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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

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

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Case No. 2025-000913

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

v.

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

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RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent, Click Properties, LLC and Hyper Formance, LLC, certify that the Return to Petitioner's Petition for Writ of Certiorari complies with Rule 242(f), SCACR, and Appellant's counsel was served with a copy of Respondents' Return to Petitioners' Petition for Writ of Certiorari via email and by depositing a copy in the US Mail, postage prepaid, on June 10, 2025, addressed to Petitioners' Counsel of Record Scarlet Bell Moore, Esq. , P.O. Box 17615, Greenville, SC 29606, Scarlet28@msn.com.

Laura W.H. Teer

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Rule 242, SCACR, authorizes this Court to issue a Writ of Certiorari to review a final decision of the Court of Appeals. Rule 242(b) provides the writ will be granted "... only when there are special and important reasons." Petitioners present no such special and important reasons.

Rule 242(b) then lists five reasons to consider, which Petitioners do not address. None of the reasons apply to this Petition. There are no novel questions or law. There was no dissent in the decision of the Court of Appeals. The decision is not in conflict with a prior decision of the Supreme Court. There are no constitutional issues directly involved, and no federal questions involved.

Rule 242(d) requires Petitioners to state the questions presented for review. Rule 208 (b)(1)(B), SCACR provides that broad general statements may be disregarded. Petitioners' Statement of Questions Presented for Review are broad and general: all five list none of the reasons, but only state the trial court erred in denying several motions. This vagueness would support this Court's denial of the Petition.[1]

COUNTERSTATEMENT OF THE CASE

There are five contested matters in Petitioners' Statement of the Case, and three misstatements:[2] (1) it is highly contested that the gravel driveway allows both owners access to the upper portion of their properties[3], as early as 1978 it was used exclusively for the back building

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[1] As former Chief Justice Jean Hoefer Toal states in *Appellate Practice in South Carolina, Second Edition* (dealing with issues on appeal):

> Ordinarily, no point will be considered that is not set forth in the statement of issues on appeal... In formulating the statement of issues, two extremes need to be avoided. One extreme is the tendency to present issues that are overly vague and general... The following examples illustrate what is meant by overly vague... "Did the circuit court err in granting summary judgment?"
> pp. 209-210.

[2] Rule 208 (b)(1)(C), SCACR, provides that the Statement of the Case shall not contain contested matters.

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

on the property owned by Hyper Formance, LLC (the Click Property);[4] (2) it is disputed that both parties used the driveway and turnaround: it was only used by the owners of the Click Property;[5] (3) Hyper Formance's owner, Brent Click, denies that the turnaround and property are not his, and settling it once and for all was a significant purpose of the lawsuit;[6] (4) matters with Thomas did not deteriorate in 2016; they had already deteriorated when Thomas took over the business from Mr. Grissinger and had a significantly negative reaction to Click's offers of assistance in 2014;[7] and (5) the Jury did not fail to enter an amount of damages. In answer to Question One on the Jury Form, they failed to enter damages for the First Cause of Action, Nuisance *per se* alone. They returned to the Jury Room and allocated $28,000 from the verdict of $196,000 that they initially reached for the Second Cause of Action, Negligence, and filled out the verdict form for $28,000 for Nuisance *per se*, and $168,000 for Negligence.[8]

The first misstatement is that the property purchased by Thomas SC Properties, LLC (the Thomas Property) was never owned by Greg Grissinger as claimed on page seven of Petitioners' Writ. The property was owned in 2013 by Jimmy and Diane Watkins[9] until sold to Petitioner Thomas SC Properties, LLC in 2018.[10] Second, Brent erected carport awnings with concrete slabs in October 2014, not 2016.[11] The final misstatement regards the asserted testimony of Jimmy Watkins. On page six, Petitioners allege that Watkins testified at trial that if Brent Click did not get along with Thomas, Watkins would erect a fence along the property line. There is no testimony in the Record that Watkins so testified.[12]

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[4] R. p. 999, ll. 23-25; p. 1001, l. 25 - p. 1002, l. 3; p. 1002, ll. 14-23; p. 1005, ll. 3-11.
[5] *Id.*
[6] R. p. 742, ll. 17-25.
[7] R. p. 735, ll. 11-22.
[8] Jury Verdict Form, R. pp. 1820-1821; p. 1290, l. 24- p. 1291, l. 11; p. 1292, l. 1 – p. 1293, l. 6.
[9] R. pp. 1456-1457, Deed of Gregory A. Porter to Jimmy A. Watkins and Diane T. Watkins.
[10] R. 1458-1459, Deed of Jimmy A. Watkins and Diane T. Watkins to Thomas SC Properties, LLC.
[11] R. p. 726, l. 22 - p. 727, l. 1.
[12] *See* Watkins Direct and Cross Examination, R. pp. 1100-1111.

