lines 5-14; p. 169, lines 10-20; p. 172, line 12 - p. 173, line 9; p. 178, line 17 - pg.179, line 10). Ms. Robinson admit to seeing Mr. Lipscomb observing the property and she has seen the workers constructing fences on the property. (R. p. 78, lines 17-20; p. 78, line 26 - p. 79, line 1; p. 80, lines 15-18; p. 99, line 11 - p. 100, line 1; p. 101, lines 13-24; p. 113, lines 19-22; p. 113, line 19 - p. 114, line 17). There was no clear and convincing proof that Stonington and Mr. Lipscomb wilfully disobeyed the June 26, 2008 Order.

Respondents' testimony that Appellants have done nothing to remediate the siltation and runoff problem are untrue. Stonington and Mr. Lipscomb have in fact made several attempts to abate the alleged nuisance. It may be so, however, that Stonington and Mr. Lipscomb's actions did not completely remediate the alleged problem. On the other hand, Stonington and Mr. Lipscomb did not willfully disregard the June 26, 2008 Order. Mr. Lipscomb has made a good faith attempt to abate the nuisance by hiring consultants and workers to set up fences, hay bales and rock dams.

Even if the Respondents believe Stonington and Mr. Lipscomb's attempts are insufficient, Respondents have not proven that Stonington and Mr. Lipscomb have intentionally disregarded the June 26, 2008 Order. Respondents did not provide testimony by Ms. Robinson nor did Respondents show in cross-examination that Stonington and Mr. Lipscomb wilfully disregarded the June 26, 2008 Order. Respondents have done nothing in assisting Stonington and Mr. Lipscomb as to what needs to be done to remediate the situation and the remediation of the situation requires the Respondents' cooperation which has not been forthcoming. (R. p. 93, lines 14-21; p. 94, lines 1-5; p. 102, lines 19-22; p. 103, lines 6-17; p. 114, lines 18-21; p. 126,

lines 6-10). Furthermore, the extent of the alleged continuing damages is unknown because Respondents have not cleaned their property with the assistance of the \$500,000 insurance settlement money. (R. p. 92, line 26 - p. 93, line 11; p. 93, lines 14-21; p. 103, line 6-17). It is unreasonable, if not impossible, for Appellants to prevent every ounce of silt and runoff from entering Respondents' property.

This lawsuit is preventing Stonington from completely remediating the alleged siltation and runoff problem. (R. p. 146, lines 8-12; p. 186, lines 10-25). The Respondents are threatening to take legal action against those who purchase the upper lots of the Stonington subdivision. (R. p. 186, lines 10-25). As a result, no one is interested in purchasing the land for the purpose of building a house. (R. p. 144, line 19 - 145, line 5). If houses are built, the land will become stabilized, sod will be laid down, and vegetation will be planted. (R. p. 182, line 15 - p. 183, line 1). These improvements to the land would stop the alleged harms done to Respondents. Id. In effect, Respondents are hindering the Appellants from complying with the June 26, 2008 Order.

Respondents have not told Appellants specifically what needs to be done to remediate the problem. (R. p. 126, lines 6-10). Stonington and Mr. Lipscomb have done what they can to solve any alleged problem. (R. p. 167, line 25 - p. 168, line 4). Respondents have not provided Appellants with any guidance. Therefore, the Trial Court should have found, like Browder, that Stonington and Mr. Lipscomb's actions in abating the nuisance were adequate enough to find they did not disregard the June 26, 2008 Order, and that Respondents did not have clear and convincing evidence to show otherwise.

IV. THE COURT ERRED BY PIERCING THE CORPORATE VEIL.

Mr. Lipscomb is not in contempt because Respondents did not pierce Stonington's veil. "A member or manager [of a limited liability company (LLC)] is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." S.C. Code Ann. § 33-44-303(a). Although no South Carolina appellate decision discusses protecting the personal liability of an LLC's individual members, other state courts apply the same test for finding LLC individual members personally liable as they apply in situations involving business corporations. *See, e.g. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 666 S.E.2d 107 (N.C. 2008). In deciding whether to find individuals personally liable for the debts and obligations of the business entity which they serve, South Carolina courts place the burden of proof on the party seeking to pierce the corporate veil. *Mid-South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597 (Ct. App. 2007) (citing the test established in *Sturkie v. Sifly*, 280 S.C. 453 (Ct. App. 1984).

South Carolina applies a two prong test for piercing the corporate veil. *Drury Dev. Corp. v. Foundation Ins. Co.*, 380 S.C. 97,102 (2008). The first prong analyzes the shareholder's relationship to the corporation by evaluating eight factors. *Id.* The second prong requires the plaintiff to demonstrate that "fundamental unfairness" would result from recognition of the corporate entity. *Id.* "The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 192-3, (Ct.App. 1995).

At the April 14, 2009 hearing, Respondents did not provide any evidence showing Mr. Lipscomb abused the formalities of a limited liability company, nor did Respondents show that a

“fundamental unfairness” would result from recognizing Stonington as an entity. The Respondents, however, are attempting to compel Stonington’s members to pay for the liabilities of Stonington. One of the purposes of forming a LLC is to limit the members’ liability. Having the members pay for the liabilities of the LLC, without piercing the veil, is contrary to the law and to public policy. Furthermore, a subsequent action to pierce the veil of Stonington is pending in the Circuit Court. Piercing Stonington’s veil by way of this contempt hearing would be premature, and would deprive Mr. Lipscomb of his day in court on this issue. Therefore, Mr. Lipscomb is shielded by the LLC’s veil in this contempt action.

V. THE COURT ERRED IN FAILING TO FIND THAT RULE 65(d) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE DOES NOT BIND MR. LIPSCOMB INDIVIDUALLY TO THE INJUNCTION.

Mr. Lipscomb is not bound to the June 26, 2008 Order in his individual capacity, pursuant to Rule 65(d) SCRCP. Rule 65(d) of the South Carolina Rules of Civil Procedures states injunctions are “binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Officers are bound to an injunction against the business entity only in their capacity as an officer. 42 Am.Jur. 2d. Injunctions § 299. Agents of the company are bound to an injunction to the extent they are acting on behalf of the company. Id. Parties who are “. . .outside an injunction’s coverage subject themselves to its proscriptions should they aid or abet the named parties in a concerted attempt to subvert those proscriptions. Id. at § 300.

In the instant case, on June 26, 2008, this Court filed an “. . .Injunction Against Stonington Develoment, LLC.” (R. p. 25). The June 26, 2008 Order enjoins Stonington from

“discharging sediment-laden stormwater onto the plaintiffs’ property. . . .” (R. p. 26). The June 26, 2008 Order goes on to include Stonington’s “members” in the injunction, which it claims is [i]n accordance with Rule 65(d) SCRPC. . . .” (R. p. 27). The Injunction Order now seeks to hold Mr. Lipscomb in contempt, individually. Id.

The June 26, 2008 Order, misquotes Rule 65(d). Id. Rule 65(d) of the South Carolina Rules of Civil Procedures states injunctions are “binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Members are not included in the rule. Therefore, the June 26, 2008 Order was not in accordance with Rule 65(d) SCRPC and Stonington’s members should not have been included in the injunction.

The June 26, 2008 Order did not establish jurisdiction over Mr. Lipscomb. Mr. Lipscomb was not a named party of the original action against Stonington, nor was he named in his individual capacity in the June 26, 2008 Order. (R. pp. 40-47; pp. 25-27). It may be argued that Mr. Lipscomb has not preserved his right to set aside the June 26, 2008 Order because Mr. Lipscomb did not file a Motion to Reconsider or a Notice of Appeal. However, these actions are not necessary to find that the injunction is not binding on Mr. Lipscomb individually. The June 26, 2008 Order failed to name the specific members who are bound to the injunction, and whether they would be liable in their individually capacity. Therefore, it was not proper for the Trial Court to hold Mr. Lipscomb in contempt because the Trial Court did not have jurisdiction over him individually.

Mr. Lipscomb is not individually liable for contempt even if he was acting as an officer or

agent of Stonington. As a member of Stonington, Mr. Lipscomb may be considered an agent or officer. However, officers are bound to injunctions against the business entity only in their capacity as an officer, and agents can only act on behalf of the company. 42 Am.Jur. 2d. Injunctions § 299. Therefore, any alleged actions Mr. Lipscomb made in violation of the injunction, would be imputed to Stonington because Mr. Lipscomb was acting on behalf of Stonington.

Mr. Lipscomb did not aid Stonington in violating the injunction. Mr. Lipscomb did have knowledge of the June 26, 2008 Order, but he did not participate in concert to violate the injunction. Respondents did not show Mr. Lipscomb actively participated in any wrongful act. To the contrary, Mr. Lipscomb only aided Stonington in complying with the injunction by hiring consultants and workers to help remediate the alleged silt and runoff problem. Therefore, under Rule 65(d) SCRPC, Mr. Lipscomb is not individually liable for contempt.

VI. THE COURT ERRED BY ENFORCING A COURT ORDER THAT DOES NOT SUFFICIENTLY SET FORTH THE ACT ENJOINED.

The Court's order of June 26, 2008 does not sufficiently set forth the act enjoined. Rule 65, SCRPC states that injunctions "...shall describe in reasonable detail, and not be reference to the complaint or other document, the act or acts sought to be restrained..." Rule 65(d), SCRPC. "Before a person may be held in contempt for violating a court order, the order should inform him in definite terms to the duties thereby imposed upon him, and the command must therefore be express rather than implied." Spartanburg v. Kimbrell's Inv. Co., 259 S.C. 203, 215-16 (1972) (citing 17 Am.Jur. 2d. 54, Contempt. Sec. 52); See also American Federal Bank, FSB v. Kateman, 335 S.C. 273 (Ct. App. 1999) (Holding the court's order was not sufficiently definite to indicate what the third party held subject to the order had to do to comply with the order).

The Court's Order of June 26, 2008 only vaguely describes the acts sought to be restrained. The Order enjoins the discharging of sediment-laden storm water and referenced South Carolina Regulations. Further, the order does not require Mr. Lipscomb to take any affirmative acts.

Stonington and Mr. Lipscomb do not have the capacity to interpret the Order and documents it references to figure out the implication of what is enjoined. As Rule 65, SCRCR states, the act enjoined must be described in detail. The Court's Order is not reasonably detailed and it references outside documents. As a result, Stonington and Mr. Lipscomb complied with the June 26, 2008 Order to the best of their ability and they should not be bound to the vague terms.

VII. THE COURT ERRED IN FINDING THAT STONINGTON, LLC AND MR. LIPSCOMB VIOLATED COUNTY ORDINANCES AND STATE STATUTES

Stonington and Mr. Lipscomb did not violate county ordinances and state statutes. Under § 26-273(b) of the Richland County Code of Ordinances:

When an authorized county official finds violations of this [Land Development Code Compliance Ordinance], it shall be the duty of said official to notify the person alleged to be in violation. Such notice of violation shall be in writing and sent by certified or registered mail or delivered by personal service. If the violator cannot be ascertained, then the notice of violation shall be sent to the record owner of the land on which the violation occurs. The notice of violation shall include an opportunity to cure the violation within a prescribed period of time.

Richland County Code of Ordinance § 26-273(b). The Order states "Sec. 26-273(b) of the Richland County Code of Ordinances subjects a violator of the stormwater provisions to a per

diem penalty of not more than \$500.00, beginning on the date the violator receives notice of a violation of the Ordinance. . .” (R. p. 31). The Order then goes on to claim the Appellants are liable for the code violations and should pay the fines to Respondents. Id.

This Order misstates the law. First, Respondents do not have standing to bring an action for violating a county ordinance. Richland County Code of Ordinances § 26-36(a)(2). Second, the Order misquotes what the actual ordinance states. *See* Richland County Code of Ordinances § 26-273(b); (R. p. 31). Richland County Code of Ordinances § 26-273(b) deals with the procedure for providing notice to a violator of Land Development Code Compliance Ordinances, while the Order incorrectly states that § 26-273(b) deals with penalties for violating stormwater provisions. Third, Appellants have not been formally accused of, nor found in violation of any Richland County Ordinance or South Carolina state law. (R. p. 174, line 5 - p. 175, line 2). Therefore, Respondents’ due process rights would be violated if such a finding was made without notice and a hearing. Fourth, the Order does not cite exactly which stormwater code the Appellants allegedly violated. Fifth, the state statute, S.C. Code Ann. § 48-14-140 does not apply here because the county ordinance does not apply. *See* S.C. Code Ann. § 48-14-140. Sixth, the June 26, 2008 order seeks to have Appellants abate the nuisance, not to enforce county codes and state statutes. (R. pp. 26-27). Lastly, Respondents are not entitled to an amount of \$25,000.00 because the amount is arbitrary and South Carolina courts do not allow citizen plaintiffs from collecting fines that would ordinarily be for the state. *See* 85 A.L.R. 3d. 895, § 3 (1978).

There was no such testimony regarding violations of county codes or state laws at the April 14, 2009 hearing. As a result, the proposed compensatory damages for violating the codes

and statutes are not proper. This Court should find that the Trial Court erred and the damages were improperly awarded.

VIII. THE COURT ERRED BY UNJUSTLY ENRICHING THE RESPONDENTS WITH THE ORDER OF CONTEMPT.

Respondents are unjustly enriched by the Trial Court's Order of contempt. The Trial Court placed an undue burden on the Appellants by holding the Appellants in contempt. Respondents would be unjustly enriched at the Appellants' expense. The Trial Court opened the door for Respondents to bring a Rule to Show Cause action whenever any silt or runoff enters their property, which would be the result of any rainfall. It was unreasonable for the Trial Court to compel Appellants to stop all silt and runoff from entering Respondents' property, which at this time, would be an impossible task. Respondents are using the judgment and injunction against Appellants for the Respondents' own monetary gain.

Awarding Respondents monetary damages, despite Respondents' lack of evidence as to monetary damages, would allow the Respondents to abuse the Appellants at the Respondents' discretion. Respondents brought biased photographs and biased testimony that the damage is continuing. Respondents admit that Respondents have done nothing to clean their pond nor have any water samples been analyzed by experts to see if there has been any further damage to the pond. (R. p. 103, lines 6-17). An insurance company settled with Respondents for approximately \$500,000 and Respondents admit to not using any of it to remediate the alleged problems. (R. p. 92, line 26 - p. 93, line 11; p. 93, lines 14-21). Respondents also failed to prove who exactly was causing alleged silt and runoff.. (R. p. 115, lines 4-24; p. 117, lines 19-21). Respondents did not even prove the extent of the alleged continuing damages or if there was any additional silt or runoff coming onto the property. If the Respondents are awarded damages

under this low burden for standard of proof, which appears to be less than clear and convincing, Respondents will likely keep bringing these actions against Appellants and collect money that is not rightfully deserved.

The Order's issuance of damages misstates the law and would unjustly enrich Respondents. The Order states "...the remedial remedy of compensatory contempt is available to the Court to restore the [Respondents] as nearly as possible to their original position." (R. p. 31). The Order then goes on to award Respondents compensatory damages of \$25,000.00, attorney's fees, costs, and pay for the costs to remove the silt that has resulted from the alleged non-compliance with the injunction. (R. pp. 32-33).

The Order misstates the law for awarding actual damages, attorney's fees and costs. The Order cites Cheapo's Truck Stop, Inc. v. Cloyd, 350 S.C. 596 (2002) to justify these awards. (R. pp. 31-32). However, Cheapo's Truck Stop was an action involving a settlement reached in open court in which the owner of the company was also named as a defendant in the action. Cheapo's Truck Stop, 350 S.C. 596 (2002) This cited case does not apply here.

The proposed \$25,000.00 in compensatory damages would unjustly enrich Respondents. The Order states that the Court has the power "... to restore the [Respondents] as nearly as possible to their original position." (R. p. 31). \$25,000.00 in compensatory damages would put the Respondents in a position better than they were in before. The pond already had silt in it and Respondents did not prove that any additional silt has caused any additional damages. This \$25,000.00 amount is also arbitrary and has no basis in the testimony. Furthermore, the Respondents would not use this money to clean the pond or prevent any further silt from entering their property because Respondents are seeking to compel Appellants to pay for the cleaning and remedial measures. Also, the Respondents have not done anything to remediate the damages

thus far, despite the \$500,000 in insurance settlement money they received and a \$3.9 million judgment entered in their favor. (R. p. 92, line 26 - p. 93 line 11; pp. 6-22). As a result, the Trial Court was incorrect to allow Respondents to profit from the injunction at the Appellants' expense.

IX. THE COURT ERRED BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF AN ATTORNEY-CLIENT FEE AGREEMENT.

This Court should not award attorneys' fees and costs to Respondent because Respondent did not provide an attorney-client fee agreement. A plaintiff may not receive attorneys' fees and costs when the plaintiff does not present an attorney-client fee agreement. Williamson v. Middleton, 383 S.C. 490 (2009). In Williamson, plaintiffs "...presented records showing attorneys' fees totaling approximately \$106,000, the trial judge awarded \$35,000. . . ." Id. at 493. The defendant appealed the award of attorney fees. Id. At deposition, plaintiff's attorney testified that he never sent plaintiff any statements of attorneys' fees and they did not have an attorney-client fee agreement. Id. at 495. However, plaintiff's attorney did keep "...extensive and diligent records detailing the amount of time spent on the case and by whom the work was done." Id. at 496. The South Carolina Supreme Court denied attorneys' fees because there was "...no competent evidence to support the finding that [plaintiff] incurred attorney's fees." Id.

Respondents should not be awarded attorneys' fees and costs, just like Williamson, because Respondents failed to produce an attorney-client fee agreement. Respondents' attorney "...estimate[s] that several attorneys spent 131 hours on enforcement of the Injunction. . . ." (R. p. 283). Respondents' attorney also states that his firm's legal fee rates are "...\$200/hour for [H. Freeman Belser], to \$185/hour for Michael J. Polk, to \$250/hour for Clinch H. Belser, Jr." (R. pp. 283-284). However, no such fee agreement was presented stating the Respondents and

the attorneys agreed upon these rates, nor was there a fee agreement stating that the attorneys would bill on a fixed hourly rate, nor have the Respondents provided any such fee agreement in connection to any of their case files with Belser & Belser, P.A. Therefore, Respondents, just as in Williamson, did not provide competent evidence to support a finding that Respondents incurred attorney's fees and costs because there is no fee agreement.

Respondents may argue that a fee agreement was reached because their attorneys kept an hourly time log of the work performed for the Injunction matter. This argument fails, however, because, as stated in Williamson, having extensive and diligently prepared time records by itself, does not satisfy the requirement of having a fee agreement. Williamson, 383 S.C. at 496. Here, there is no record that Respondents agreed to pay the amounts their attorneys' suggest are the established hourly rates.

On the other hand, a fee agreement would not be necessary in the instant case if the attorneys "regularly represented" the Respondents and an agreed upon rate of payment was already established. Rule 1.5(b), SCRCP. However, neither Respondents nor the Respondents' attorneys have shown that Belser & Belser, P.A. "regularly represents" the Respondents. It may be true that Respondents have used Belser & Belser, P.A. for several actions against Stonington Development, and Belser & Belser, P.A. may be thought of as "regularly representing" the Respondents in these matters, but all of these legal actions spurned from the same incident. Respondents' attorney admits that his firm is working on this Injunction matter as well as "... several different matters within this file. ..." (R. p. 283). There is no proof that Respondents and Belser & Belser, P.A. had any relationship prior to the instant matter, and Respondents cannot be considered "regularly represented clients" of Belser & Belser, P.A. Therefore, the Trial Court erred in awarding attorneys' fees and costs to Respondents without a the presentment

of a valid fee agreement.

X. THE COURT ERRED BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF A FEE INVOICE DESCRIBING THE SERVICES RENDERED AND THE TIME SPENT.

The Trial Court should not have awarded Respondents attorneys' fees and costs because Respondents did not present a legal fee invoice which itemizes billable hours along with the legal services provided. When determining the amount of attorney's fees to award, the court should consider the time necessarily devoted to the case. Glasscock v. Glasscock, 304 S.C. 158, 161 (1991). A court should not award attorneys' fees and costs in a contempt action when the "...record lacks sufficient evidence from which the circuit court could determine the appropriate amount of attorneys' fees required. . ." Ex Parte Cannon, 385 S.C. 643, 667 (Ct.App. 2009). An award of attorneys' fees to a plaintiff is improper when their lawyer fails to send billing statements to that plaintiff/client. Williamson, 383 S.C. at 496.

Here, Respondents failed to present a legal fee invoice allocating the services and time spent on this action. Respondents also failed to present any legal fee statements that Respondents' attorney sent to Respondents requesting payment. Respondents' attorney vaguely states he "...estimate[s] that the several attorneys spent 131 hours working on enforcement of the Injunction on those 74 days investigating the facts, preparing documents to be submitted to or filed with the [Trial] Court, researching applicable law, scheduling hearings, and communicating with adversary counsel. . . ." (R. p. 283). Also, "[Belser & Belser, P.A.] tracks billable time on a daily basis for each attorney by file only, not by task." Id. This speculation regarding who performed particular services and how much time was spent for each service is not "competent evidence" to show such services were necessary, or whether they actually occurred. It is impossible to know if such time and service was necessary or even reasonable for this case

without a legal fee invoice.

Awarding Respondents attorneys' fees and costs, without presenting a legal fee invoice, would unjustly enrich Respondents. Respondents' attorney admits that while their "...firm worked on enforcement of the Injunction, time was also spent working on other matters in the file." Id. If this is so, Respondents may be attempting to have Appellants pay for services that Respondents would have paid otherwise for one of the "several different matters within this file that are not related to enforcement of the Injunction." Id. This would be an unjust enrichment to Respondents and an undue burden on the Appellants. Furthermore, as stated above, Respondents' attorney admits that "[Belser & Belser, P.A.] tracks billable time on a daily basis for each attorney by file only, not by task." Id. Respondents' attorney's vague, uncertain, and speculative explanation of the allocation of time and services rendered is not competent evidence to find for an award for attorneys' fees and costs. A legal fee invoice, which is commonly used in the practice of law in South Carolina and in the United States, is a proper method to prove the allocation of attorneys' fees costs. Respondents have failed to produce such a document, and therefore, the Trial Court erred by awarding attorneys' fees and costs to Respondents.

XI. THE COURT ERRED BY FAILING TO FIND THAT THE NATURE, EXTENT AND DIFFICULTY OF THE SERVICES RENDERED DID NOT AMOUNT TO AN AWARD OF ATTORNEY'S FEES AND COSTS.

The Trial Court should not have awarded attorneys' fees and costs to Respondents because the instant case does not rise to the level of difficulty that Respondents' attorney suggests. In determining the amount of attorney's fees to award, the court should consider the nature, extent, and difficulty of the case. Glasscock, 304 S.C. at 161. Here, Respondents' attorney states that this case was made more complicated and has required more work because

Appellants willfully disregarded the Injunction Order. (R. p.283). However, this argument is not persuasive. First, Respondents' attorney admits that other matters not related to the Injunction are included within this file. Id. This means a lot of the work completed for other matters were used for this Injunction matter. That would actually make this Injunction matter less complicated because a lot of the work was already done. Second, Respondents' attorneys did not have to analyze any damage reports showing continuing damage to the pond because Respondents never hired any such experts to perform those services. Third, the only evidence Respondents' attorney presented in an attempt to prove willful disregard of the Appellants at the Rule to Show Cause hearing was his client's testimony and dated photographs of the pond. Gathering this information could not have made this case "more complicated." Lastly, it is difficult to determine how complicated handling this Injunction matter was for Respondents' attorneys without an accurate legal fee invoice stating these supposedly difficult services performed made this case so complex. Neither Respondents nor Respondents' attorneys presented a legal fee invoice. Therefore, Respondents did not show that this matter rises to a level of complexity where attorneys' fees and costs should be awarded.

XII. THE COURT ERRED BY FAILING TO FIND THAT THE DECISION TO AWARD ATTORNEY'S FEES AND COSTS WAS NOT RIPE.

The original case which found Respondent Stonington liable to Respondents is currently under Appeal. In addition, despite specific requests for a formal hearing from all of the Appellants, the Trial Court unilaterally awarded attorney's fees and costs based on the affidavit of Respondents' counsel. There was no opportunity for the Appellants to put in evidence of their own or cross-examine the Respondents on this issue. Therefore, it was improper for the Trial Court to award attorneys' fees and costs to Respondents.

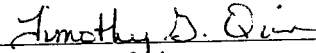
CONCLUSION

The Trial Court improperly found Appellants in contempt and improperly awarded attorneys' fees and costs to Respondents. South Carolina law does not hold Stonington or Mr. Lipscomb in contempt of court for violating the injunction and the Trial Court's September 28, 2009 and January 7, 2010 Orders misstate several important issues. First, the Circuit Court does not have jurisdiction to enforce this injunction. Second, Appellants were not given proper notice of the Motion for a Contempt Hearing. Third, Stonington did not intentionally disregard the Order because they did in fact attempt to remediate the alleged problems, and Respondents did not show clear and convincing evidence to show otherwise. Fourth, Respondents did not bring evidence to pierce the corporate veil against Mr. Lipscomb. Fifth, Rule 65(d) SCRCF does not extend to Mr. Lipscomb in finding him individually liable for contempt. Sixth, Rule 65(d) SCRCF does not allow vague injunctions to bind the parties. Seventh, Stonington and Mr. Lipscomb should not be penalized for violating ordinances that are inapplicable here. Richland County Code of Ordinances § 26-273(b); S.C. Code Ann. § 48-14-140. Lastly, Respondents should not be allowed to profit from this injunction at Appellants' expense.

It was also improper for the Trial Court to award attorneys' fees and costs to Respondents. When looking at the totality of the circumstances, the Respondents did not show that they are entitled to "more than \$27,695.00[.]" in attorneys fees and costs, if any, which Respondents' attorney suggested. (R. p. 284). Respondents did not provide a fee agreement or legal fee invoice, nor did Respondents show that the complexity of this case warrants an award of attorneys fees and costs. Also, the decision to award attorneys' fees and costs was premature. Therefore, attorneys' fees and costs should not have been awarded.

When looking at the totality of the circumstances, the September 28, 2009 and January 7, 2010 Orders are improper. The Respondents failed to satisfy their burden of proof, and Stonington and Mr. Lipscomb did show cause that they are not in contempt. Stonington Development, LLC and Stephen E. Lipscomb, urge this Court to reverse the Trial Court's decision.

Respectfully Submitted,



Timothy G. Quinn
Law Offices of Quinn & Quinn
2309 Devine Street
Post Office Drawer 12589
Columbia, South Carolina 29205
(803) 771-0936
Fax: (803) 254-7751
Attorneys for Appellants
Stonington Development, LLC and
Stephen E. Lipscomb

Columbia, South Carolina
November 12, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

L. Casey Manning, Judge

Case No. 2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko,
and L.K. Harrell, III, ... Appellants,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis, Joseph R. Robinson
Janette H. Robinson, ... Respondents,

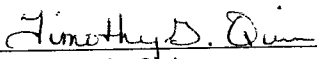
v.

Stonington Development, LLC, Appellant,

CERTIFICATE OF COUNSEL

I certify that this Final Brief of Appellants, Stonington Development, LLC and Stephen E.
Lipscomb complies with Rule 211(b), SCACR.

Columbia, South Carolina
November 10, 2010


Timothy G. Quinn
Law Offices of Quinn & Quinn
2309 Devine Street
Post Office Drawer 12589
Columbia, South Carolina 29205
(803) 771-0936
Fax: (803) 254-7751
Attorneys for Appellants
Stonington Development, LLC and
Stephen E. Lipscomb

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

L. Casey Manning, Judge

Case No. 2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko,
and L.K. Harrell, III, ... Appellants,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis, Joseph R. Robinson
Janette H. Robinson, ... Respondents,

v.

Stonington Development, LLC, Appellant,

PROOF OF SERVICE

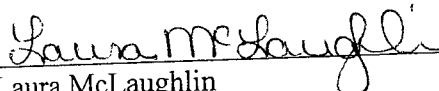
I, Laura McLaughlin, certify that I served three copies each of the Final Brief of Appellant's Stonington Development, LLC and Stephen E. Lipscomb on Glenn Y. Hollis, Jr., John E. Hollis, Joseph R. Robinson, Janette H. Robinson, Ron Safko, and L.K. Harrell, III, by depositing a copy of it in the United States Mail, postage prepaid, on November 12, 2010, addressed as follows:

H. Freeman Belser
William C. Dillard, Jr.
Belser & Belser, P.A.
P.O. Box 96
Columbia, SC 29202

Kelley Shull Cannon
George V. Hanna, IV
Caroline H. Raines
Howser, Newman & Besley, LLC
P.O. Box 12009

Columbia, SC 29211

J. Edward Bradley
William B. Fortino
Moore, Taylor & Thomas, P.A.
P.O. Box 5709
West Columbia, SC 29171


Laura McLaughlin
Assistant to Timothy G. Quinn

November 12, 2010

App 655

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	4
ARGUMENTS.....	8
1. THE INJUNCTION IS THE LAW OF THE CASE	8
2. ASSUMING, ARGUENDO, THAT APPELLANTS PRESERVED THEIR ARGUMENTS, JUDGE MANNING HAD JURISDICTION OVER THE APPELLANTS.....	9
a. Rule 65(d), SCRCP, provided Judge Manning with jurisdiction over the Appellants	9
b. An LLC member may not shirk his responsibilities by dissociating from the LLC.....	11
c. The pendency of an appeal on a collateral issue did not deprive Judge Manning of jurisdiction over the Injunction.....	12
3. THE NOTICE PROVISIONS OF S.C. CODE ANN. SECTION 15- 43-120 (1976, AS AMENDED) DO NOT APPLY TO THIS CASE.....	14
4. JUDGE MANNING DID NOT ABUSE HIS DISCRETION IN ISSUING THE CONTEMPT ORDER.....	15
a. The Contempt Order has evidentiary support	15
b. The Injunction clearly and unequivocally enjoins the Appellants from further sediment laden discharges	18
5. JUDGE MANNING DID NOT ABUSE HIS DISCRETION WHEN HE AWARDED THE RESPONDENTS COMPENSATORY CONTEMPT AND ATTORNEYS' FEES AND COSTS	22
a. Judge Manning's award of compensatory contempt was proper	23

b. Judge Manning's award of attorney's fees and costs was proper	23

CONCLUSION	25

TABLE OF AUTHORITIES

CASES

<u>Arnal v. Fraser</u> , 371 S.C. 512, 641 S.E.2d 419 (2007)	13-14
<u>Brandt v. Gooding</u> , 368 S.C. 618, 630 S.E.2d 259 (2006)	15
<u>Burton v. York County Sheriff's Dept.</u> , 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004)	20-22
<u>Charleston Lumber Co., Inc. v. Miller Hous. Corp.</u> , 338 S.C. 171, 525 S.E. 2d 869 (2000).....	8
<u>Cheapo's Truck Stop, Inc. v. Cloyd</u> , 350 S.C. 596, 567 S.E.2d 514 (2002)	23
<u>Durlach v. Durlach</u> , 359 S.C. 64, 596 S.E.2d 908 (2004)	15
<u>Ex Parte Cannon</u> , 385 S.C. 643, 685 S.E.2d 814 (Ct.App.2009)	24-25
<u>Floyd v. Floyd</u> , 365 S.C. 56, 615 S.E.2d 465 (Ct.App.2005).....	15
<u>Glasscock v. Glasscock</u> , 304 S.C. 158, 403 S.E.2d 313 (1991)	25
<u>Miller v. Miller</u> , 375 S.C. 443, 652 S.E.2d 754 (Ct. App. 2007).....	19
<u>Sea Pines Plantation Company v. Wells</u> , 294 S.C. 266, 363 S.E.2d 891 (1987).....	19
<u>Silvester v. Spring Valley Country Club</u> , 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001)	13
<u>Smith v. Phillips</u> , 318 S.C. 453, 458 S.E. 2d 427 (1995)	19
<u>South Carolina Dept. of Trans. v. First Carolina Corp. of S.C.</u> , 372 S.C. 295, 641 S.E.2d 903 (2007).....	8
<u>Sprouse v. Winston</u> , 212 S.C. 176, 46 S.E. 2d 874 (1948)	19-20
<u>Sutton v. Catawba Power Co.</u> , 104 S.C. 405, 89 S.E. 353 (1916)	13
<u>Williamson v. Middleton</u> , 383 S.C. 490, 681 S.E.2d 867 (2009).....	24
<u>Wynock v. Carroll</u> , 289 S.C. 338, 345 S.E. 2d 503 (Ct. App. 1986).....	20

STATUTES

S.C. Code Ann. § 15-43-10 (1976, as amended).....	14
S.C. Code Ann. § 15-43-120 (1976, as amended).....	14
S.C. Code Ann. § 33-44-203 (1976, as amended).....	9
S.C. Code Ann. § 33-44-301 (1976, as amended).....	9
S.C. Code Ann. § 33-44-601 (1976, as amended).....	11

RULES

Rule 203, SCACR	8, 18
Rule 205, SCACR	12-13
Rule 241, SCACR	12-14
Rule 54, SCRCP	24
Rule 59, SCRCP.....	8
Rule 62, SCRCP	14
Rule 65, SCRCP	9-10, 21

SECONDARY AUTHORITIES

42 Am.Jur. 2d. <i>Injunctions</i> § 4	19
42 Am.Jur. 2d. <i>Injunctions</i> § 5	19
42 Am. Jur. 2d <i>Injunctions</i> § 315	10-11
85 A.L.R. 3d. 895, § 3 (1978).....	22
23 S.C. Jur. <i>Public Nuisance</i> § 9	15
27 S.C. Jur. <i>Injunctions</i> § 52	22

STATEMENT OF ISSUES ON APPEAL

1. DID JUDGE MANNING ERR BY HOLDING THAT THE TERMS OF THE INJUNCTION ARE THE LAW OF THE CASE?
2. DID JUDGE MANNING HAVE PERSONAL JURISDICTION OVER THE APPELLANTS AT THE CONTEMPT HEARING?
3. DID JUDGE MANNING HAVE SUBJECT MATTER JURISDICTION OVER THE INJUNCTION DURING THE PENDENCY OF AN APPEAL OF SEPARATE MATTERS?
4. DID JUDGE MANNING ERR BY NOT APPLYING THE NOTICE PROVISIONS OF CHAPTER 43, TITLE 15 OF THE SOUTH CAROLINA CODE?
5. DOES THE RECORD CONTAIN EVIDENTIARY SUPPORT FOR THE FINDING OF CONTEMPT?
6. DID THE INJUNCTIVE ORDER SET FORTH THE ENJOINED ACTS IN REASONABLE DETAIL?
7. DID JUDGE MANNING ERR IN AWARDING THE RESPONDENTS \$25,000 IN COMPENSATORY CONTEMPT?
8. DID JUDGE MANNING ERR IN REQUIRING THE APPELLANTS TO PAY \$27,695 IN ATTORNEYS' FEES AND COSTS?

STATEMENT OF THE CASE

Stonington Development, LLC is the developer of a residential subdivision in Richland County. (R. p. 42, ¶ 13). The Respondents own properties and ponds immediately downstream from the Stonington development. (R. pp. 263–64, ¶ 4, 5). In July 2005, the Respondents filed a lawsuit against Stonington and several of its subcontractors, alleging that Stonington's land disturbing activities had for several years resulted in damage caused by siltation and increased runoff. (R. p. 44, ¶ 23).

On April 6, 2007, a Richland County jury rendered a verdict in the amount of \$3,900,000 in favor of the Respondents against Stonington. (R. p. 38). The verdict represented \$400,000 actual damages and \$3,500,000 punitive damages. (R. p. 38). On December 13, 2007, Stonington filed a Notice of Appeal concerning the jury's punitive damages award. (R. p. 252).

On April 16, 2007, after electing to proceed on the jury's award on the private nuisance cause of action, the Respondents filed a Motion for an Injunction against Stonington to address any future siltation and increased runoff. (R. p. 297). On September 17, 2007, the Court issued a Form-4 stating, "Plaintiff's motion for permanent injunction granted; Formal order to follow on this issue." (R. p. 5).

On June 26, 2008, the Court signed the Order Granting Plaintiffs' Restated and Renewed Post-Trial Motion for an Injunction Against Stonington Development, LLC ("Injunction"). (R. p. 25). The Injunction provided, in pertinent part, that:

3. In accordance with Rule 65(d) of the South Carolina Rules of Civil Procedure, this injunction is binding upon Stonington Development, LLC and its officers, agents, employees, and members.

(R. p. 27, ¶ 3).

That same day, June 26, 2008, the Respondents' process server personally served the Injunction on Stonington and its members: Appellants Lipscomb, Safko, and Harrell. (R. pp. 291-93). Respondents' counsel enclosed a cover letter with the Injunction stating:

Please be advised that the Injunction enjoins Stonington Development, LLC and its members from discharging sediment laden storm water onto the Plaintiffs' property in violation of the Common Law and DHEC Regulations. Should such discharge occur, my clients will immediately seek appropriate relief against all individuals bound by the Injunction.

(R. p. 303). Appellant Harrell is a member of the South Carolina Bar. (R. p. 70, In. 10–11). No Rule 59(e) Motion to Reconsider or Notice of Appeal was ever filed with reference to the Injunction by any of the Appellants.

On September 11, 2008, the Respondents' filed a Motion for an Order Holding Stonington Development, LLC and its Members in Contempt of Court. (R. p. 305). Respondents' counsel also asked the Court to execute a Rule to Show Cause setting a date, time, and location of a hearing to provide Stonington and its members with the opportunity to explain why they should not be held in contempt of Court for willfully disregarding the Injunction. (R. p. 304). Respondents served the Motion on Appellants by mail.

The Court signed the Rule to Show Cause on November 6, 2008. (R. p. 39). The Rule was personally served on Appellants Stonington, Lipscomb, and Safko on November 6, 2008, and on Appellant Harrell three days later. (R. pp. 294–96). The Rule to Show Cause hearing was initially set for December 4, 2008, but was postponed due to the unavailability of Stonington's witness. (R. p. 28). The Rule to Show Cause hearing was held on April 14, 2009. (R. p. 28).

On September 28, 2009, Judge Manning issued an Order Granting Plaintiff's Motion for an Order Holding Stonington Development, LLC and its Members in Contempt of Court ("Contempt Order") (R. p. 28). The Contempt Order required the Appellants to pay the Respondents \$25,000 in compensatory

contempt. (R. p. 32, ¶ 2). On October 12, 2009, pursuant to the Contempt Order, the Respondents filed a Motion for Attorney's Fees and Costs. (R. p.459. See also R. p. 281).

The Appellants filed Rule 59(e) Motions to Reconsider the Contempt Order. (R. pp. 428–58). On January 7, 2010, Judge Manning issued an Order Denying the Rule 59(e) Motions of Stonington, Lipscomb, Harrell, and Safko. (R. p. 34, ¶ 1). In the same Order, Judge Manning granted the Respondent's Motion for Attorney's Fees and Costs ("Attorney's Fees Order") in the amount of \$27,695. (R. pp. 34–35, ¶ 2; R. p. 459. See also R. p. 284, ¶ 9). Thereafter, Appellants Harrell and Safko filed Rule 59(e) Motions to Reconsider the Attorney's Fees Order. (R. pp. 471–81). On March 15, 2010, Judge Manning issued an Order Denying the Rule 59(e) Motions of Harrell and Safko. (R. p. 36).

Thereafter, the Appellant's filed Notices of Appeal. (R. pp. 253–54, 255–56, 257–58, 259–60, 261–62).