STATEMENT OF FACTS

As often happens, the topography of the land served to create a natural boundary between the Click and Thomas properties that was recognized by the previous landowners for over 40 years.[13] This visual boundary was furthered by the placement of a driveway and turnaround that followed the contour of the properties and served only the Click Property, due to the steep slope.[14] A significant difference in elevation had existed between the Click and Thomas properties even before the negligent excavation in 2018.[15] The property line was treated in this manner without dispute.[16]

The Click Property was owned by Mark Smith in 2013 when Brent and Shelly rented the back building for their business.[17] The only access to the back building was the driveway and turnaround.[18] Brent and Shelly openly and exclusively used the driveway and turnaround without issue for the four years they rented.[19] Brent even built carport awnings with concrete slabs that extended into the turnaround in 2014 without objection.[20] Brent and Shelly purchased the property from Smith in early 2017[21] and continued exclusively using the driveway and turnaround.

Just months after Petitioners purchased the Thomas Property in 2018, Thomas excavated the lateral support to the driveway and turnaround serving the Click property.[22] Thomas did not use anyone experienced in excavation and did not even call such a company to obtain an estimate.[23]

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[13] R. p. 1000, ll. 12-25; pp. 1309-1310
[14] R. p. 720, ll. 15-23; p. 1304; pp. 1305-1308
[15] The terms Click and Thomas properties include the ownership of the properties by predecessors as well as the current owners.
[16] R. p. 993, l. 20 - p. 994, l. 21; p. 999, l. 9 – p. 1000, l. 11; p. 1022, ll. 5-19; p. 1023, ll. 3-6.
[17] R. p. 1023, ll. 7-19; pp. 1318-1319.
[18] R. p. 719, ll. 21-23; p. 720, ll. 15-23.
[19] R. p. 866, l. 25 – p. 867, l. 4.
[20] R. p. 726, l. 22 – p. 727, l. 1; p. 737, l. 12 – p. 738, l. 16.
[21] R. p. 739, ll. 16-19; pp. 1311-1314; pp. 1315-1317.
[22] R. p. 768, ll. 21-25.
[23] R. p. 1034, ll. 18-24; p. 1144, ll. 6-16; p. 1145, ll. 12-25.

He left a severe 90° cliff of 36 feet, with absolutely no lateral support.[24] The current owner of the Thomas Property, who had exhibited significant animus against Brent since his purchase of the business, threatened to continue digging until the back building fell.[25] He also had been silent regarding Respondents' use of the driveway and turnaround. Therefore, Respondents filed this action.[26]

A four-day trial was conducted, during which Respondents proved that Petitioners' negligent excavation of the Thomas property caused significant and continuing damage to the Click property and its back building.[27] The Jury not only found monetary damages for nuisance *per se* and negligence, but also found acquiescence and a prescriptive easement for the driveway and turnaround. Petitioners are now attempting to reargue the same issues unsuccessfully raised before two Judges, a Jury, and a unanimous Court of Appeals.

ARGUMENT

I. INTRODUCTION

Petitioners seek not only a reversal of a unanimous Court of Appeals, but also a reversal of a Jury verdict in favor of Respondents, along with reversal of several pre and post-trial Motions which contain many of the same issues. Respondents will respond to the issues themselves rather than repeat them in separate subsections.

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

The Jury found in Respondents' favor for nuisance *per se* after a four-day trial, awarding $28,000 in damages. In order to disturb this award, Petitioners must show there is no evidence

[24] R. p. 770, ll. 2-15. R. p. 769, ll. 12-17; p. 963, ll. 1-15.
[25] R. p. 735, ll. 11-22. R. p. 780, l. 2 – p. 781, l. 2.
[26] *Id.*
[27] R. p. 775, ll. 7-9; p. 811, l.13 – p. 812, l. 5; p. 812, l. 21- p. 819, l. 14.

which reasonably supports the verdict. Not only did Respondents provide some evidence, they provided ample evidence.