STATEMENT OF FACTS

The evidence adduced at the Rule to Show Cause hearing provided the Lower Court with ample evidence to support a finding that the Appellants have each willfully disregarded the terms of the Injunction. The testimonial and photographic evidence demonstrates that neither Stonington Development, LLC nor Stephen Lipscomb made sufficient efforts to ensure compliance with the Injunction. Lipscomb asserted that engineers had provided him with reports about the siltation problems, but the relevant engineer was not present at the hearing for cross-examination and the reports were not entered as evidence. (R.

p. 192, ln. 13–26; R. p. 193, ln. 1–5. See also R. pp. 2–3). Furthermore, the attorneys for Ronald Safko and Trey Harrell admitted that their clients had done absolutely nothing to ensure compliance with the Injunction. (R. p. 64, ln. 17–21; R. p. 16, ln. 3–9).

Three witnesses testified at the April 14, 2009 Rule to Show Cause hearing: Respondent Janette Robinson, Kevin Lee, a homeowner in Stonington, and Appellant Lipscomb. (R. p. 58).

Appellants Safko and Harrell elected not to testify at the Rule to Show Cause hearing, even though the purpose of the hearing was for them to give cause as to why they should not be held in contempt of court.

The transcript of the April 14 hearing demonstrates that:

- The siltation problem that gave rise to the lawsuit continued after the April 6, 2007 jury verdict and after the June 26, 2008 Injunction was served. (R. p. 91, ln. 1–11).
- Respondent Janette Robinson had observed sediment-laden water entering the Respondents' pond through the unnamed tributary that receives stormwater from Stonington's detention pond. (R. p. 78, ln. 7–13; R. p. 79, ln. 10–14).
- The fact that the siltation problem had not been stopped was frustrating and angering to the Respondents because justice had not been served and the Respondents' properties were still being damaged. (R. p. 91, ln. 23–25; R. p. 92, ln. 1–6).

- Respondent Janette Robinson had observed no maintenance on the detention pond and no recent maintenance on the road that circles the pond. (R. p. 79, ln. 15–22; R. p. 80, ln. 15–21).
- Judge Manning took judicial notice that there was a siltation problem. (R. p. 156, ln. 22–26; p. 195, ln. 23–26; p. 196, ln. 1–18).
- Appellant Safko was a member of Stonington at the time of the Injunction, but had not taken any affirmative steps to comply with its terms. He had not called anyone, hired anyone, written a letter, or anything else. (R. p. 64, ln. 17–21; p. 65, ln. 18–20).
- Appellant Harrell had not taken any affirmative steps to comply with the terms of the Injunction. (R. p. 71, ln. 3–9).
- Appellant Lipscomb claimed to have hired professionals (none of whom were present at the hearing to testify or to be cross-examined) to comply with the Injunction, but admitted that he had not personally done anything on the ground to stop the problems. (R. p. 192, ln. 13–26; R. p. 193, ln. 1–5).
- No inspection reports or other documentary evidence regarding remediation efforts were entered into evidence. (R. p. 176, ln. 15–26; p. 177, ln. 1–22).

The Respondents also presented photographs taken during the months between the issuance of the Injunction and the Rule to Show Cause hearing. The photographs demonstrated that excessive siltation was still entering into and discoloring the Respondents' ponds during this period and that the siltation was

entering on to the Respondents' property from Stonington property. (Appx. pp. 12-16, 25-34. See *also* R. p. 85, ln. 16 through p. 86, ln. 5; p. 88, ln. 22 through p. 90, ln. 18).

ARGUMENTS

1. THE INJUNCTION IS THE LAW OF THE CASE.

It is well established in South Carolina that arguments must be preserved to be raised on appeal. South Carolina Dept. of Trans. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). When a lower Court issues an Order, an individual subject to the Order has the right to appeal the Order, but only if he timely files a motion to reconsider under Rule 59(e), SCRCP, and/or a Notice of Appeal. Rule 203, SCACR.

Appellants Stonington, Lipscomb, Harrell, and Safko were personally served with the Injunction on June 26, 2008. (R. pp. 291–93). After receiving the Injunction and the cover letter, Lipscomb, Harrell (a member of the South Carolina Bar) and Safko took no action; they elected not to file a Rule 59(e), SCRCP, Motion to Reconsider or a Notice of Appeal. In fact, the arguments that the Appellants argue on appeal were not raised until more than 8 months later, when, in late March and early April 2009, Appellants Safko and Lipscomb filed memoranda in opposition to the Respondents' motion for Contempt. (R. pp. 307, 356–57).

Accordingly, the Injunction was the law of the case at the time of the Contempt Order and remains so now. Charleston Lumber Co., Inc. v. Miller Hous. Corp., 338 S.C. 171, 175, 525 S.E. 2d 869, 871 (2000).

2. ASSUMING, ARGUENDO, THAT APPELLANTS PRESERVED THEIR ARGUMENTS, JUDGE MANNING HAD JURISDICTION OVER THE APPELLANTS.

2a. Rule 65(d), SCRCP, provided Judge Manning with jurisdiction over the Appellants.

Rule 65(d) of the South Carolina Rules of Civil Procedure expressly provides that:

Every order granting an injunction . . . is binding only upon the parties to action, their officers, **agents**, servants, employees attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by **personal service** or otherwise. (Emphasis added.)

Appellants were agents of Stonington as a matter of statute. Under S.C. Code Ann. § 33-44-301 (1976, as amended), all members of a member-managed limited liability company are its agents. Stonington is a member-managed limited liability company. (R. p. 74, ln. 4-10, 25-26, p. 75, ln. 1-3 (Counsel for Respondents stating that Stonington Development, LLC is member-managed, with no objection or later contradiction from opposing counsel, and offering to provide the Court a copy of the operating agreement)). See also S.C. Code Ann. §§ 33-44-203(a)(6), -301 (1976, as amended) (establishing member-management as the default organizational structure for an LLC). There is no evidence in the Record that the company's operating agreement or articles of organization limited the agency of the company's members. Therefore, Judge Manning was correct in holding that the Injunction was binding upon Stonington's individual members.

Appellants argue that the Injunction impermissibly expands the scope of Rule 65(d), SCRCP, because it states that the Injunction is binding upon

Stonington and its agents and members. Appellants are misguided because agents and members are synonymous in the context of a member-managed limited liability company.

Rule 65(d), SCRCP, expressly provides that an injunction binds individuals who are not parties to the action. The only requirement in the Rule is that those not parties have actual knowledge and be personally served. There is no dispute that the Appellants had actual knowledge of the Injunction because they were personally served.

The reason that an injunction against a corporation or limited liability company is binding on the entity's agents is that a jural person can only act through its agents. If a jural person is like an automobile, then its agents are the drivers. If an injunction were not binding on the drivers of the automobile, then the agents could simply abandon the automobile and leave it for someone else to deal with. The law does not act in a manner that allows individuals to abandon responsibility.

It is easier to understand the responsibility of agents to abate the nuisance of a corporation or limited liability company when considering the example of a corporate pig farm that is releasing noxious fumes. If a Judge orders an injunction against the corporate pig farm, then the agents cannot simply abandon the pig farm, thereby allowing the noxious fumes to continue to interfere with the neighbors' right to use and enjoy their property. Instead, the law imposes a responsibility to abate the nuisance through affirmative steps. See 42 Am. Jur. 2d *Injunctions* § 315 ("Parties bound by an injunction are obliged to take steps to

insure that even inadvertent violations do not occur, and to take all reasonable and diligent steps within their power to assure the prompt compliance with the court's injunction order.”). Similarly, the individual members of Stonington cannot abandon Stonington and avoid the obligations imposed by the Injunction.

2b. An LLC member may not shirk his responsibilities by dissociating from the LLC.

It is undisputed that Appellants Safko and Harrell were members of Stonington at the time they were personally served with the Injunction. (R. p. 65, ln.18–20; p. 70, ln. 18–19). Nevertheless, Appellants Safko and Harrell argue that they were able to evade their responsibilities by dissociating from Stonington on December 10, 2008, several days after the originally scheduled Rule to Show Cause hearing was postponed due to the unavailability of a witness.

Dissociation is a statutory term that refers to the ability of a member of a limited liability company to redeem his distributional interest in the limited liability company. S.C. Code Ann. § 33-44-601, et seq. Dissociation relates only to the relationship between the dissociating member, the non-dissociating members, and the company. It does not affect the dissociating member's relationships with third parties or the Court. For example, if a dissociating member of a limited liability company has guaranteed a company debt with a bank, the dissociation does not affect the personal guaranty.

It would be a perversity of the law to allow Appellants Safko and Harrell to shirk their obligation to comply with Judge Manning's Injunction by simply dissociating from Stonington. Such a finding would not only strip Judge Manning's Injunction of all substance, but also leave the injured parties, the

Respondents, with a continuing problem, and have the effect of furthering Stonington's violation of the Injunction by making it more difficult to enforce the Injunction against a hollow and deflated legal entity.

2c. The pendency of an appeal on a collateral issue did not deprive Judge Manning of jurisdiction over the Injunction.

Stonington has appealed the April 6, 2007 jury verdict. (R. p. 408). The issues on appeal in that matter concern only the issue of the jury's punitive damages award of \$3,500,000. (Id.) That is a matter that is wholly separate and distinct from the issues in this appeal.

It is well established that the pendency of an appeal on one matter does not deprive the lower court of jurisdiction over separate matters. Rules 205, 241(a), SCACR. A Circuit Court retains the power to issue an injunction, as well as an order of contempt for violation of such an injunction, during the pendency of an appeal of separate matters. "The lower court . . . retains jurisdiction over matters not affected by the appeal *including the authority to enforce any matters not stayed by the appeal.*" Rule 241(a) SCACR [emphasis added]. "Nothing in [the Appellate Court Rules] shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Rule 205, SCACR. The automatic stay on appeal only applies to "matters decided in the order, judgment, decree or decision on appeal." Rule 241(a), SCACR.

In this case, Judge Manning issued an Injunction relating to a matter that was separate from the issues on appeal. The money judgment and the June 26, 2008 Injunction were based on separate instances of a continuous nuisance, and South Carolina law makes it clear that such separate instances constitute

different matters. "[E]very continuance of a nuisance is a new nuisance, authorizing a fresh action." Silvester v. Spring Valley Country Club, 344 S.C. 280, 287, 543 S.E.2d 563, 567 (S.C. Ct. App. 2001) (quoting Sutton v. Catawba Power Co., 104 S.C. 405, 408, 89 S.E. 353, 353 (1916)). Conduct and events giving rise to separate causes of action under the law of nuisance surely qualify as different matters under the Appellate Court Rules. See Rules 205, 241(a), SCACR.

Simply put, Stonington's December 13, 2007 Notice of Appeal related to a judgment based on Stonington's *prior conduct*. On the other hand, the June 26, 2008 Injunction against Stonington and its members related only to the parties' conduct *from that day forward*.

Appellants Lipscomb and Stonington cite to the Supreme Court of South Carolina's analysis of the relevant Appellate Court Rules in Arnal v. Fraser, 371 S.C. 512, 641 S.E.2d 419 (2007), but this opinion in fact supports the Respondents' position. In Arnal, the Supreme Court held that the lower family court did not have subject matter jurisdiction over modification of child visitation terms after the appeal of a divorce order setting a visitation schedule and child support obligations, Id. at 521, 641 S.E.2d at 423–24, but that the family court could still order the father to pay educational expenses because "these types of expenses were not dealt with in the [original divorce] order." Id. at 520, 641 S.E.2d at 423. Like the educational expenses in Arnal, but unlike the terms of visitation in that case, the June 26, 2008 Injunction against Stonington was not

dealt with in the orders then pending on appeal from the jury trial. (R. pp. 252, 408).

Finally, even if the Injunction had been on appeal at the time of the Contempt Order, the Lower Court would have retained subject matter jurisdiction. When an enjoined party appeals an injunctive order, the lower court "in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal." Rule 62(c), SCRPC. "[A]n interlocutory or final judgment in an action for an injunction . . . shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal." Rule 62(a), SCRPC. The automatic stay on appeal does not apply to "an appeal from an order granting an injunction." Rule 241(b)(8), SCACR.

3. THE NOTICE PROVISIONS OF S.C. CODE ANN. SECTION 15-43-120 (1976, AS AMENDED) DO NOT APPLY TO THIS CASE

In defense of their inaction, Appellants argue that S.C. Code Ann. § 15-43-120 requires that a property owner be provided 10 days written notice before an action to abate a qualifying nuisance is commenced against him. The Appellants' reliance on this argument is misguided because Chapter 43 only concerns nuisances involving the use of property "for the purposes of lewdness, assignation, prostitution, repeated acts of unlawful possession or sale of controlled substances, or continuous breach of the peace." S.C. Code Ann. § 15-43-10 (1976, as amended); 23 S.C. Jur. *Public Nuisance* § 9. Accordingly, S.C. Code Ann. § 15-43-120 is irrelevant to this case.

Assuming, *arguendo*, that this notice statute did apply, the Appellants cannot seriously argue that they were not provided notice of the stormwater

nuisance emanating from Stonington and interfering with the Respondents' ability to use and enjoy their properties and ponds. The Contempt Order originates from a lawsuit filed in 2005, resulting in a jury verdict in 2007 and an Injunction that was personally served on them in June of 2008, well before the Court held Stonington and its members in contempt of Court. (R. p. 408–09, 291–94).

4. JUDGE MANNING DID NOT ABUSE HIS DISCRETION IN ISSUING THE CONTEMPT ORDER.

It is well established in South Carolina that a Judge may enforce orders (or punish the disobedience thereof) through the civil contempt power. Durlach v. Durlach, 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004). The Judge's decision must be based on clear and convincing evidence. Id. On appeal, a finding of contempt by a Judge will not be disturbed unless it is without evidentiary support or the trial judge has abused his discretion. Brandt v. Gooding, 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006); Floyd v. Floyd, 365 S.C. 56, 72, 615 S.E.2d 465, 473 (Ct.App.2005).

4a. The Contempt Order has evidentiary support.

At the Rule to Show Cause hearing, the Respondents presented evidence that the siltation problem was continuing and that little to nothing was being done by the Appellants to abate the nuisance. Appellants Safko and Harrell presented no evidence to contradict the Respondents' evidence. Appellant Lipscomb presented evidence of limited efforts, but Judge Manning was not persuaded. (R. p. 29, ¶ 2). Thus, there was sufficient evidentiary support for Judge Manning's finding of contempt.

Three witnesses testified at the April 14, 2009 Rule to Show Cause hearing: Respondent Janette Robinson, Kevin Lee, a homeowner in Stonington, and Respondent Lipscomb. (R. p. 58).

Appellants Safko and Harrell elected not to testify at the Rule to Show Cause hearing, even though the purpose of the hearing was for them to give cause as to why they should not be held in contempt of court.

The transcript of the April 14 hearing demonstrates that:

- Respondent Janette Robinson had observed sediment-laden water entering the Respondents' pond through the unnamed tributary that receives stormwater from Stonington's detention pond. (R. p. 78, ln. 7–13; p. 79, ln. 10–14).
- The siltation problem that gave rise to the lawsuit continued after the April 6, 2007 jury verdict and after the June 26, 2008 Injunction was served. (R. p. 91, ln. 1–11).
- The fact that the siltation problem had not been stopped was frustrating and angering to the Respondents because justice had not been served and the Respondents' properties were still being damaged. (R. p. 91, ln. 23–25; R. p. 92, ln. 1–6).
- Respondent Janette Robinson had observed no maintenance on the detention pond, and no recent maintenance on the road that circles the pond. (R. p. 79, ln. 15–22; p. 80, ln. 15–21).
- Judge Manning took judicial notice that there was a siltation problem. (R. p. 156, ln. 22–26; p. 195, ln. 23–26; p. 196, ln. 1–18).

- Appellant Safko was a member of Stonington at the time of the Injunction, but had not taken any affirmative steps to comply with its terms. He had not called anyone, hired anyone, written a letter, or anything else. (R. p. 64, ln. 17–21; p. 65, ln. 18–20).
- Appellant Harrell had not taken any affirmative steps to comply with the terms of the Injunction. (R. p. 71, ln. 3–9).
- Appellant Lipscomb claimed to have hired professionals (none of whom were present at the hearing to testify or to be cross-examined) to comply with the Injunction, but admitted that he had not personally done anything on the ground to stop the problems. (R. p. 192, ln. 13–26; p. 193, ln. 1–5).
- No inspection reports or other documentary evidence regarding remediation efforts were entered into evidence. (R. p. 176, ln. 15–26; p. 177, ln. 1–22).

The Respondents also presented photographs taken during the months between the issuance of the Injunction and the Rule to Show Cause hearing. The photographs demonstrated that excessive siltation was still entering into and discoloring the Respondents' ponds during this period and that the siltation was entering on to the Respondents' property from Stonington property. (Appx. pp. 12–16, 25–34. See also R. p. 85, ln. 16 through p. 86, ln. 5; p. 88, ln. 22 through p. 90, ln. 18).

Based on this testimony and photographic evidence, Judge Manning concluded that the Appellants had willfully disregarded the Injunction. Clearly, Judge Manning's conclusion had evidentiary support.

Appellants Safko and Harrell argue that their lack of a controlling interest in Stonington left them unable to do anything to comply with the Injunction. This argument is wrong, because, as set forth above, the Injunction was binding on both Stonington and them individually. Therefore, the lack of a controlling interest is irrelevant to what they did or did not do.

Furthermore, the record reflects that they did not even try to do anything at all. There is no evidence that their alleged lack of a controlling interest actually prevented them from taking affirmative steps. For example, they did not write a letter to Stonington's controlling member asking what could be done and whether they had permission to act. Rather, they simply failed to do anything at all.

4b. The Injunction clearly and unequivocally enjoins the Appellants from further sediment laden discharges.

Judge Manning's Injunction expressly provides:

Stonington Development, LLC is enjoined henceforth from discharging sediment-laden stormwater onto the plaintiffs' property in violation of the common law of this State and the stormwater discharge Regulations promulgated by the South Carolina Department of Health and Environmental Control, to wit, S.C. Regs. § 72-307(C)(5)(b).

(R. p. 26, ¶ 1).

This language is clear and unequivocal.

Although the Appellants now argue that this language is impermissibly vague, as set forth above, it is the law of case. If the Appellants had any question about the Injunction after being personally served with it, they should have exercised their right to raise those questions in July 2008. Rule 203, SCACR.

Appellants Safko and Harrell admittedly have not done anything at all to abate the stormwater nuisance emanating from Stonington. (R. p. 64, ln. 15–21; p. 71, ln. 3–9). Lack of comprehension is not a defense to having done nothing at all. Therefore, Appellants Safko and Harrell should be estopped from arguing that the Injunction is impermissibly vague.

While it is well established that a Court may issue and enforce orders, Miller v. Miller, 375 S.C. 443, 453, 652 S.E.2d 754, 759 (S.C. Ct. App. 2007), a Court does not have the responsibility to actually plan for and execute the implementation of such orders itself. Again, it may be easier to understand the responsibility of the Appellants to comply with the Injunction by comparing the stormwater nuisance in this case to a nuisance caused by noxious fumes from a corporate pig farm. If a Judge enjoins the corporate pig farm from emitting noxious fumes into the surrounding areas, then it is the responsibility of the corporate pig farm to take affirmative steps to abate the nuisance by necessary means. Similarly, in this case, it was then and is now the responsibility of the Appellants, not Judge Manning, to abate the stormwater nuisance by any means necessary. (R. pp. 26–27).

It is well established that injunctions can be both prohibitory and mandatory in nature. 42 Am.Jur. 2d. *Injunctions* §§ 4-5. Mandatory injunctions that require affirmative action by the defendant are well recognized in South Carolina. Smith v. Phillips, 318 S.C. 453, 458 S.E. 2d 427 (1995); Sea Pines Plantation Company v. Wells, 294 S.C. 266, 363 S.E.2d 891 (1987); Sprouse v.

Winston, 212 S.C. 176, 46 S.E. 2d 874 (1948); Wynock v. Carroll, 289 S.C. 338, 345 S.E. 2d 503 (Ct. App. 1986).

South Carolina law does not require, as the Appellants seem to argue, step by step instructions regarding the implementation of an injunction. In Burton v. York County Sheriff's Dept., 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), the Sheriff's Department had incorrectly claimed that certain documents were exempt from disclosure under the Freedom of Information Act. Id. at 345, 594 S.E.2d at 891. The Court of Appeals upheld the following injunction against the Sheriff's Department's arguments that it was insufficiently detailed:

[D]efendants are permanently enjoined and restrained from asserting exemptions from mandatory disclosure that have no legal or factual justification, and from continuing to refuse to segregate exempt and non-exempt material and make non-exempt public records available for inspection and copying.

Id. at 355, 594 S.E.2d at 897. The Court of Appeals held that "[r]eading the trial court's order as a whole, the reasons for the injunction and the acts it intends to proscribe are amply clear." Id.

Burton makes it clear that Rule 65(d) does not prevent an injunctive order from leaving room for a certain amount of discretion and common sense. The Court of Appeals in that case upheld an injunction that required the enjoined party to exercise discretionary judgment in at least two ways: first, the Sheriff's Department had to determine whether potential FOIA exemptions were based on any legal or factual justification and, second, it had to determine how to properly and sufficiently make records available for inspection and copying. Id.

In comparison to the injunction upheld in Burton, compliance with the Injunction issued in the matter on appeal would have required the application of relatively little discretionary judgment. The Injunction in this case merely required the abatement of a continuing storm water nuisance, whereas the injunction in Burton required a perpetual determination of potentially complex legal issues in a variety of unforeseen circumstances.

Finally, even to whatever extent it may be improper for an injunction to rely on references to outside statutes and ordinances, the Lower Court's Injunction was nonetheless sufficiently independent and specific. The Injunction's primary directive was that Stonington and its members must put an end to a common law continuing nuisance, that is, the discharge of sediment laden storm water onto the Respondents' property. The reference to statutes and ordinances was a secondary and supplemental part of the order. (See R. p. 26, ¶ 1).

This analysis derives further support from consideration of Burton. In that case, the Court of Appeals upheld an injunction that was *entirely reliant* on unspecified provisions of the Freedom of Information Act. The Burton injunction prohibited the Sheriff's Department from claiming disclosure exemptions without legal and factual justification, which necessarily required reference to the FOIA disclosure provisions. Id. at 355, 594 S.E.2d at 897. Similarly, that injunction required the Department to make documents available for inspection and copying; this was nothing more than a directive that the Department follow the statutory requirements of the FOIA. Id.

If it was proper for the Burton injunction to require legal analysis and compliance with a modern statutory framework, then it was certainly proper for Judge Manning to enforce a mandatory Injunction requiring the abatement of a common law continuing nuisance. This conclusion is not affected by the fact that the nuisance also happens to be prohibited by statutes and local ordinances.

5. JUDGE MANNING DID NOT ABUSE HIS DISCRETION WHEN HE AWARDED THE RESPONDENTS COMPENSATORY CONTEMPT AND ATTORNEYS' FEES AND COSTS.

It is well established that when a party fails to comply with a Court Order, and another party suffers damage as a result, the Court has the discretionary power to hold the offending parties in contempt of Court, and to punish the contemnors by issuing fines, sentencing jail time, or awarding compensatory contempt. 27 S.C. Jur. *Injunctions* § 52.

Ordinarily, a fine is thought to be payable to the Court, but that is limited to punishment for criminal activity or criminal contempt of Court. In cases of civil contempt of Court, however, a fine may be assessed for the benefit of the party who has suffered because of the contempt, and the purpose of such a fine is to coerce the parties into compliance with the Court's Order. The Federal Courts and a clear majority of the State Courts allow compensatory damages or fines payable to the injured party. See 85 A.L.R. 3d. 895, § 3 (1978). The remedial remedy of compensatory contempt is available to the Court to restore the plaintiffs as nearly as possible to their original position. The Court has the authority to award the plaintiffs' actual damages resulting from the offending

parties' disobedience, including reasonable attorney's fees and costs. Cheapo's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 567 S.E.2d 514 (2002).

5a. Judge Manning's award of compensatory contempt was proper.

Judge Manning did not abuse his discretion in awarding the Respondents compensatory contempt and attorney's fees and costs, and the Contempt Order does not unjustly enrich the Respondents. In determining the amount of the compensatory contempt, Judge Manning based his decision on the substantial actual damages sustained by the Respondents as a result of the Appellants' willful disregard of the Lower Court's order to protect the Respondents. (R. p. 29, ¶ 1; p. 30, ¶ 7). The photographic evidence and testimony of Respondent Janette Robinson at the April 14, 2009 Rule to Show Cause hearing, more than two years after the jury verdict, demonstrated to Judge Manning that the damages were real. (See Section 4a of this Brief, *supra*).

5b. Judge Manning's award of attorney's fees and costs was proper.

The Contempt Order instructed the Respondents' counsel to submit an application for attorneys' fees and costs within ten days of the Order. (R. p. 32, ¶ 3). Respondents' counsel did as instructed and submitted an Affidavit outlining in extensive detail the work actually performed and the attorney's fees and costs actually incurred by the Respondents in enforcing the Injunction. (R. pp. 281–84). The Affidavit from the Respondents' counsel, an officer of the Court, provides substantial and credible evidence from which the Court exercised its discretion in awarding attorney's fees and costs. Judge Manning awarded attorney's fees and

costs without a hearing, because (a) he retained jurisdiction over the matter in the Contempt Order (R. p. 32, ¶ 3), (b) there was substantial and credible evidence to award attorney's fees and costs (R. pp. 281–84), and (c) no hearing is required under Rule 54(d), SCRCP.

The Appellants incorrectly rely on Williamson v. Middleton, 383 S.C. 490, 681 S.E.2d 867 (2009), for the proposition that, without a written fee agreement, there can be no award of attorneys fees. In Williamson, unlike here, there was no expectation of payment on behalf of the attorneys. In fact, the attorney applying for attorney's fees and costs in Williamson admitted that the client would have only a moral obligation to pay. In this case, there is an expectation of payment and the Respondents have more than a moral obligation to pay the fee. (R. pp. 283–84, ¶ 7–9). Finally, while Williamson does require an attorney fee agreement, it does not require the agreement to be in writing.

The Appellants also incorrectly rely on Ex Parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (Ct.App.2009), in support of their argument that the record lacks sufficient evidence for the award of attorney's fees and costs. Cannon is distinguishable from the case at bar because the trial judge in Cannon ordered "the payment into [the circuit] court of \$50,000.00 to be applied towards the payment of attorneys' fees as incurred by the various parties . . ." Id., 685 S.E.2d at 820. The Court of Appeals remanded the issue of attorney's fees back to the trial court for a finding of fact "as to the proper amount of attorneys' fees required for indemnification." Id. at 667, 685 S.E.2d at 827. In this case, the Court made a

finding of fact based on its review of the Affidavit of the Respondents' counsel. (R. pp. 34–35, ¶ 2). Therefore, the Court did not abuse its discretion.

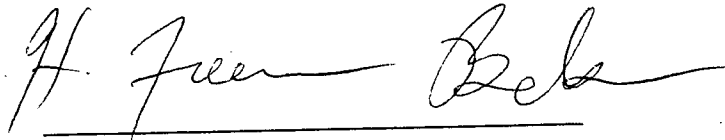
The Appellants also incorrectly rely on Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991), in support of their argument that the amount of the attorney's fee award is not justified in light of the nature, extent, and difficulty of the work performed. The reason that Appellants have been ordered to pay the Respondents' a substantial award of attorney's fees is that they have done nothing to comply with the Court's orders. (R. p. 29, ¶ 2–3; p. 32, ¶ 3). When citizens respect and obey the law, there is less work for lawyers. Where, as here, citizens willfully disregard their obligations, it takes time, effort, and expense to call those citizens to task. Therefore, the Appellants have no one but themselves to blame.

CONCLUSION

For the above stated reasons, Judge Manning's Injunction, Contempt Order, and Attorneys' Fees Order should be affirmed.

(Attorney signature to follow)

BELSER & BELSER, P.A.

A handwritten signature in cursive script, reading "H. Freeman Belser", written over a horizontal line.

H. Freeman Belser
William C. Dillard, Jr.
1901 Main St., Suite 1550 (29201)
P.O. Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Respondents

Columbia, South Carolina

September 1, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
SEP 03 2010
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736
Tracking Number 2010-151167

Ex Parte: Stephen E. Lipscomb, Ron Safko,
And L. K. Harrell, III,.....Appellants,

In Re:
Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, Janette H. Robinson.....Respondents.

v.

Stonington Development, LLC.....Appellant,

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I hereby certify that this Final Brief of Respondents complies with Rule 211(b) in that it contains only corrections to obvious typographical errors.

William C. Dillard

H. Freeman Belser
William C. Dillard, Jr.
Belser & Belser, P.A.
1901 Main St., Suite 1550 (29201)
P.O. Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Respondents

September 1, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736
Tracking Number 2010-151167

RECEIVED
SEP 03 2010
SC Court of Appeals

Ex Parte: Stephen E. Lipscomb, Ron Safko,
And L. K. Harrell, III, ...Appellants,

In Re:
Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, Janette H. Robinson.....Respondents.

v.

Stonington Development, LLC.....Appellant,

PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondents** and **Appendix to the Record on Appeal** on Stephen E. Lipscomb, Ron Safko, L. K. Harrell, III, and Stonington Development, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on September 3, 2010, addressed to attorneys of record as follows:

Timothy Quinn, Esquire
Quinn & Quinn, Attorneys at Law
P.O. Drawer 12589
Columbia, SC 29211

George V. Hanna, Esquire
Howser, Newman & Belsey, LLC
P.O. Box 12009
Columbia, SC 29211

J. Edward Bradley, Esquire
Moore Taylor & Thomas, P.A.
P.O. Box 5709
West Columbia, SC 29171

September 3, 2010

William C. Dillard

H. Freeman Belser
William C. Dillard, Jr.
Belser & Belser, P.A.
1901 Main St., Suite 1550 (29201)
P.O. Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Respondents

ORIGINAL

IN THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

ORIGINAL

L. Casey Manning

2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko,
and L. K. Harrell, III, ... Appellants,

In Re:
Glenn Y. Hollis, Jr., John E. Hollis, Joseph R.
Robinson, Janette H. Robinson, ... Respondents,

v.

Stonington Development, LLC Appellant.

FINAL REPLY BRIEF OF APPELLANT

RECEIVED

AUG 28 2010

SC Court of Appeals

Kelley Shull Cannon
George V. Hanna, IV
Caroline H. Raines
HOWSER, NEWMAN & BESLEY,
L.L.C.
1508 Washington Street
P.O. Box 12009
Columbia, SC 29211
(803) 758-6000
ATTORNEYS FOR RON E. SAFKO

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	1
ARGUMENT.....	1
1. The Injunction Is Not The Law Of The Case.....	1
a. Safko Was Never A Party To The Original Action.....	1
b. The Injunction Fails To Give Notice To The Individual Members That They Will Incur Individual Liability For Any Violations.....	1
2. Safko's Status As A Former Member Of A Member Managed LLC Is Not Sufficient To Impose Personal Liability For The Obligations Of Stonington.....	3
CONCLUSION.....	4

TABLE OF AUTHORITIES

Cases Cited

<u>S.C. Dep't of Natural Res. v. Town of McClellanville</u> , 345 S.C. 617, 550 S.E.2d 299 (2001)	2
<u>Whaley v. CSX Transp., Inc.</u> , 362 S.C. 456, 609 S.E.2d 286 (2005)	1

Statutes, Rules & Other Authority

S.C. Code Ann. §33-44-302	4
S.C. Code Ann. §33-44-303	3

STATEMENT OF ISSUES ON APPEAL

- 1. The Injunction Is Not The Law Of The Case.**
 - a. Safko Was Never A Party To The Original Action.**
 - b. The Injunction Fails To Give Notice To The Individual Members That They Will Incur Individual Liability For Any Violations.**
- 2. Safko's Status As A Former Member Of A Member Managed LLC Is Not Sufficient To Impose Personal Liability For The Obligations Of Stonington.**

ARGUMENT

- 1. The Injunction Is Not The Law Of The Case.**
 - a. Safko Was Never A Party To The Original Action.**

The Respondents suggest that Safko's arguments on Appeal are not properly preserved because no Appeal was filed after service of the injunction on June 26, 2008. This argument is without merit. Safko was not made a party to the original action against Stonington Development, LLC. (R. pp. 40-55). Therefore, the Court never had jurisdiction over Safko. It is axiomatic that an injunction cannot serve as the law of the case against an individual that was never properly brought within the court's jurisdiction. Whaley v. CSX Transp., Inc., 362 S.C. 456, 474, 609 S.E.2d 286, 295 (2005) (proper service of process conveys the court with personal jurisdiction over a defendant).

- b. The Injunction Fails To Give Notice To The Individual Members That They Will Incur Individual Liability For Any Violations.**

The Respondent's take the position that the individual members were required to file Rule 59(e) motion within 10 days of receipt of the June 26, 2008 Order, and the failure to do so makes the Injunction the law of the case. According to Respondent's, the reference in the June 26, 2008 Order to "Stonington Development, LLC and its officers, agents, employees, and members," should have put the individual members on notice that

the injunction applied to them in their individual capacity rather than in their capacity as officers, agents, employees, and/or members of Stonington.

Safko was never individually named in the Complaint or any subsequent amendments. (R. pp. 40-55). At the conclusion of the trial, judgment was entered against Stonington Development, LLC and not Safko individually. (R. p. 38). The post trial motion for the permanent injunction did not name Safko individually and was not served on Safko individually. (R. pp. 297-300). The Court's September 17, 2007 Form-4 Order granting the Permanent Injunction did not name Safko individually and was not served on Safko individually. (R. p. 5). The Court's June 26, 2008 formal Order granting the injunction against Stonington Development, LLC was the first document since the inception of the suit against Stonington Development, LLC that was served personally on Safko. However, the Order does not mention Safko by name, rather the Order states that it "is binding upon Stonington Development, LLC and its officers, agents, employees, and members." (R. p. 27). This language is insufficient to put Safko on notice that the Injunction was intended to impose individual liability on him for any violations of the injunction, in that the language is ambiguous. *See, S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001) (A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.)

Not until the service of the Plaintiff's Motion for an Order Holding Stonington Development, LLC and its members in contempt of Court on September 11, 2008, was Safko ever individually identified. (R. pp. 305-306). The September 11, 2008 Motion also made it clear for the first time that Plaintiffs were seeking to hold Safko individually

liable for the alleged violations of the injunction. Thereafter, Judge Manning issued a Rule to Show Cause on November 6, 2008, which named Safko individually, making it clear that the Judge intended to hold Safko personally liable for any violations of the injunction. (R. p. 39) Stated another way, the September 11, 2008 motion and subsequent Rule to Show Cause of November 6, 2008, clarified what had previously been an ambiguity. Thereafter, Safko raised all appropriate objections to the injunction. Under these facts, the Injunction is not the law of the case.

2. Safko's Status As A Former Member Of A Member Managed LLC Is Not Sufficient To Impose Personal Liability For The Obligations Of Stonington.

Respondents argue that because Stonington Development was a member managed LLC, Safko should be personally liable for alleged violations of the Injunction because of his status as a member. This argument completely disregards the protections of the corporate shield applicable to individual members of LLC(s) found at S.C. Code Ann. § 33-44-303. South Carolina's Uniform Limited Liability Act (SCULLA) provides the following regarding the personal liability of an LLC's individual members:

(a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

S.C. Code Ann. § 33-44-303(a). The evidence in this case shows that Safko was nothing more than a former member of Stonington and as such cannot be personally responsible for violations of the injunction.

In addition, the SCULLA explicitly states that:

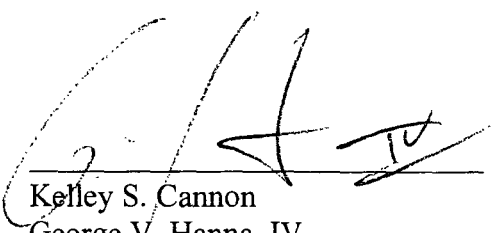
A limited liability company is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other

actionable conduct, of a member or manager acting in the ordinary course of business of the company and with the authority of the company.

S.C. Code Ann § 33-44-302. The only evidence offered as to the conduct of Safko is that he took no action at all. To the extent this failure to act has resulted in liability that liability falls to the LLC and not to Safko individually.

CONCLUSION

Safko respectfully requests the Court overturn Judge Manning's Orders finding him in contempt and awarding compensatory damages and attorney's fees. The Respondents argument that the injunction is the law of the case is incorrect. First, Safko was never made a party to the original action and as such the court never had jurisdiction over him. Second, the Injunction Order is ambiguous as to whether the Injunction is intended to apply to Safko in an individual capacity rather than in his capacity as an agent or member of Stonington. In addition, Safko's status as a former member of Stonington is insufficient to impose personal liability in that he is protected by two separate provisions of the SCULLA.



Kelley S. Cannon
George V. Hanna, IV
Caroline H. Raines
HOWSER, NEWMAN & BESLEY, L.L.C.
1508 Washington Street
P.O. Box 12009
Columbia, SC 29211
(803)758-6000
ATTORNEYS FOR RON E. SAFKO

August 17, 2010

IN THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning

2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko,
and L. K. Harrell, III, ... Appellants,

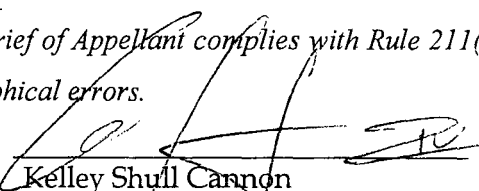
In Re:
Glenn Y. Hollis, Jr., John E. Hollis, Joseph R.
Robinson, Janette H. Robinson, ... Respondents,

v.

Stonington Development, LLC.....Appellant,

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

*I hereby certify that this Final Reply Brief of Appellant complies with Rule 211(b) in that
it contains only corrections to obvious typographical errors.*


Kelley Shull Cannon
George V. Hanna, IV
Carolina H. Raines
HOWSER, NEWMAN & BESLEY, L.L.C.
1508 Washington Street
P.O. Box 12009
Columbia, SC 29211
(803) 758-6000
ATTORNEYS FOR RONE SAFKO

August 17, 2010

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

SEP 01 2010

L. Casey Manning, Circuit Court Judge

SC Court of Appeals

2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko, and
L. K. Harrell, III Appellants,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, and Janette H.
Robinson Respondents

v.

Stonington Development,
LLC Appellant

FINAL REPLY BRIEF OF APPELLANT L.K. HARRELL, III

James Edward Bradley
William B. Fortino
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
Post Office Box 5709
West Columbia, SC 29171
Tel: 803-796-9160
Fax: 803-791-8410

Attorneys for Appellant L.K. Harrell, III

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
ARGUMENTS	1
I. MR. HARRELL MAY PROPERLY APPEAL THE COURT'S LACK OF JURISDICTION TO SUBJECT HIM TO CONTEMPT	1
A. Mr. Harrell Has The Right To Appeal Judge Manning's Finding Of Contempt	1
B. Mr. Harrell Has The Right To Challenge The Injunction In His Appeal	1
i. Mr. Harrell Was Not A Party In The Action Against Stonington Development, LLC	2
ii. Stonington Development, LLC Filed A Notice Of Appeal	3
II. MR. HARRELL IS NOT INDIVIDUALLY LIABLE FOR STONINGTON DEVELOPMENT, LLC'S ACTIONS	4
A. Mr. Harrell Cannot Be Deemed An Agent Of Stonington Development, LLC For Purposes Of Being Individually Liable For Violations Of The Injunction	4
B. Mr. Harrell Cannot Be Held Individually Liable For Contempt Simply Because Of His Minority Stake In Stonington Development, LLC	4
C. Even If Mr. Harrell Is Deemed An Agent Of Stonington Development, LLC, He Cannot Be Held Individually Liable For Its Violations Of The Injunction	5
CONCLUSION	7

TABLE OF AUTHORITIES

CASES

<i>Charleston Lumber Co., Inc. v. Miller Housing Corp.</i> , 338 S.C. 171, 525 S.E.2d 869 (2000)	3
<i>Louden v. Moragne</i> , 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997)	2
<i>The State v. B.F. Hunt</i> , 35 S.C.L. 322, 4 Strob. 322, 1850 WL 2817 (S.C. App. L. 1850)	1
<i>Thornton v. Alford</i> , 247 S.C. 1, 260 S.E.2d 179 (1979)	2

STATUTES

S.C. Code Ann. § 33-44-302 (1976)	5
S.C. Code Ann. § 33-44-303 (1976)	5

TREATISES / OTHER AUTHORITIES

17 C.J.S. Contempt § 36 (2009)	6

STATEMENT OF ISSUES

- I. Mr. Harrell can properly appeal the Trial Court's lack of jurisdiction to find him in contempt.
- II. Mr. Harrell is not individually liable for Stonington Development, LLC's actions.