A. There is Evidence of Nuisance *per se*

The test for nuisance *per se* is whether or not the nuisance issue had become dangerous at all times and under all circumstances to the adjoining property.[28] Petitioners cite the case of *Suddeth,* but fail to disclose its principal holding: that the question of whether a nuisance had become dangerous to the land was for the jury.[29] In *Suddeth,* the Court of Appeals relied upon *Deason v. Southern Ry. Co.*, 142 S.C. 328, 140 S.E. 575 (1927) where the Railroad Company closed a ditch and raised an embankment which caused water to pond on an uphill landowner's property.[30] The South Carolina Supreme Court in *Deason* noted that questions regarding nuisance *per se* were "peculiarly a question for the jury."[31]

South Carolina Courts have not required the injury to be constantly present to find reasonable evidence of nuisance *per se*. In *Deason*, the jury found perpetual danger as a result of the probability of ponds overflowing at every rain, and of drying up and creating mosquitoes during every dry spell.[32] Similarly, in *Suddeth,* ponding was the result of periodic rain.[33] If the periodic ponding of water is sufficient to create a question of fact of a nuisance becoming "dangerous at all times and under all circumstances," then the testimony of Respondents' expert that a continuing

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[28] *Suddeth v. Knight*, 280 S.C. 540, 545, 314 S.E.2d 11, 14 (Ct. App. 1984). *See also Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 253, 125 S.E.2d 628, 632, (1962) ("[a] nuisance is anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property."); *LeFurgy v. Long Cone Club Owners Ass'n, Inc.*, 313 S.C. 555, 558, 443 S.E.2d 577, 579 (Ct. App. 1994)("If a lawful business is operated in an unlawful or unreasonable manner so as to produce material injury or great annoyance to others or unreasonably interferes with the lawful use and enjoyment of the property of others, it will constitute a nuisance.").

[29] *Suddeth,* 280 S.C. at 545-46, 314 S.E.2d at 15.

[30] *Suddeth,* 280 S.C. at 545, 314 S.E.2d at 14.

[31] *Deason,* 142 S.C. at 337, 140 S.E. at 578.

[32] *Deason, supra.*

[33] *Suddeth, supra.*

failure is created in removing the lateral support by digging a 90°, 36-foot steep drop off and thereby endangering a neighbor's home and business is as well.

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

Petitioners claim nuisance *per se* is wholly inapplicable to excavation that allegedly caused erosion and damage to structures on the Respondents' property.[34] Respondents are claiming damage to their adjoining property and back building as a result of the excavation. There are many reported nuisance cases in South Carolina where a landowner sued due to the negative impact on their land caused by the actions of the adjoining landowner.[35] Nuisance *per se* applies equally to this case.

C. There is Reasonable Evidence of Property Damage

Respondents presented evidence of property damage to support the Jury's conclusions.[36] The evidence submitted to the Jury, without objection, reasonably supports their conclusion that the removal of the lateral support created a nuisance and caused it to be dangerous at all times and under all circumstances to the Click property. Therefore, this Court should deny Petitioners'

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[34] Petition, p. 13.

[35] *See Lucas v. Raul Family Ltd. Partnership,* 359 S.C. 505, 598 S.E.2d 712 (2004) (adjoining landowner clears land causing damage to plaintiff's property); *Suddeth, supra.* (trial court's nonsuit reversed for a jury trial when adjoining landowner constructed a ditch and drainage system causing water damage to the plaintiff's property); *Davis v. Palmetto Quarries Co.*, 212 S.C. 496, 48 S.E.2d 329 (1948) (adjoining landowner operates a quarry causing damage to plaintiff's property); *Deason, supra.* (adjoining landowner erects an embankment causing water damage to the plaintiff's property).

[36] Brent testified to severe cracks and uneven floors in the back building since the excavation (R. p. 798, ll. 7-22; p. 814, ll. 1-9.). Multiple photos showed cracks (R. p. 1338; pp. 1352-1358; pp. 1367-1370). Chris Danner testified the door to the paint booth started sticking and Brent stopped using dollies to move cars due to the uneven floors, (R. p. 885, l. 16 – p. 886, l. 12; pp. 1339-1342), that he stopped parking on the side of the building due to the land "eroding out" (R. p. 882, ll. 5-15), that the ground had dropped 12 inches (R. p. 883, ll. 16-25), and that the cabinets inside the shop became uneven (R. p. 886, l. 13- p. 887, l. 11). Bradley Dobson testified the floors became uneven (R. p. 1006, ll. 3-11). Mark Smith testified the floor was fine when he owned the building from 2005 until 2014 (R. p. 1026, ll. 9-25). Shelly testified regarding the changes in the floor (R. p. 925, l. 20-p. 927, l. 6; pp. 1330-1331; pp. 1365-1366). Expert David Hall testified regarding the cracks in the floor, (R. p. 971, l. 19-p. 972, l. 6, pp. 1359-1364), the physical evidence of failure, the unsafe condition of imminent failure caused by the removal of the lateral support to the hill (R. p. 961, l. 19-p. 962, l. 20; p. 982, ll. 6-13; p. 1371; pp. 1375-1376), and Petitioners' leaving embankments of significant steepness without mitigation. (R. p. 962, l. 22 –p. 963, l. 15).

request to overturn the Jury's finding of nuisance, along with the affirmance by the Court of Appeals.