ARGUMENTS

I. MR. HARRELL MAY PROPERLY APPEAL THE COURT'S LACK OF JURISDICTION TO SUBJECT HIM TO CONTEMPT.

A. Mr. Harrell Has The Right To Appeal Judge Manning's Finding Of Contempt.

It is well settled under South Carolina law that every court has the power to make a finding of contempt. *The State v. B.F. Hunt*, 35 S.C.L. 322, 4 Strob. 322, 1850 WL 2817, 13 (S.C. App. L. 1850). However, it is equally as well settled that a party to a contempt action has a right to appeal that finding. *Id.*

The Respondents brought a contempt action against Mr. Harrell for Stonington Development, LLC's violations of an injunction. (R. pp. 305-306). Judge Manning held Mr. Harrell in contempt for Stonington Development, LLC's alleged violations. (R. pp. 28-33). Mr. Harrell has a right to appeal Judge Manning's findings.

B. Mr. Harrell Has The Right To Challenge The Injunction In His Appeal.

The Respondents have alleged that Mr. Harrell cannot challenge the injunction because it is the "law of the case." However, Mr. Harrell was not a party to the case against Stonington Development, LLC which included the injunction. (R. pp. 41-55). Further, Stonington Development, LLC, the party enjoined in the case, filed a notice of appeal. (R. p. 252).

i. Mr. Harrell Was Not A Party In The Action Against Stonington Development, LLC.

Mr. Harrell's name is not in the injunction issued against Stonington Development, LLC. (R. pp. 5, 25-27). He was not individually identified in Judge Manning's Orders. (R. pp. 5, 25-27). He was not named in the summons and complaint. (R. pp. 40-55). He was never added as a party, and he was never served individually as a party to the lawsuit. (R. pp. 40-55). He was not named in the Respondents' motions. (R. pp. 297-302). Nor was he served with their motions or provided with notices of any hearings. The first time Mr. Harrell was individually identified in anything related to this matter was in the Rule to Show Cause seeking to hold him in contempt. (R. p. 39).

The Respondents had the opportunity to name Mr. Harrell as a party to their action against Stonington Development, LLC. The Respondents had the opportunity to serve Mr. Harrell with a summons, as they did Stonington Development, LLC. *See Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997) (stating service of a summons gives the court jurisdiction over the party to render a personal judgment). However, they chose not to do this. (R. pp. 40-55). In doing so, they failed to bring him within the court's jurisdiction.

As consequence, Mr. Harrell took no part in the lawsuit against Stonington Development, LLC. He was not brought within the court's jurisdiction and is not personally bound by the injunction. *See Louden*, 327 S.C. at 468, 486 S.E.2d at 526 (stating a court may not enter a valid judgment without personal jurisdiction); *Thornton v. Alford*, 247 S.C. 1, 3, 260 S.E.2d 179, 181 (1979) (holding that disobedience of an order issued without jurisdiction is not contempt).

The Respondents' claim that Mr. Harrell cannot challenge the injunction because it is the "law of the case" is without merit. The court did not have jurisdiction over Mr. Harrell when it issued the injunction. He was not named as a party in the lawsuit against Stonington Development, LLC. He was not named in the injunctions issued against Stonington Development, LLC. Consequently, Mr. Harrell is not bound by Judge Manning's rulings against Stonington Development, LLC.

ii Stonington Development, LLC Filed A Notice Of Appeal.

Stonington Development, LLC was named in the injunction. (R. pp. 5, 25-27). Stonington Development, LLC was named in the Respondents' motions and provided notice of the hearings. (R. pp. 297-302). As a party to the action, it was also served with a summons and within the jurisdiction of the court. (R. pp. 40-55). Consequently, Stonington Development, LLC is unquestionably bound by the injunction.

As the party to the action, properly within the court's jurisdiction, Stonington Development, LLC filed an appeal of the original finding that Stonington Development, LLC, was even the cause of the siltation in this matter. (R. p. 252). Thus, the proper party to the action challenged the "law of the case" with its notice of appeal. *See Charleston Lumber Co., Inc., v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000).

II. MR. HARRELL IS NOT INDIVIDUALLY LIABLE FOR STONINGTON DEVELOPMENT, LLC'S ACTIONS.

A. Mr. Harrell Cannot Be Deemed An Agent Of Stonington Development, LLC For Purpose Of Being Individually Liable For Violations Of The Injunction.

Mr. Harrell was nothing more than a minority stakeholder in Stonington Development, LLC. (R. p. 278). He did not have any authority and took no part in its managerial decisions. (R. p. 278). Stephen Lipscomb was its managing member. (R. p. 279). Mr. Lipscomb handled Stonington Development, LLC's compliance with the injunction. (R. p. 167). Mr. Lipscomb visited the site and met with the Respondents on behalf of Stonington Development, LLC. (R. p. 167). Mr. Harrell never visited the site. (R. p. 162). He did not have any involvement in the action against Stonington Development, LLC or the efforts to prevent the siltation. (R. p. 162). The Respondents did not even know who he was at the contempt hearing. (R. p. 107). The Respondents cannot simply now allege that he is an agent of the company for the purpose of holding him individually liable for violations of the injunction.

B. Even If Mr. Harrell Is Deemed An Agent Of Stonington Development, LLC, He Cannot Be Held Individually Liable for Its Violations Of The Injunction.

Even if Mr. Harrell may be deemed an agent of Stonington Development, LLC, or involved in its violation of the injunction by virtue of his former stake in the company, he cannot be subjected to personal liability. The injunction was not issued against Mr. Harrell personally. (R. pp. 5, 25-27). It was issued against Stonington Development, LLC. (R. pp. 5, 25-27). Just because someone may be an agent does not mean that he is responsible for all of the actions of the principal. A principal is responsible for actions of the agent within the relationship, but an agent is not liable for the actions of the principal.

Otherwise, every employee would take on liability for any and all actions of their principals.

Pursuant to South Carolina Code § 33-44-302, Stonington Development, LLC would be liable, and Mr. Harrell would not. Section 33-44-302 states as follows:

A limited liability company is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a member or manager acting in the ordinary course of business of the company or with authority of the company.

S.C. Code Ann. § 33-44-302 (1976). The Respondents did not present any evidence that Mr. Harrell did anything at all, let alone acted in any way other than on behalf of Stonington Development, LLC. As consequence, any liability Mr. Harrell may have incurred in this matter would fall to Stonington Development, LLC, his principal. *Id.* Mr. Harrell should not be held personally liable for violations of the injunction.

C. Mr. Harrell Cannot Be Held Individually Liable For Contempt Simply Because Of His Minority Stake In Stonington Development, LLC.

The Respondents seek to hold Mr. Harrell personally liable for violations of the injunction because he was a member of Stonington Development, LLC and was served with a copy of the injunction. However, Mr. Harrell cannot be held personally liable under those facts.

South Carolina Code § 33-44-303 states, in pertinent part, as follows:

[T]he debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. **A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.** (emphasis added).

S.C. Code Ann. 33-44-303(a) (1976). Mr. Harrell was a member of Stonington Development, LLC, nothing more. (R. pp. 278-280). As such, he cannot be held personally liable for its violations of the injunction based on his minority share.

To hold him liable, he must have been personally involved with the violations of the injunction:

[T]he court cannot punish for contempt an officer of a corporation who was not a party to the contumacious conduct. Simply because a corporation has failed to comply with a court order, it does not necessarily follow that all corporate agents or officers are in contempt because of their agent status; there must be evidence in the record that the corporate agent charged with contempt was somehow personally connected with defying the authority of the court or disobeying its lawful decrees. (emphasis added).

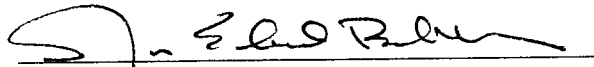
17 C.J.S. Contempt § 36 (2009). The Respondents have offered no evidence to prove that Mr. Harrell was a party to any violations of the injunction. The only thing the Respondents have proven is that Mr. Harrell was a minority member of Stonington Development, LLC and he received a copy of the injunction. There is nothing in the record to show he personally violated Judge Manning's Orders. As such, there is no basis to hold him personally liable for Stonington Development, LLC's violations of the injunction.

CONCLUSION

Mr. Harrell respectfully asks this Court to overturn Judge Manning's order finding Mr. Harrell in contempt of court, awarding compensatory damages and awarding attorney's fees for the following additional reasons:

- Mr. Harrell is able to properly appeal the Court's jurisdiction to bind him to the Injunction.
- Mr. Harrell is not individually liable for Stonington Development, LLC's violations of the Injunction.

August 30, 2010



James Edward Bradley
William B. Fortino
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, South Carolina 29171
Tel.: 803-796-9160
Fax: 803-791-8410

Attorneys for Appellant

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko, and
L.K. Harrell, III, ...Appellants,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, and Janette H.
Robinson.....Respondents.

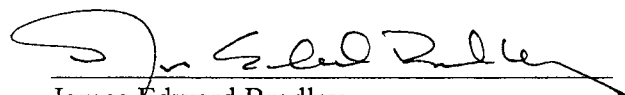
v.

Stonington Development,
LLC.....Appellant,

CERTIFICATE OF COUNSEL

I certify that this Final Reply Brief of Appellant L.K. Harrell, III complies with
Rule 211(b), SCACR.

August 30, 2010



James Edward Bradley

William B. Fortino

Moore, Taylor & Thomas, P.A.

1700 Sunset Boulevard

P.O. Box 5709

West Columbia, SC 29171

Tel: 803-796-9160

Fax: 803-791-8410

Attorneys for Appellant L.K. Harrell, III

IN THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Common Pleas

L. Casey Manning

2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko, and
L.K. Harrell, III, ...Appellants,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, and Janette H.
Robinson.....Respondents.

v.

Stonington Development,
LLC.....Appellant,

PROOF OF SERVICE

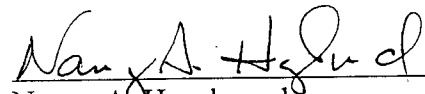
I certify that I have served the Appellant L.K. Harrell, III's Final Reply Brief on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid on September 1, 2010, addressed to their attorneys of record as follows:

H. Freeman Belser, Esquire
William C. Dillard, Jr., Esquire
P.O. Box 96
Columbia, SC 29202

Timothy Quinn, Esquire
William M. Saltzman, Esquire
P.O. Drawer 12589
Columbia, SC 29211

George V. Hanna, IV, Esquire
Kelley Shull Cannon, Esquire
Caroline H. Raines, Esquire
P.O. Box 12009
Columbia, SC 29211

September 1, 2010


Nancy A. Hazelwood
Assistant to James Edward Bradley

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko,
and L.K. Harrell, III,

Appellants,

In re:

Glenn Y. Hollis, Jr., John E. Hollis, Joseph R.
Robinson, Janette H. Robinson,

Respondents,

v.

Stonington Development, LLC,

Appellant.

REPLY BRIEF OF APPELLANTS,
STONINGTON DEVELOPMENT, LLC AND STEPHEN E. LIPSCOMB

Timothy G. Quinn
Law Offices of Quinn & Quinn, PA
Post Office Drawer 12589
Columbia, South Carolina 29211
(803) 771-0936
Fax: (803) 254-7751
Attorney for Appellants,
Stonington Development, LLC
and Stephen E. Lipscomb

TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Facts.....	2
Arguments	
I. THE COURT ERRED BY ISSUING AN ORDER OF CONTEMPT WHEN AN APPEAL WAS PENDING	6
II. THE COURT ERRED BY FAILING TO RECOGNIZE THAT SOUTH CAROLINA LAW PROVIDES TEN DAYS' WRITTEN NOTICE TO AN OWNER OF REAL ESTATE BEFORE A PROCEEDING IS COMMENCED FOR FAILING TO ABATE A NUISANCE.....	8
III. THE COURT ERRED IN FINDING THAT STONINGTON, LLC AND MR. LIPSCOMB INTENTIONALLY DISREGARDED THE JUNE 26, 2008 ORDER.....	8
IV. THE COURT ERRED BY PIERCING THE CORPORATE VEIL.....	11
V. THE COURT ERRED IN FAILING TO FIND THAT RULE 65(d) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE DOES NOT BIND MR. LIPSCOMB INDIVIDUALLY TO THE INJUNCTION	13
VI. THE COURT ERRED BY ENFORCING A COURT ORDER THAT DOES NOT SUFFICIENTLY SET FORTH THE ACT ENJOINED.....	15
VII. THE COURT ERRED IN FINDING THAT STONINGTON, LLC AND MR. LIPSCOMB VIOLATED COUNTY ORDINANCES AND STATE STATUTES.....	16
VIII. THE COURT ERRED BY UNJUSTLY ENRICHING THE RESPONDENTS WITH THE ORDER OF CONTEMPT.....	17
IX. THE COURT ERRED BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF AN ATTORNEY-CLIENT FEE AGREEMENT.....	20
X. THE COURT ERRED BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF A FEE INVOICE DESCRIBING THE	

SERVICES RENDERED AND THE TIME SPENT.....	22
XI. THE COURT ERRED BY FAILING TO FIND THAT THE NATURE, EXTENT AND DIFFICULTY OF THE SERVICES RENDERED DID NOT AMOUNT TO AN AWARD OF ATTORNEY'S FEES AND COSTS.....	23
XII. THE COURT ERRED BY FAILING TO FIND THAT THE DECISION TO AWARD ATTORNEY'S FEES AND COSTS WAS NOT RIPE.....	24
Conclusion.....	25

TABLE OF AUTHORITIES

CASES

<u>American Federal Bank, FSB v. Kateman</u> , 335 S.C. 273 (Ct. App. 1999)	15
<u>Arnal v. Fraser</u> , 371 S.C. 512, (2007).....	7
<u>Bigham v. Bigham</u> , 264 S.C. 101 (Ct.App. 1975).....	9
<u>Browder v. Browder</u> , 675 S.E. 830 (S.C. Ct.App 2009)	9,11
<u>Cheapo's Truck Stop, Inc. v. Cloyd</u> , 350 S.C. 596 (2002)	19
<u>Drury Dev. Corp. v. Foundation Ins. Co.</u> , 380 S.C. 97 (2008).....	12
<u>Dumas v. InfoSafe Corp.</u> , 320 S.C. 188 (Ct.App. 1995).....	12
<u>Ex Parte Cannon</u> , 385 S.C. 643 (Ct.App. 2009).....	22
<u>Floyd v. Floyd</u> , 365 S.C. 56 (Ct.App. 2005).....	9
<u>Glasscock v. Glasscock</u> , 304 S.C. 158 (1991).....	22,23
<u>Mid-South Mgmt. Co. v. Sherwood Dev. Corp.</u> , 374 S.C. 588 (Ct. App. 2007)	12
<u>Spartanburg v. Kimbrell's Inv. Co.</u> , 259 S.C. 203 (1972)	15
<u>Spartanburg Co. Dep't of Soc. Servs. v. Padgett</u> , 296 S.C. 79 (1988).....	9
<u>State ex rel. Cooper v. Ridgeway Brands Mfg., LLC</u> , 666 S.E.2d 107 (N.C. 2008).....	12
<u>Sturkie v. Sifly</u> , 280 S.C. 453 (Ct. App. 1984).....	12
<u>Williamson v. Middleton</u> , 383 S.C. 490 (2009).....	20,21,22

STATUTES

Richland County Code of Ordinances § 26-36(a)(2).....	17
Richland County Code of Ordinance § 26-273(b).....	5,16,17,25
S.C. Code Ann. § 15-43-120.....	8
S.C. Code Ann. § 33-44-303(a).....	12
S.C. Code Ann. § 48-14-140.....	5,6,17,25

OTHER AUTHORITIES

85 A.L.R. 3d. 895, § 3 (1978).....	17
17 Am.Jur. 2d 54, Contempt. Sec. 52.....	15
42 Am.Jur. 2d. Injunctions § 299.....	13,14

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR BY ISSUING AN ORDER OF CONTEMPT WHEN AN APPEAL WAS PENDING?
2. DID THE COURT ERR BY FAILING TO RECOGNIZE THAT SOUTH CAROLINA LAW PROVIDES TEN DAYS' WRITTEN NOTICE TO AN OWNER OF REAL ESTATE BEFORE A PROCEEDING IS COMMENCED FOR FAILING TO ABATE A NUISANCE?
3. DID THE COURT ERR IN FINDING THAT STONINGTON, LLC AND MR. LIPSCOMB INTENTIONALLY DISREGARDED THE JUNE 26, 2008 ORDER?
4. DID THE COURT ERR BY PIERCING THE CORPORATE VEIL?
5. DID THE COURT ERR IN FAILING TO FIND THAT RULE 65(d) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE DOES NOT BIND MR. LIPSCOMB INDIVIDUALLY TO THE INJUNCTION?
6. DID THE COURT ERR BY ENFORCING A COURT ORDER THAT DOES NOT SUFFICIENTLY SET FORTH THE ACT ENJOINED?
7. DID THE COURT ERR IN FINDING THAT STONINGTON DEVELOPMENT, LLC AND MR. LIPSCOMB VIOLATED COUNTY ORDINANCES AND STATE STATUTES?
8. DID THE COURT ERR BY UNJUSTLY ENRICHING THE RESPONDENTS WITH THE ORDER OF CONTEMPT?
9. DID THE COURT ERR BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF AN ATTORNEY-CLIENT FEE AGREEMENT?
10. DID THE COURT ERR BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF A FEE INVOICE DESCRIBING THE SERVICES RENDERED AND THE TIME SPENT?
11. DID THE COURT ERR BY FAILING TO FIND THAT THE NATURE, EXTENT AND DIFFICULTY OF THE SERVICES RENDERED DID NOT AMOUNT TO AN AWARD OF ATTORNEY'S FEES AND COSTS?
12. DID THE COURT ERR BY FAILING TO FIND THAT THE DECISION TO AWARD ATTORNEY'S FEES AND COSTS WAS NOT RIPE?

STATEMENT OF THE CASE

On June 26, 2008, the Trial Court issued an Order enjoining Stonington Development, LLC (Stonington) from “. . . from discharging sediment-laden stormwater onto the [Respondents'] property.” *June 26, 2008 Order* at 2.

On September 11, 2008, Respondents filed a Motion for an Order Holding Stonington and its Members in Contempt of Court for failing to comply with the June 26, 2008 Order.

A Rule to Show Cause hearing was heard on April 14, 2009.

On September 28, 2009, the Court entered an Order Granting Plaintiffs' Motion for an Order Holding Stonington and its Members in Contempt.

On October 7, 2009, Respondents, Stonington and Stephen E. Lipscomb filed a Rule 59(e) Motion as to the September 28, 2009 Order.

On January 7, 2010, the Trial Court filed an Order denying Respondents' Rule 59(e) Motion and awarded attorney's fees to Respondents.

On February 5, 2010, Respondents, Stonington and Mr. Lipscomb filed a Notice of Appeal as to the Trial Court's September 28, 2009 and January 7, 2010 Orders.

FACTS

On April 6, 2007, a Richland County jury rendered a verdict in favor of the Respondents against Stonington in the amount of \$400,000.00 in actual damages and \$3.5 million in punitive damages, for a total of \$3.9 million, for a private nuisance arising from alleged siltation and increased runoff that damaged the Respondents' properties and ponds. The Trial Court filed the Orders on November 12, 2007 and December 4, 2007. Stonington filed a Notice of Appeal on December 13, 2007. That Appeal was briefed, filed, and is pending. Also, Respondents'

separate action to pierce the corporate veil of Stonington, LLC is pending.

On June 26, 2008, the Trial Court issued an Order enjoining Stonington "... from discharging sediment-laden stormwater onto the plaintiffs' property." *June 26, 2008 Order* at 2. On September 11, 2008, the Respondents filed a Motion for an Order Holding Stonington Development, LLC and its Members in Contempt of Court for failing to comply with the June 26, 2008 Order. This Motion was filed without any prior notice to Stonington or Mr. Lipscomb.

A Rule to Show Cause hearing was heard on April 14, 2009. The Court heard the sworn testimony of Respondent, Janette H. Robinson, Kevin Lee of the Stonington Homeowners' Association, and of Appellant, Mr. Lipscomb. The Trial Court also reviewed numerous photographs identified by the witnesses.

At this hearing, Ms. Robinson testified that the Respondents have done nothing to repair their property. (Tr. pg. 39 lines 1-5; pg. 47 lines 19-22; pg. 48 lines 6-17). She said the Respondents have collected approximately \$500,000 in settlements from several cases that relate to the instant case which involve insurance companies. (Tr. pg. 37 lines 26 through pg. 38 lines 11). Despite this \$500,000 settlement, Respondents admit they have not removed any of the silt from the pond, they have not hired engineers to help diagnose or fix the silt and runoff problem, and Respondents have not assisted Stonington in any way to find a solution for the alleged issues. (Tr. pg. 38 lines 14-21; pg. 39 lines 1-5; pg. 47 lines 19-22; pg. 48 lines 6-17; pg. 59 lines 18-21; pg. 71 lines 6-10). Ms. Robinson also acknowledged on cross examination that the engineers she consulted all state that siltation will likely continue until the upper area is developed. (Tr. pg. 72 lines 16-22). Mr. Lipscomb and Mr. Lee testified that it was the continued actions of the Respondents that are preventing the development of the upper land areas. (Tr. pg. 89 line 19

through pg. 90 line 5; pg. 91 lines 8-12; pg. 131 lines 10-25).

Respondents did not prove what caused the silt and runoff problem, if any. Respondents admit that Phase III of the Stonington subdivision was not owned by Stonington at the time of the jury trial, and not at the time of the Rule to Show Cause hearing. (Tr. pg. 56 lines 3-13).

Respondents also admit that the drainage system from Phase III flowed through the property owned by Stonington. (Tr. pg. 55 lines 2-19). However, Respondents did not bring any evidence showing Stonington caused the alleged silt and runoff from Phase III to enter Respondents' property. Respondents also did not show that additional harm was done to their property since the June 26, 2008 Order was filed, nor did they present any testimony as to monetary damage caused by any additional siltation and no testimony that their damage, if any, could not be cured by their earlier settlement monies.

At the Rule to Show Cause Hearing, Appellants showed that Stonington and Mr. Lipscomb took remedial measures to solve the silt and runoff issues. (Tr. pg. 112 line 25 through pg. 113 line 4; pg. 117 line 12 through pg. 118 line 9; pg. 123 line 17 through pg. 124 line 10). On cross-examination, Ms. Robinson testified that she saw Mr. Lipscomb, as well as several other workers, setting up silt fences and hay bales along her property. (Tr. pg. 23 lines 17-20; pg. 23 line 26 through pg. 24 line 1; pg. 25 lines 15-18; pg. 44 line 11 through pg. 45 line 1; pg. 46 lines 13-24; pg. 58 lines 19-22; pg. 58 line 25 through pg. 59 line 5; pg. 59 lines 6-17). On direct examination of Mr. Lipscomb, Mr. Lipscomb testified that he hired three separate engineers to inspect the property and find a solution for any problems if they existed. (Tr. pg. 112 line 25 through pg. 113 line 4). Mr. Lipscomb also hired Carolina Storm Water Services to: monitor the property, check on the silt fences, set up a rock dam, and give Mr. Lipscomb reports regarding

the condition of the property. (Tr. pg. 113 lines 5-14; pg. 114 lines 10-20; pg. 117 line 12 through pg. 118 line 9). Carolina Storm Water Services monitored the property every week for over one year. Id. Mr. Lipscomb also testified that DHEC and the Army Corps of Engineers went to the property and they have never found any violations, nor has Mr. Lipscomb ever been cited for not being in code compliance. (Tr. pg. 119 line 5 through pg. 120 line 2).

On September 28, 2009, the Court entered an Order Granting Plaintiffs' Motion for an Order Holding Stonington Development, LLC and its Members in Contempt. The Order states a Findings of Fact. First, the Order states "[t]he siltation and increased runoff problems that were the subject of the underlying lawsuit between the plaintiffs and Stonington are continuing[.]" and Plaintiffs proved these damages "beyond question" by showing photographs of the property and the testimony of Ms. Robinson. *September 28, 2009 Order* at 2. However, the photographs were taken on days right after it rained and Respondents would not allow Appellants onto the property to make similar observations.

Second, the Order states "Stonington and Mr. Lipscomb have made minimal efforts but have not done enough to stop the siltation and increased runoff problems" Id. However, "Mr. Lipscomb testified that he had hired a consultant to periodically inspect Stonington's property." Id. Lastly, the Order wrongfully states that Appellants ". . . failed to show cause why they should not be held in contempt of Court[.]" and that the ". . . damages will need to be remediated after the siltation is stopped" Id. at 3.

Under the Conclusions of Law section, the Order found Stonington, Mr. Lipscomb, Mr. Safko, and Mr. Harrell in Contempt of Court. Id. at 3-5. The Order found the Appellants violated § 26-273(b) of the Richland County Code of Ordinances and S.C. Code Ann. § 48-14-

140. Id. at 4. The Order then awards compensatory damages to Respondents. Id. at 4-5.

The Orders of the Court section found Stonington, Mr. Lipscomb, Mr. Safko and Mr. Harrell individually liable for civil contempt. Id. at 5-6. The Appellants were found joint and severally liable for the amount of \$25,000.00 in compensatory damages to the Respondents, and Appellants are joint and severally liable for the Respondents' attorney's fee and costs. Id. at 5. Finally, the Order demands that the Appellants pay to remediate the silt and runoff problems. Id. at 5-6.

Appellants, Stonington and Mr. Lipscomb filed a Rule 59(e) Motion on October 7, 2009 as to the September 28, 2009 Order. In an Order filed on January 7, 2010, the Trial Court denied said Motion and awarded attorney's fees and costs to Respondents. Appellants, Stonington and Mr. Lipscomb then filed a Notice of Appeal on February 5, 2010 as to the Orders dated September 28, 2009 and January 7, 2010.

ARGUMENTS

I. THE COURT ERRED BY ISSUING AN ORDER OF CONTEMPT WHEN AN APPEAL WAS PENDING

An order for contempt is not proper when an appeal is pending. Rules 205 and 225 of the South Carolina Appellate Court Rules terminates the Circuit Court's jurisdiction over a Contempt hearing when the issue under review is pending in the Appellate Court. Rule 205 states that "[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal[.]" Rule 205, SCACR. Rule 225 states:

...the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration

of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 225, SCACR. In Arnal v. Fraser, 371 S.C. 512, 521 (2007), a final divorce order gave a father specific parameters for child visitation. The father appealed a portion of the order concerning the visitation. Id. While the appeal was pending, the Family Court issued several orders modifying the visitation schedule. Id. The father argued the Family Court could not modify the divorce order while an appeal was pending. Id. The Supreme Court of South Carolina agreed with the father and held that the Appellate Court had exclusive jurisdiction over the matter, rather than the lower court. Id.

Here, just as in Arnal, the lower court is attempting to enforce a matter that is pending with the Appellate Court. Stonington is appealing whether it is liable in the underlying case. Final Br. of Appellant 14-15. The trial court's order originally found Stonington liable for \$3.9 million and required Stonington to stop any further silt and runoff from entering Plaintiffs' property. November 14, 2007 Order; December 4, 2007 Order; September 17, 2007 SCRCF Form-4 J. When Appellants' Notice of Appeal was filed, the matters issued in these orders were automatically stayed, in accordance with Rule 225, SCACR. However, the trial court issued an injunction against the Appellants on June 26, 2008 without effectively lifting the stay. The injunction orders Appellants to stop any silt or runoff from entering Respondents' property. *June 26, 2008 Order* at 2. This was a matter stayed for appeal. Allowing the Circuit Court to enforce this injunction would infringe the Appellate Court's jurisdiction. Therefore, under Rules 205 and 225 SCACR, the Circuit Court lacks jurisdiction to enforce the injunction. The Appellate Court

has exclusive jurisdiction over this matter.

II. THE COURT ERRED BY FAILING TO RECOGNIZE THAT SOUTH CAROLINA LAW PROVIDES TEN DAYS' WRITTEN NOTICE TO AN OWNER OF REAL ESTATE BEFORE A PROCEEDING IS COMMENCED FOR FAILING TO ABATE A NUISANCE.

Respondents failed to provide Appellants with a ten day notice before filing the Rule to Show Cause. South Carolina law provides ten days' written to an owner of real estate before a proceeding is commenced for failing to abate a nuisance. S.C. Code Ann. § 15-43-120. South Carolina Civil Remedies and Procedures provides the following, regarding notice to an owner before an action is brought against him:

No proceeding against the owner of the real estate shall be commenced hereunder unless ten days' written notice be given by the prosecuting attorney to such owner or his agent and upon his failure thereafter to abate the nuisance.

Id. In the instant case, on September 11, 2008, Respondents filed a Motion for an Order Holding Stonington and its Members in Contempt of Court because Appellants allegedly failed to abate a nuisance. Respondents filed this motion without providing prior notice to Appellants. Under South Carolina law, when a defendant is accused of failing to abate a nuisance, ten days notice must be given to a defendant before an action is commenced. Id. Therefore, Respondents' motion for contempt is not viable because Respondents did not comply with S.C. Code Ann. § 15-43-120.

III. THE COURT ERRED IN FINDING THAT STONINGTON, LLC AND MR. LIPSCOMB INTENTIONALLY DISREGARDED THE JUNE 26, 2008 ORDER.

Stonington and Mr. Lipscomb did not intentionally disregard the June 26, 2008 Order. Stonington and Mr. Lipscomb in fact complied with the June 26, 2008 Order of injunction and sought to abate the nuisance. "Contempt results from the willful disobedience of a court order."

Browder v. Browder, 675 S.E. 830 (S.C. Ct.App 2009) (citing Bigham v. Bigham, 264 S.C. 101, 104 (Ct.App. 1975)). “Willful disobedience requires an act to be ‘done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.” Id. (quoting Spartanburg Co. Dep’t of Soc. Servs. v. Padgett, 296 S.C. 79, 82-3 (1988)). “Civil contempt must be proven by clear and convincing evidence.” Floyd v. Floyd, 365 S.C. 56 (Ct.App. 2005).

In Browder, a divorce order was issued requiring the husband to provide an accounting of proceeds collected from the sale of property. Browder, 675 S.E. at 822. The wife accused the husband of being in contempt for failing to provide the accounting. Id. However, the husband testified that he repeatedly requested the accounting records to no avail. Id. at 825. He also explained that the records were sent to the marital residence and he could not locate the information that was requested. Id. Instead, the husband tried to explain the accounts to the best of his knowledge. Id. The Court did not hold the husband in contempt because his actions to comply with the order were adequate. Id.

Here, just as in Browder, Stonington and Mr. Lipscomb’s actions were adequate enough to find they were complying with the June 26, 2008 Order. Mr. Lipscomb, acting on behalf of Stonington, hired consultants and workers to monitor the Respondents’ property and to set up fencing, rock dams and hay bales where there was a possibility of siltation and runoff. (Tr. pg. 112 line 25 through pg. 113 line 4; pg. 113 lines 5-14; pg. 114 lines 10-20; pg. 117 line 12 though pg. 118 line 9; pg. 123 line 17 through pg.124 line 10). Ms. Robinson admit to seeing Mr. Lipscomb observing the property and she has seen the workers constructing fences on the

property. (Tr. pg. 23 lines 17-20; pg. 23 line 26 through pg. 24 line 1; pg. 25 lines 15-18; pg. 44 line 11 through pg. 45 line 1; pg. 46 lines 13-24; pg. 58 lines 19-22; pg. 58 line 25 through pg. 59 lines 6-17). There was no clear and convincing proof that Stonington and Mr. Lipscomb wilfully disobeyed the June 26, 2008 Order.

Respondents' testimony that Appellants have done nothing to remediate the siltation and runoff problem are untrue. Stonington and Mr. Lipscomb have in fact made several attempts to abate the alleged nuisance. It may be so, however, that Stonington and Mr. Lipscomb's actions did not completely remediate the alleged problem. On the other hand, Stonington and Mr. Lipscomb did not willfully disregard the June 26, 2008 Order. Mr. Lipscomb has made a good faith attempt to abate the nuisance by hiring consultants and workers to set up fences, hay bales and rock dams.

Even if the Respondents believe Stonington and Mr. Lipscomb's attempts are insufficient, Respondents have not proven that Stonington and Mr. Lipscomb have intentionally disregarded the June 26, 2008 Order. Respondents did not provide testimony by Ms. Robinson nor did Respondents show in cross-examination that Stonington and Mr. Lipscomb wilfully disregarded the June 26, 2008 Order. Respondents have done nothing in assisting Stonington and Mr. Lipscomb as to what needs to be done to remediate the situation and the remediation of the situation requires the Respondents' cooperation which has not been forthcoming. (Tr. pg. 38 lines 14-21; pg. 39 lines 1-5; pg. 47 lines 19-22; pg. 48 lines 6-17; pg. 59 lines 18-21; pg. 71 lines 6-10). Furthermore, the extent of the alleged continuing damages is unknown because Respondents have not cleaned their property with the assistance of the \$500,000 insurance settlement money. (Tr. pg. 37 line 26 through pg. 38 line 11; pg. 38 lines 14-21; pg. 48 line 6-17).

It is unreasonable, if not impossible, for Appellants to prevent every ounce of silt and runoff from entering Respondents' property.

This lawsuit is preventing Stonington from completely remediating the alleged siltation and runoff problem. (Tr. pg. 91 lines 8-12; pg. 131 lines 10-25). The Respondents are threatening to take legal action against those who purchase the upper lots of the Stonington subdivision. (Tr. 131 lines 10-25). As a result, no one is interested in purchasing the land for the purpose of building a house. (Tr. pg. 89 line 19 through 90 line 5). If houses are built, the land will become stabilized, sod will be laid down, and vegetation will be planted. (Tr. pg. 127 line 15 through pg. 128 line 1). These improvements to the land would stop the alleged harms done to Respondents. Id. In effect, Respondents are hindering the Appellants from complying with the June 26, 2008 Order.

Respondents have not told Appellants specifically what needs to be done to remediate the problem. (Tr. pg. 71 lines 6-10). Stonington and Mr. Lipscomb have done what they can to solve any alleged problem. (Tr. pg. 112 line 25 through pg. 113 line 4). Respondents have not provided Appellants with any guidance. Therefore, the Trial Court should have found, like Browder, that Stonington and Mr. Lipscomb's actions in abating the nuisance were adequate enough to find they did not disregard the June 26, 2008 Order, and that Respondents did not have clear and convincing evidence to show otherwise.

IV. THE COURT ERRED BY PIERCING THE CORPORATE VEIL.

Mr. Lipscomb is not in contempt because Respondents did not pierce Stonington's veil. "A member or manager [of a limited liability company (LLC)] is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or

manager.” S.C. Code Ann. § 33-44-303(a). Although no South Carolina appellate decision discusses protecting the personal liability of an LLC’s individual members, other state courts apply the same test for finding LLC individual members personally liable as they apply in situations involving business corporations. *See, e.g. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 666 S.E.2d 107 (N.C. 2008). In deciding whether to find individuals personally liable for the debts and obligations of the business entity which they serve, South Carolina courts place the burden of proof on the party seeking to pierce the corporate veil. *Mid-South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597 (Ct. App. 2007) (citing the test established in *Sturkie v. Sifly*, 280 S.C. 453 (Ct. App. 1984).

South Carolina applies a two prong test for piercing the corporate veil. *Drury Dev. Corp. v. Foundation Ins. Co.*, 380 S.C. 97,102 (2008). The first prong analyzes the shareholder's relationship to the corporation by evaluating eight factors. *Id.* The second prong requires the plaintiff to demonstrate that “fundamental unfairness” would result from recognition of the corporate entity. *Id.* “The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell.” *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 192-3, (Ct.App. 1995).

At the April 14, 2009 hearing, Respondents did not provide any evidence showing Mr. Lipscomb abused the formalities of a limited liability company, nor did Respondents show that a “fundamental unfairness” would result from recognizing Stonington as an entity. The Respondents, however, are attempting to compel Stonington’s members to pay for the liabilities of Stonington. One of the purposes of forming a LLC is to limit the members’ liability. Having the members pay for the liabilities of the LLC, without piercing the veil, is contrary to the law

and to public policy. Furthermore, a subsequent action to pierce the veil of Stonington is pending in the Circuit Court. Piercing Stonington's veil by way of this contempt hearing would be premature, and would deprive Mr. Lipscomb of his day in court on this issue. Therefore, Mr. Lipscomb is shielded by the LLC's veil in this contempt action.

V. THE COURT ERRED IN FAILING TO FIND THAT RULE 65(d) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE DOES NOT BIND MR. LIPSCOMB INDIVIDUALLY TO THE INJUNCTION.

Mr. Lipscomb is not bound to the June 26, 2008 Order in his individual capacity, pursuant to Rule 65(d) SCRPC. Rule 65(d) of the South Carolina Rules of Civil Procedures states injunctions are "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Officers are bound to an injunction against the business entity only in their capacity as an officer. 42 Am.Jur. 2d. Injunctions § 299. Agents of the company are bound to an injunction to the extent they are acting on behalf of the company. *Id.* Parties who are "...outside an injunction's coverage subject themselves to its proscriptions should they aid or abet the named parties in a concerted attempt to subvert those proscriptions. *Id.* at § 300.

In the instant case, on June 26, 2008, this Court filed an "...Injunction Against Stonington Development, LLC." *June 26, 2008 Order* at 1. The June 26, 2008 Order enjoins Stonington from "discharging sediment-laden stormwater onto the plaintiffs' property. ..." *Id.* at 2. The June 26, 2008 Order goes on to include Stonington's "members" in the injunction, which it claims is [i]n accordance with Rule 65(d) SCRPC. ..." *Id.* at 3. The Injunction Order now seeks to hold Mr. Lipscomb in contempt, individually. *Id.*

The June 26, 2008 Order, misquotes Rule 65(d). Id. Rule 65(d) of the South Carolina Rules of Civil Procedures states injunctions are “binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Members are not included in the rule. Therefore, the June 26, 2008 Order was not in accordance with Rule 65(d) SCRCF and Stonington’s members should not have been included in the injunction.

The June 26, 2008 Order did not establish jurisdiction over Mr. Lipscomb. Mr. Lipscomb was not a named party of the original action against Stonington, nor was he named in his individual capacity in the June 26, 2008 Order. It may be argued that Mr. Lipscomb has not preserved his right to set aside the June 26, 2008 Order because Mr. Lipscomb did not file a Motion to Reconsider or a Notice of Appeal. However, these actions are not necessary to find that the injunction is not binding on Mr. Lipscomb individually. The June 26, 2008 Order failed to name the specific members who are bound to the injunction, and whether they would be liable in their individual capacity. Therefore, it was not proper for the Trial Court to hold Mr. Lipscomb in contempt because the Trial Court did not have jurisdiction over him individually.

Mr. Lipscomb is not individually liable for contempt even if he was acting as an officer or agent of Stonington. As a member of Stonington, Mr. Lipscomb may be considered an agent or officer. However, officers are bound to injunctions against the business entity only in their capacity as an officer, and agents can only act on behalf of the company. 42 Am.Jur. 2d. Injunctions § 299. Therefore, any alleged actions Mr. Lipscomb made in violation of the injunction, would be imputed to Stonington because Mr. Lipscomb was acting on behalf of

Stonington.

Mr. Lipscomb did not aid Stonington in violating the injunction. Mr. Lipscomb did have knowledge of the June 26, 2008 Order, but he did not participate in concert to violate the injunction. Respondents did not show Mr. Lipscomb actively participated in any wrongful act. To the contrary, Mr. Lipscomb only aided Stonington in complying with the injunction by hiring consultants and workers to help remediate the alleged silt and runoff problem. Therefore, under Rule 65(d) SCRPC, Mr. Lipscomb is not individually liable for contempt.

VI. THE COURT ERRED BY ENFORCING A COURT ORDER THAT DOES NOT SUFFICIENTLY SET FORTH THE ACT ENJOINED.

The Court's order of June 26, 2008 does not sufficiently set forth the act enjoined. Rule 65 SCRPC states that injunctions "...shall describe in reasonable detail, and not be reference to the complaint or other document, the act or acts sought to be restrained..." Rule 65(d) SCRPC. "Before a person may be held in contempt for violating a court order, the order should inform him in definite terms to the duties thereby imposed upon him, and the command must therefore be express rather than implied." Spartanburg v. Kimbrell's Inv. Co., 259 S.C. 203, 215-16 (1972) (citing 17 Am.Jur. 2d. 54, Contempt. Sec. 52); See also American Federal Bank, FSB v. Kateman, 335 S.C. 273 (Ct. App. 1999) (Holding the court's order was not sufficiently definite to indicate what the third party held subject to the order had to do to comply with the order).

The Court's Order of June 26, 2008 only vaguely describes the acts sought to be restrained. The Order enjoins the discharging of sediment-laden storm water and referenced South Carolina Regulations. Further, the order does not require Mr. Lipscomb to take any affirmative acts.

Stonington and Mr. Lipscomb do not have the capacity to interpret the Order and

documents it references to figure out the implication of what is enjoined. As Rule 65 SCRPC states, the act enjoined must be described in detail. The Court's Order is not reasonably detailed and it references outside documents. As a result, Stonington and Mr. Lipscomb complied with the June 26, 2008 Order to the best of their ability and they should not be bound to the vague terms.

VII. THE COURT ERRED IN FINDING THAT STONINGTON, LLC AND MR. LIPSCOMB VIOLATED COUNTY ORDINANCES AND STATE STATUTES

Stonington and Mr. Lipscomb did not violate county ordinances and state statutes. Under § 26-273(b) of the Richland County Code of Ordinances:

When an authorized county official finds violations of this [Land Development Code Compliance Ordinance], it shall be the duty of said official to notify the person alleged to be in violation. Such notice of violation shall be in writing and sent by certified or registered mail or delivered by personal service. If the violator cannot be ascertained, then the notice of violation shall be sent to the record owner of the land on which the violation occurs. The notice of violation shall include an opportunity to cure the violation within a prescribed period of time.

Richland County Code of Ordinance § 26-273(b). The Order states "Sec. 26-273(b) of the Richland County Code of Ordinances subjects a violator of the stormwater provisions to a per diem penalty of not more than \$500.00, beginning on the date the violator receives notice of a violation of the Ordinance. . ." *September 28, 2009 Order* at 4. The Order then goes on to claim the Appellants are liable for the code violations and should pay the fines to Respondents. Id.

This Order misstates the law. First, Respondents do not have standing to bring an action

for violating a county ordinance. Richland County Code of Ordinances § 26-36(a)(2). Second, the Order misquotes what the actual ordinance states. *See* Richland County Code of Ordinances § 26-273(b); *September 28, 2009 Order* at 4. Richland County Code of Ordinances § 26-273(b) deals with the procedure for providing notice to a violator of Land Development Code Compliance Ordinances, while the Order incorrectly states that § 26-273(b) deals with penalties for violating stormwater provisions. Third, Appellants have not been formally accused of, nor found in violation of any Richland County Ordinance or South Carolina state law. (Tr. pg. 119 line 5 through pg. 120 line 2). Therefore, Respondents' due process rights would be violated if such a finding was made without notice and a hearing. Fourth, the Order does not cite exactly which stormwater code the Appellants allegedly violated. Fifth, the state statute, S.C. Code Ann. § 48-14-140 does not apply here because the county ordinance does not apply. *See* S.C. Code Ann. § 48-14-140. Sixth, the June 26, 2008 order seeks to have Appellants abate the nuisance, not to enforce county codes and state statutes. *June 26, 2008 Order* at 2-3. Lastly, Respondents are not entitled to an amount of \$25,000.00 because the amount is arbitrary and South Carolina courts do not allow citizen plaintiffs from collecting fines that would ordinarily be for the state. *See* 85 A.L.R. 3d. 895, § 3 (1978).

There was no such testimony regarding violations of county codes or state laws at the April 14, 2009 hearing. As a result, the proposed compensatory damages for violating the codes and statutes are not proper. This Court should find that the Trial Court erred and the damages were improperly awarded.

VIII. THE COURT ERRED BY UNJUSTLY ENRICHING THE RESPONDENTS WITH THE ORDER OF CONTEMPT.

Respondents are unjustly enriched by the Trial Court's Order of contempt. The Trial

Court placed an undue burden on the Appellants by holding the Appellants in contempt.

Respondents would be unjustly enriched at the Appellants' expense. The Trial Court opened the door for Respondents to bring a Rule to Show Cause action whenever any silt or runoff enters their property, which would be the result of any rainfall. It was unreasonable for the Trial Court to compel Appellants to stop all silt and runoff from entering Respondents' property, which at this time, would be an impossible task. Respondents are using the judgment and injunction against Appellants for the Respondents' own monetary gain.

Awarding Respondents monetary damages, despite Respondents' lack of evidence as to monetary damages, would allow the Respondents to abuse the Appellants at the Respondents' discretion. Respondents brought biased photographs and biased testimony that the damage is continuing. Respondents admit that Respondents have done nothing to clean their pond nor have any water samples been analyzed by experts to see if there has been any further damage to the pond. (Tr. pg. 48 lines 6-17). An insurance company settled with Respondents for approximately \$500,000 and Respondents admit to not using any of it to remediate the alleged problems. (Tr. pg. 37 line 26 through pg. 38 line 11; pg. 38 lines 14-21). Respondents also failed to prove who exactly was causing alleged silt and runoff. (Tr. pg. 60 lines 4-24; pg. 62 lines 19-21). Respondents did not even prove the extent of the alleged continuing damages or if there was any additional silt or runoff coming onto the property. If the Respondents are awarded damages under this low burden for standard of proof, which appears to be less than clear and convincing, Respondents will likely keep bringing these actions against Appellants and collect money that is not rightfully deserved.

The Order's issuance of damages misstates the law and would unjustly enrich

Respondents. The Order states “. . .the remedial remedy of compensatory contempt is available to the Court to restore the [Respondents] as nearly as possible to their original position.”

September 28, 2009 Order at 4. The Order then goes on to award Respondents compensatory damages of \$25,000.00, attorney’s fees, costs, and pay for the costs to remove the silt that has resulted from the alleged non-compliance with the injunction. Id.

The Order misstates the law for awarding actual damages, attorney’s fees and costs. The Order cites Cheapo’s Truck Stop, Inc. v. Cloyd, 350 S.C. 596 (2002) to justify these awards. *September 28, 2009 Order* at 4-5. However, Cheapo’s Truck Stop was an action involving a settlement reached in open court in which the owner of the company was also named as a defendant in the action. Id. This cited case does not apply here.

The proposed \$25,000.00 in compensatory damages would unjustly enrich Respondents. The Order states that the Court has the power “. . . to restore the [Respondents] as nearly as possible to their original position.” *September 28, 2009 Order* at 4. \$25,000.00 in compensatory damages would put the Respondents in a position better than they were in before. The pond already had silt in it and Respondents did not prove that any additional silt has caused any additional damages. This \$25,000.00 amount is also arbitrary and has no basis in the testimony. Furthermore, the Respondents would not use this money to clean the pond or prevent any further silt from entering their property because Respondents are seeking to compel Appellants to pay for the cleaning and remedial measures. Also, the Respondents have not done anything to remediate the damages thus far, despite the \$500,000 in insurance settlement money they received and a \$3.9 million judgment entered in their favor. As a result, the Trial Court was incorrect to allow Respondents to profit from the injunction at the Appellants’ expense.

IX. THE COURT ERRED BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF AN ATTORNEY-CLIENT FEE AGREEMENT.

This Court should not award attorneys' fees and costs to Respondent because Respondent did not provide an attorney-client fee agreement. A plaintiff may not receive attorneys' fees and costs when the plaintiff does not present an attorney-client fee agreement. Williamson v. Middleton, 383 S.C. 490 (2009). In Williamson, plaintiffs "...presented records showing attorneys' fees totaling approximately \$106,000, the trial judge awarded \$35,000. . . ." Id. at 493. The defendant appealed the award of attorney fees. Id. At deposition, plaintiff's attorney testified that he never sent plaintiff any statements of attorneys' fees and they did not have an attorney-client fee agreement. Id. at 495. However, plaintiff's attorney did keep "...extensive and diligent records detailing the amount of time spent on the case and by whom the work was done." Id. at 496. The South Carolina Supreme Court denied attorneys' fees because there was "...no competent evidence to support the finding that [plaintiff] incurred attorney's fees." Id.

Respondents should not be awarded attorneys' fees and costs, just like Williamson, because Respondents failed to produce an attorney-client fee agreement. Respondents' attorney "...estimate[s] that several attorneys spent 131 hours on enforcement of the Injunction. . . ." (Aff. of H. Freeman Belser ¶ 7). Respondents' attorney also states that his firm's legal fee rates are "...\$200/hour for [H. Freeman Belser], to \$185/hour for Michael J. Polk, to \$250/hour for Clinch H. Belser, Jr." (Aff. of H. Freeman Belser ¶ 8). However, no such fee agreement was presented stating the Respondents and the attorneys agreed upon these rates, nor was there a fee agreement stating that the attorneys would bill on a fixed hourly rate, nor have the Respondents provided any such fee agreement in connection to any of their case files with Belser & Belser,

P.A. Therefore, Respondents, just as in Williamson, did not provide competent evidence to support a finding that Respondents incurred attorney's fees and costs because there is no fee agreement.

Respondents may argue that a fee agreement was reached because their attorneys kept an hourly time log of the work performed for the Injunction matter. This argument fails, however, because, as stated in Williamson, having extensive and diligently prepared time records by itself, does not satisfy the requirement of having a fee agreement. Williamson, 383 S.C. at 496. Here, there is no record that Respondents agreed to pay the amounts their attorneys' suggest are the established hourly rates.

On the other hand, a fee agreement would not be necessary in the instant case if the attorneys "regularly represented" the Respondents and an agreed upon rate of payment was already established. Rule 1.5(b), SCRCP. However, neither Respondents nor the Respondents' attorneys have shown that Belser & Belser, P.A. "regularly represents" the Respondents. It may be true that Respondents have used Belser & Belser, P.A. for several actions against Stonington Development, and Belser & Belser, P.A. may be thought of as "regularly representing" the Respondents in these matters, but all of these legal actions spurned from the same incident. Respondents' attorney admits that his firm is working on this Injunction matter as well as "...several different matters within this file. . . ." (Aff. of H. Freeman Belser ¶ 7). There is no proof that Respondents and Belser & Belser, P.A. had any relationship prior to the instant matter, and Respondents cannot be considered "regularly represented clients" of Belser & Belser, P.A. Therefore, the Trial Court erred in awarding attorneys' fees and costs to Respondents without a the presentment of a valid fee agreement.

X. THE COURT ERRED BY AWARDING ATTORNEY'S FEES WITHOUT RESPONDENT'S PRESENTATION OF A FEE INVOICE DESCRIBING THE SERVICES RENDERED AND THE TIME SPENT.

The Trial Court should not have awarded Respondents attorneys' fees and costs because Respondents did not present a legal fee invoice which itemizes billable hours along with the legal services provided. When determining the amount of attorney's fees to award, the court should consider the time necessarily devoted to the case. Glasscock v. Glasscock, 304 S.C. 158, 161 (1991). A court should not award attorneys' fees and costs in a contempt action when the "...record lacks sufficient evidence from which the circuit court could determine the appropriate amount of attorneys' fees required. . . ." Ex Parte Cannon, 385 S.C. 643, 667 (Ct.App. 2009). An award of attorneys' fees to a plaintiff is improper when their lawyer fails to send billing statements to that plaintiff/client. Williamson, 383 S.C. at 496.

Here, Respondents failed to present a legal fee invoice allocating the services and time spent on this action. Respondents also failed to present any legal fee statements that Respondents' attorney sent to Respondents requesting payment. Respondents' attorney vaguely states he "...estimate[s] that the several attorneys spent 131 hours working on enforcement of the Injunction on those 74 days investigating the facts, preparing documents to be submitted to or filed with the [Trial] Court, researching applicable law, scheduling hearings, and communicating with adversary counsel. . . ." (Aff. of H. Freeman Belser ¶ 7). Also, "[Belser & Belser, P.A.] tracks billable time on a daily basis for each attorney by file only, not by task." (Aff. of H. Freeman Belser ¶ 7). This speculation regarding who performed particular services and how much time was spent for each service is not "competent evidence" to show such services were necessary, or whether they actually occurred. It is impossible to know if such time and service

was necessary or even reasonable for this case without a legal fee invoice.

Awarding Respondents attorneys' fees and costs, without presenting a legal fee invoice, would unjustly enrich Respondents. Respondents' attorney admits that while their "...firm worked on enforcement of the Injunction, time was also spent working on other matters in the file." (Aff. of H. Freeman Belser ¶ 7). If this is so, Respondents may be attempting to have Appellants pay for services that Respondents would have paid otherwise for one of the "several different matters within this file that are not related to enforcement of the Injunction." (Aff. of H. Freeman Belser ¶ 7). This would be an unjust enrichment to Respondents and an undue burden on the Appellants. Furthermore, as stated above, Respondents' attorney admits that "[Belser & Belser, P.A.] tracks billable time on a daily basis for each attorney by file only, not by task." (Aff. of H. Freeman Belser ¶ 7). Respondents' attorney's vague, uncertain, and speculative explanation of the allocation of time and services rendered is not competent evidence to find for an award for attorneys' fees and costs. A legal fee invoice, which is commonly used in the practice of law in South Carolina and in the United States, is a proper method to prove the allocation of attorneys' fees costs. Respondents have failed to produce such a document, and therefore, the Trial Court erred by awarding attorneys' fees and costs to Respondents.

XI. THE COURT ERRED BY FAILING TO FIND THAT THE NATURE, EXTENT AND DIFFICULTY OF THE SERVICES RENDERED DID NOT AMOUNT TO AN AWARD OF ATTORNEY'S FEES AND COSTS.

The Trial Court should not have awarded attorneys' fees and costs to Respondents because the instant case does not rise to the level of difficulty that Respondents' attorney suggests. In determining the amount of attorney's fees to award, the court should consider the nature, extent, and difficulty of the case. Glasscock, 304 S.C. at 161. Here, Respondents'

attorney states that this case was made more complicated and has required more work because Appellants willfully disregarded the Injunction Order. (Aff. of H. Freeman Belser ¶ 5(j)).

However, this argument is not persuasive. First, Respondents' attorney admits that other matters not related to the Injunction are included within this file. (Aff. of H. Freeman Belser ¶ 7). This means a lot of the work completed for other matters were used for this Injunction matter. That would actually make this Injunction matter less complicated because a lot of the work was already done. Second, Respondents' attorneys did not have to analyze any damage reports showing continuing damage to the pond because Respondents never hired any such experts to perform those services. Third, the only evidence Respondents' attorney presented in an attempt to prove willful disregard of the Appellants at the Rule to Show Cause hearing was his client's testimony and dated photographs of the pond. Gathering this information could not have made this case "more complicated." Lastly, it is difficult to determine how complicated handling this Injunction matter was for Respondents' attorneys without an accurate legal fee invoice stating these supposedly difficult services performed made this case so complex. Neither Respondents nor Respondents' attorneys presented a legal fee invoice. Therefore, Respondents did not show that this matter rises to a level of complexity where attorneys' fees and costs should be awarded.

XII. THE COURT ERRED BY FAILING TO FIND THAT THE DECISION TO AWARD ATTORNEY'S FEES AND COSTS WAS NOT RIPE.

The original case which found Respondent Stonington liable to Respondents is currently under Appeal. In addition, despite specific requests for a formal hearing from all of the Appellants, the Trial Court unilaterally awarded attorney's fees and costs based on the affidavit of Respondents' counsel. There was no opportunity for the Appellants to put in evidence of their own or cross-examine the Respondents on this issue. Therefore, it was improper for the Trial Court to award attorneys' fees and costs to Respondents.

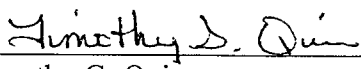
CONCLUSION

The Trial Court improperly found Appellants in contempt and improperly awarded attorneys' fees and costs to Respondents. South Carolina law does not hold Stonington or Mr. Lipscomb in contempt of court for violating the injunction and the Trial Court's September 28, 2009 and January 7, 2010 Orders misstate several important issues. First, the Circuit Court does not have jurisdiction to enforce this injunction. Second, Appellants were not given proper notice of the Motion for a Contempt Hearing. Third, Stonington did not intentionally disregard the Order because they did in fact attempt to remediate the alleged problems, and Respondents did not show clear and convincing evidence to show otherwise. Fourth, Respondents did not bring evidence to pierce the corporate veil against Mr. Lipscomb. Fifth, Rule 65(d) SCRCF does not extend to Mr. Lipscomb in finding him individually liable for contempt. Sixth, Rule 65(d) SCRCF does not allow vague injunctions to bind the parties. Seventh, Stonington and Mr. Lipscomb should not be penalized for violating ordinances that are inapplicable here. Richland County Code of Ordinances § 26-273(b); S.C. Code Ann. § 48-14-140. Lastly, Respondents should not be allowed to profit from this injunction at Appellants' expense.

It was also improper for the Trial Court to award attorneys' fees and costs to Respondents. When looking at the totality of the circumstances, the Respondents did not show that they are entitled to "more than \$27,695.00[,]" in attorneys fees and costs, if any, which Respondents' attorney suggested. (Aff. of H. Freeman Belser ¶ 9). Respondents did not provide a fee agreement or legal fee invoice, nor did Respondents show that the complexity of this case warrants an award of attorneys fees and costs. Also, the decision to award attorneys' fees and costs was premature. Therefore, attorneys' fees and costs should not have been awarded.

When looking at the totality of the circumstances, the September 28, 2009 and January 7, 2010 Orders are improper. The Respondents failed to satisfy their burden of proof, and Stonington and Mr. Lipscomb did show cause that they are not in contempt. Stonington Development, LLC and Stephen E. Lipscomb, urge this Court to reverse the Trial Court's decision.

Columbia, South Carolina
November 12, 2010


Timothy G. Quinn
Quinn & Quinn, P.A.
2309 Devine Street
Post Office Drawer 12589
Columbia, South Carolina 29205
(803) 771-0936
Fax: (803) 254-7751
Attorney for Appellants
Stonington Development, LLC and
Stephen E. Lipscomb

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

L. Casey Manning, Judge

Case No. 2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko,
and L.K. Harrell, III, ... Appellants,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis, Joseph R. Robinson
Janette H. Robinson, ... Respondents,

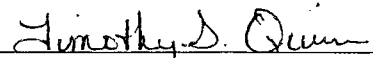
v.

Stonington Development, LLC, Appellant,

CERTIFICATE OF COUNSEL

I certify that this Reply Brief of Appellants, Stonington Development, LLC and Stephen
E. Lipscomb complies with Rule 211(b), SCACR.

Columbia, South Carolina
November 12, 2010



Timothy G. Quinn
Law Offices of Quinn & Quinn
2309 Devine Street
Post Office Drawer 12589
Columbia, South Carolina 29205
(803) 771-0936
Fax: (803) 254-7751
Attorneys for Appellants
Stonington Development, LLC and
Stephen E. Lipscomb

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

L. Casey Manning, Judge

Case No. 2005-CP-40-3736

Ex parte: Stephen E. Lipscomb, Ron Safko,
and L.K. Harrell, III, ... Appellants,

In Re:

Glenn Y. Hollis, Jr., John E. Hollis, Joseph R. Robinson
Janette H. Robinson, ... Respondents,

v.

Stonington Development, LLC, Appellant,

PROOF OF SERVICE

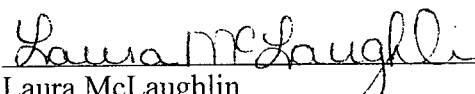
I, Laura McLaughlin, certify that I served three copies each of the Reply Brief of Appellant's Stonington Development, LLC and Stephen E. Lipscomb on Glenn Y. Hollis, Jr., John E. Hollis, Joseph R. Robinson, Janette H. Robinson, Ron Safko, and L.K. Harrell, III, by depositing a copy of it in the United States Mail, postage prepaid, on November 12, 2010, addressed as follows:

H. Freeman Belser
William C. Dillard, Jr.
Belser & Belser, P.A.
P.O. Box 96
Columbia, SC 29202

Kelley Shull Cannon
George V. Hanna, IV
Caroline H. Raines
Howser, Newman & Besley, LLC
P.O. Box 12009

Columbia, SC 29211

J. Edward Bradley
William B. Fortino
Moore, Taylor & Thomas, P.A.
P.O. Box 5709
West Columbia, SC 29171


Laura McLaughlin
Assistant to Timothy G. Quinn

November 12, 2010

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Ex parte: Stephen E. Lipscomb, Ron Safko,
and L. K. Harrell, III, Appellants,

In re:

Glenn Y. Hollis, Jr., John E. Hollis, Joseph R.
Robinson, Janette H. Robinson,
Respondents,

v.

Stonington Development, LLC, Appellant.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 4961
Heard January 25, 2012 – Filed April 4, 2012

REVERSED

George Verner Hanna, IV, William Saltzman,
and Timothy Quinn, all of Columbia, for
Appellants.

H. Freeman Belser, of Columbia, for
Respondents.

WILLIAMS, J.: Stonington Development, LLC (Stonington), Stephen Lipscomb (Lipscomb), Ron Safko (Safko), and L.K. Harrell, III (Harrell) (collectively, Appellants) appeal the circuit court's order of civil contempt and assessment of attorney's fees against them for Stonington's failure to abate the discharge of sediment-laden storm water onto the Hollis's and Robinsons' (collectively, Respondents) residential properties. We reverse.

FACTS/PROCEDURAL HISTORY

Stonington is the developer of a residential subdivision in the Blythewood area of Columbia, South Carolina. Respondents own properties immediately downstream from Stonington's development. On July 29, 2005, Respondents filed suit and asserted several causes of action against Stonington on the grounds that Stonington damaged their properties as a result of increased stormwater runoff and siltation from the development project. On April 6, 2007, after a four-day trial, a jury returned a verdict against Stonington for \$400,000 in actual damages and \$3,500,000 in punitive damages.[1] Respondents then filed a separate lawsuit against Lipscomb, Stonington's majority shareholder, to pierce Stonington's corporate veil. Lipscomb, in turn, joined Harrell and Safko as third-party defendants.[2]

After the April 6, 2007 jury verdict, Respondents elected to proceed under a private nuisance cause of action and accordingly moved to enjoin Stonington from discharging sediment-laden stormwater onto Respondents' properties. On September 17, 2007, the circuit court issued a Form 4 order granting Respondents' motion for a permanent injunction, and in a subsequent, formal order dated June 26, 2008, enjoined Stonington "from discharging sediment-laden stormwater onto [Respondents'] property and causing damage thereto." The circuit court then held the injunction was "binding upon Stonington Development, LLC and its officers, agents, employees, and members" in accordance with Rule 65(d), SCRPC. The same day, Respondents personally served the injunction on Stonington, Lipscomb, Harrell, and Safko.

Neither Stonington nor its members filed a Rule 59(e), SCRPC, motion to reconsider the injunction, nor did they appeal the issuance of the injunction. On September 11, 2008, Respondents filed a motion to hold Stonington and its members in civil contempt for willfully disregarding the court's prior injunction. The circuit court issued a rule to show cause on November 6, 2008, which was served on Stonington and each member. After one continuance, the circuit court held a hearing on April 14, 2009, at which time Respondent Janette Robinson (Robinson), Kevin Lee (Lee) of the Stonington Homeowners' Association, and Lipscomb testified.

During the hearing, Robinson testified that when it rained, muddy water entered Respondents' ponds by way of an unnamed tributary. She stated a seventy-two inch pipe coming out the back of Stonington's stormwater management system fed into this tributary. The sediment and discharge from the pipe discolored the water and caused erosion of the soil and ponds on Respondents' properties. When questioned, Robinson stated Respondents did not attempt to remediate the problems because it was Stonington's problem to fix. Robinson acknowledged Stonington laid hay bales and erected three sets of silt fences along the sewer line between the properties but stated siltation was not an issue in those areas. She testified she was aware Lipscomb hired Carolina Erosion Control to abate the problem of siltation. In addition, Robinson stated she had not taken any engineers to the property since the trial to assess where the siltation was coming from and had taken no samples from the pond since the date of trial. However, she stated Respondents failed to take any remedial action by removing the silt from the ponds because there "was no sense in cleaning out the pond until the problem is stopped." Robinson submitted numerous photographs of Respondents' ponds and wetlands to document her complaints and support her testimony.

Kevin Lee, chair of the Advisory Committee for the Stonington Homeowners' Association, testified at the hearing. He testified he had lived in Stonington for four years. During that

time, he saw the development erect silt fences, lay hay bales, and he observed contractors in different areas attempting to remediate the siltation issues. Lee observed siltation in the sediment pond in Stonington's development as well as the main pond behind Stonington's clubhouse but acknowledged he had never been to Respondents' properties or ponds. Lee claimed the lawsuit forced Stonington to financially abandon the Homeowners' Association, which adversely affected the quality of the development and the homeowners' property value.

Lipscomb also testified about efforts he undertook on behalf of Stonington to abate the siltation and stormwater issues. He stated:

I've had – there's been three separate engineers to look over the plans. And I've also hired professionals to keep the necessary silt fencing and dams in place. And I also had some – another professional company to monitor that. And I hired – I asked all around and I hired the best people recommended – that I could get recommended in the state.

The circuit court excluded the reports from Carolina Stormwater Services due to the engineer's failure to appear at the hearing. However, Lipscomb testified Carolina Stormwater Services inspects the property and issues a report to him every seven days. He stated Carolina Stormwater Services also engineered a silt rock dam to prevent sediments from the stormwater pipes from entering Respondents' ponds. Lipscomb admitted there were other actions that could be taken to ameliorate the situation, but because of his inability to further develop upper lots in the development as a result of the injunction, the land surrounding Respondents' property that was contributing to the problems could not be fully stabilized.

After viewing photographs submitted by both parties and hearing the foregoing testimony, the circuit court issued an order on September 28, 2009, finding Stonington and its members in contempt of court. In the contempt order, the circuit court found Stonington, Lipscomb, Safko, and Harrell jointly and severally liable for compensatory contempt based on Stonington's "minimal efforts . . . to stop the siltation and increased runoff problems."

The circuit court fined Stonington and its members \$25,000 to be paid to Respondents. It also authorized Respondents to submit a motion and supporting affidavit for reasonable attorney's fees and costs specifically incurred as a result of Respondents' efforts to enforce the injunction. Respondents then submitted a motion for attorney's fees and costs, and the circuit court ordered Stonington, Lipscomb, Safko, and Harrell to pay Respondents \$52,695, which included \$25,000 in compensatory contempt as well as \$27,695 in attorney's fees and costs. Stonington, Lipscomb, Safko, and Harrell submitted Rule 59(e), SCRCP, motions for both orders, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

"A decision on contempt rests within the sound discretion of the [circuit] court." Floyd v. Floyd, 365 S.C. 56, 71, 615 S.E.2d 465, 473 (Ct. App. 2005). It is within the circuit court's discretion to punish by fine or imprisonment every act of contempt before the court. Miller v. Miller, 375 S.C. 443, 454-55, 652 S.E.2d 754, 760 (Ct. App. 2007). On appeal, this court should reverse the contempt decision only if it is without evidentiary support or the circuit court abused its discretion. Floyd, 365 S.C. at 71-72, 615 S.E.2d at 473.

LAW/ANALYSIS

A. Contempt

First, Appellants argue the circuit court erred in holding them in contempt because Respondents failed to present clear and convincing evidence that Appellants intentionally disregarded or willfully disobeyed the injunction. We agree.

"Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001). "A willful act is one . . . done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Ex parte Cannon, 385 S.C. 643, 661, 685 S.E.2d 814, 824 (Ct. App. 2009). "Once the moving party has made out a prima facie case [for contempt], the burden then shifts to the respondent to establish his . . . defense and inability to comply with the order." Id. "If, through no fault of his own, the contemnor is unable to obey a court order, the contemnor cannot be held in contempt." Id. "Civil contempt must be [shown] by clear and convincing evidence." Poston v. Poston, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998).

We find Respondents failed to present clear and convincing evidence at the rule to show cause hearing that Stonington and its members willfully and intentionally disobeyed or disregarded the circuit court's injunction.

Both Robinson and Lipscomb agreed that Stonington's efforts have not stopped all discharge of sediment-laden stormwater onto Respondents' property. As such, Stonington has failed to do everything required by the terms of the injunction. However, Stonington's failure to do so does not necessarily render it in contempt. Our case law is clear that contempt is only proper when a party voluntarily and intentionally disobeys or disregards a court order. See Ex Parte Kent, 379 S.C. 633, 637, 666 S.E.2d 921, 923 (Ct. App. 2008) (holding that a willful act is one "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law").

Lipscomb testified he hired consultants and workers to monitor Respondents' property and to erect fencing, rock dams, and hay bales. Although Robinson testified the efforts Lipscomb made were insufficient because they did not alleviate the siltation and stormwater runoff issues, she acknowledged the presence of the silt fencing and hay bales and was aware of Stonington's hiring of consultants and engineers to address the stormwater and siltation issues. Furthermore, Lee's testimony that he saw Stonington erect silt fences and lay hay bales and observed contractors in different areas attempting to remediate the siltation issues supports Stonington's contention that it made good faith efforts to abide by the terms of the injunction.

A good faith attempt to comply with the court's order, even if unsuccessful, does not warrant a finding of contempt. See Abate v. Abate, 377 S.C. 548, 554, 660 S.E.2d 515, 519 (Ct. App. 2008) (holding father's failure to give child medication during summer visitation, despite court's order to do so, did not warrant a finding of contempt because

father made a good faith effort to comply with the order so that his disobedience was not willful); Burnell v. Burnell, 359 S.C. 361, 365-66, 597 S.E.2d 24, 26-27 (Ct. App. 2004) (finding the family court erred in holding mother in contempt because mother made good faith effort to comply with joint custody order); see also State v. Spare, 374 S.C. 264, 270, 647 S.E.2d 706, 709 (Ct. App. 2007) (finding trial court erred in revoking probation for failure to pay restitution because probationer was making progress, albeit slow, toward paying his restitution obligation, which negated the trial court's finding that probationer willfully failed to comply with order). Because the evidence does not clearly and convincingly prove Appellants intentionally violated the mandates of the injunction, we find the circuit court's contempt order was without evidentiary support, and thus, we reverse the circuit court's decision to hold Stonington, Lipscomb, Harrell, and Safko in contempt.[3]

B. Attorney's Fees

Appellants raise several grounds in support of their argument that the circuit court erred in assessing attorney's fees against Stonington as well as Lipscomb, Harrell, and Safko. Because the award of attorney's fees was predicated on the circuit court's finding of contempt, we reverse the award of attorney's fees. See Myers v. Myers, 391 S.C. 308, 321, 705 S.E.2d 86, 93-94 (Ct. App. 2011) ("[I]t is not improper for this court to reverse an attorney's fees award when the substantive results achieved by trial counsel are reversed on appeal.").

CONCLUSION

Accordingly, the circuit court's ruling is

REVERSED.

SHORT and GEATHERS, JJ., concur.

[1] Stonington appealed several aspects of the underlying punitive damages award in Hollis v. Stonington Dev., LLC, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011). This court affirmed the denial of the directed verdict motion on punitive damages and the jury charge on punitive damages but found the imposition of a \$3.5 million dollar punitive damages award excessive and accordingly reduced the award to \$2 million dollars. Id. at 407, 714 S.E.2d at 917.

[2] The suit to pierce Stonington's corporate veil in that action is not before this court on appeal.

[3] We need not address any of Appellants' remaining arguments on the circuit court's contempt ruling because our determination on this issue is dispositive; thus, we decline to address those remaining issues in this appeal. See Futch v. McAllister Towing Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736

RECEIVED

APR 16 2012

SC Court of Appeals

Ex Parte: Stephen E. Lipscomb, Ron Safko,
And L. K. Harrell, III,.....Appellants,

In Re:
Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, Janette H. Robinson.....Respondents.

v.

Stonington Development, LLC.....Appellant,

RESPONDENTS' PETITION FOR REHEARING

Respondents respectfully petition this Court for a rehearing on its April 4, 2012 Order, which reversed the Honorable L. Casey Manning's September 28, 2009 Order holding Appellants in contempt of court for intentionally disregarding and willfully disobeying his June 26, 2008 Order to abate a stormwater nuisance. In its April 4, 2012 Order, this Court held that Judge Manning abused his discretion in holding Appellants in contempt of court because, in this Court's view, the record in the case, including the record from the April 15, 2009 Rule to Show Cause Hearing, did not contain clear and convincing evidence that the

Appellants intentionally disregarded and willfully disobeyed his June 26, 2008 order.

The grounds for this petition are twofold. First, that this Court overlooked the fact that Appellants Safko and Harrell did not present any evidence at the April 15, 2009 Rule to Show Cause hearing that they had made any effort whatsoever to comply with Judge Manning's June 26, 2008 Order. Second, that this Court overlooked the fact that Judge Manning, who was the trial judge for the underlying 2007 jury trial and the judge who had issued the post-trial injunction, was in a better position than this Court to judge the credibility of Mr. Lipscomb's testimony at the April 15, 2009 Rule to Show Cause hearing and to assign appropriate weight to that testimony.

As to the first ground for rehearing, which relates only to Appellants Safko and Harrell, counsel for Harrell and counsel for Safko openly admitted at the April 15, 2009 Rule to Show Cause hearing that neither Harrell nor Safko had taken any affirmative steps to comply with the terms of the prior injunction. (Record, page 64, line 17 – 21, page 65, lines 18 – 20, and page 71, lines 3 – 9). When questioned about this in oral argument before the Court of Appeals, the same admission was made by counsel for Appellants Harrell and Safko. In essence, the position of Appellants Harrell and Safko was that they were personally under no legal obligation to do anything, not that they did enough to avoid a finding of contempt. Therefore, as to Safko and Harrell, there is no evidence in the record to suggest any finding of fact other than that Harrell and Safko knew about Judge Manning's June 28, 2009, but did not even make a minimal effort to comply with

its terms, because they did not think that Judge Manning had the authority to tell them what to do. Judge Manning did not abuse his discretion in finding that Harrell and Safko willfully disregarded and intentionally disobeyed his June 28, 2009, because that is exactly what Harrell and Safko did.

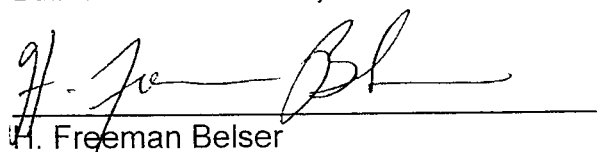
As to the second ground for rehearing, which relates only to Mr. Lipscomb, this Court reviewed the printed words in the record from the April 15, 2009 Rule to Show Cause hearing and found that Mr. Lipscomb's minimal efforts to abate the nuisance constituted a good faith attempt to comply with the Court's Order. In reaching this conclusion, the Court placed disproportionate weight on Mr. Lipscomb's self-serving statements at the Rule to Show Cause hearing, and overlooked the fact that Judge Manning, who had the benefit of hearing and observing Mr. Lipscomb's live testimony, did not deem his minimal efforts to abate the nuisance sufficient to prevent a finding of civil contempt. Although the role of this Court is to review the record for an abuse of discretion, it is well established in South Carolina that, in reviewing a finding of contempt, this Court should defer to the trial court's judgment on issues of credibility and weight of testimony. Ex Parte Cannon, 385 S.C. 643, 665, 685 S.E.2d 814, 826 (Ct. App. 2009), *citing* Reed v. Ozmint, 374 S.C. 19, 647 S.E.2d 209 (2007). In this case, and under that standard, this Court should defer to Judge Manning's finding of fact that Mr. Lipscomb's minimal efforts were not good faith efforts at all. As Judge Manning knew well from his experience as the trial judge in the underlying 2007 jury trial, which lasted five (5) days, the minimal efforts of Appellant Lipscomb and the other members of Stonington Development, LLC to prevent

stormwater problems at their development from damaging the Respondents are what led to the lawsuit being filed in the first place. When the jury in 2007 heard about those minimal efforts, the jury resoundingly found that minimal efforts do not good faith efforts and should be punished with punitive damages in a very substantial amount.

Minimal efforts cannot and should not be deemed to constitute good faith efforts, because if minimal efforts alone are sufficient, then any individual bound by a Court order could simply "talk the talk" without having to "walk the walk", meaning that he or she could make a half-hearted effort to comply with a Court order with no actual intent to comply. Minimal efforts are contemptuous because they are just minimal, and minimal efforts do not excuse a failure to comply with a Court order. Here, the failure of Mr. Lipscomb's minimal efforts are what caused the nuisance to continue unabated and the plaintiffs to continue to be harmed. That is what Judge Manning's June 26, 2008 order was all about.

Respectfully submitted,

BELSER & BELSER, P.A.



H. Freeman Belser
Clinch H. Belser, Jr.
1901 Main Street, Suite 1550
Columbia, South Carolina 29201
(803)929-0096
Attorneys for Petitioners

April 16, 2012

Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

2005-CP-40-3736

Ex Parte: Stephen E. Lipscomb, Ron Safko,
And L. K. Harrell, III,.....Appellants,

In Re:
Glenn Y. Hollis, Jr., John E. Hollis,
Joseph R. Robinson, Janette H. Robinson.....Respondents.

v.

Stonington Development, LLC.....Appellant,

RECEIVED

APR 16 2012

CERTIFICATE OF SERVICE

SC Court of Appeals

I certify that I have served the *Respondents' Petition for Rehearing* by depositing a copy of it in the United States Mail, postage prepaid, on April 16, 2012, addressed to attorneys of record as follows:

Timothy Quinn, Esquire
P.O. Drawer 12589
Columbia, SC 29211

George V. Hanna, Esquire
P.O. Box 12009
Columbia, SC 29211

J. Edward Bradley, Esquire
P.O. Box 5709
West Columbia, SC 29171

[signature block to follow)

April 16, 2012

William C. Dillard

H. Freeman Belser

William C. Dillard, Jr.

Belser & Belser, P.A.

1901 Main St., Suite 1550 (29201)

P.O. Box 96

Columbia, South Carolina 29202

(803) 929-0096

Attorneys for Respondents

The South Carolina Court of Appeals

Ex parte: Stephen E. Lipscomb, Ron Safko, and L. K.
Harrell, III, Appellants,
In re Glenn Y. Hollis, Jr., John E. Hollis, Joseph R.
Robinson, Janette H. Robinson, Respondents,

v.

Stonington Development, LLC, Appellant.

Appellate Case No. 2010-151167

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr.

J.

H. B. Wein

J.

John O. Jett

J.

Columbia, South Carolina

FILED

July 26, 2012

cc:

William Martin Saltzman

James Edward Bradley

H. Freeman Belser

Timothy G. Quinn

George Verner Hanna, IV