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

Petitioners overlook the fact that if the evidence at trial yields more than one reasonable inference or its inferences are in doubt, the trial court must deny the Motion for Directed Verdict or JNOV.[37] An appellate court will reverse the [circuit] court's ruling only if no evidence supports the ruling below.[38]

Petitioners argue that Respondents' expert agreed that the soil material that would be affected by the failure of the slope, does not affect the back building. They then further argue that this means there is no evidence of damage as a result of the excavation. This argument ignores Hall's testimony that the observed cracks in the exterior wall and interior floor of the back building show shifting in the ground in the direction of the excavation and that the failure condition of the soil had already begun and there is a continual loss of material.[39] The Jury could reasonably infer from this testimony that Petitioners' excavation created a continuing, dangerous condition and caused damage to the Click Property. It was therefore proper for the trial court to deny Petitioners' Motion for Directed Verdict and JNOV.

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

Petitioners abandoned this issue by failing to cite to any law or authority in support of their argument.[40]

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[37] *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012).
[38] *Id.*
[39] R. p. 971, l. 19 – p. 972, l. 6. R. p. 982, ll. 6-13.
[40] *See D.R. Horton, Inc. v. Wescott Land Co.*, LLC, 398 S.C. 528, 548-49, 730 S.E.2d 340, 350-51 (Ct. App. 2012) (holding appellant abandoned an issue by failing to cite any law or authority in support of their argument and making only conclusory arguments).

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

A. Evidence Supporting Damages

As set forth in Section II. C above, ample testimony was presented supporting Respondents' damages suffered as a result of the negligent digging.[41] Respondents' expert, David Hall, P.E., made it clear that Petitioners' excavation was at a dangerously unsafe angle that removed the lateral support previously enjoyed by the Click property. Hall testified that damage was already occurring.[42] Respondents presented Geotechnical testing which showed the excavation created a dangerous instability on the Click Property.[43] Respondents have become limited in the work they can perform because the property cannot safely support large vehicles on the driveway and turn-around and have experienced utility problems.[44] They will eventually lose access to the back building due to the damage caused by Thomas, which will further damage their business and home.[45]

Petitioners make the point[46] that the slab Brent poured for the carport was not cracked, thus negating the testimony of the Clicks. However, Brent Click explained this slab was far thicker than the floor of the back building and it was reasonable for a jury to find the absence of cracks in the newer, thicker slab did not negate the presence of other evidence of damage in the back building following the excavation.[47]

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[41] See note 36, *supra*. See also R. pp. 1332-1337. The floor has measurably shifted since the excavation. R. p. 724, ll. 9-10; p. 803, l. 6-p. 804, l. 21; pp. 1343-1351; p. 856, ll. 6-17; p. 878, l. 14- p. 879, l. 15; p. 885, ll. 16-22; p. 923, l. 2 -p. 926, l. 7; p. 971, l. 19 -p. 972, l. 6; p. 1004, ll. 7-16, p. 1005, l. 23- p. 1006, l. 1; p. 1012, l. 18- p. 1013, l. 6.
[42] R. p. 982, ll. 6-13.
[43] R. p. 956, l. 21- p. 957, l. 4; p. 961, l. 21 – p. 962, l. 21.
[44] R. p. 825, l. 23-p. 827, l. 15; Hall confirmed. R. p. 972, l. 14-p. 973, l. 3. R. p. 833, l. 6-p. 835, l. 20(utility issues).
[45] R. p. 973, ll. 4-8. R. p. 843, ll. 2-10. Brent and Shelly also live in the back building. R. p. 752, ll. 14-19.
[46] Petitioners' Writ, p. 17.
[47] R. p. 728, ll. 2-21 (slab 4 to 8 inches thicker with rebar and special concrete).

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

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

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

A. Evidence Supporting Acquiescence

Petitioners seem to assert there must be an explicit agreement between the landowners that they will recognize and accept a new property line for acquiescence to exist. However, the conduct of the prior owners, consistent over the years, is sufficient to reasonably support the Jury's verdict that a different boundary line had been established.[48] Respondents' witnesses who previously owned the Click Property, Dobson and Smith, testified in detail about their open and exclusive use of the driveway and turnaround area and treatment of the natural topography as the property boundary line.[49] Dobson had personal knowledge of the same use by his predecessors, as he visited them prior to buying the property.[50]

The prior owners of the adjoining Thomas Property never prohibited Dobson from treating the driveway and turnaround as if it were his own.[51] Neither Watkins nor his renters ever used the

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[48] "[I]f a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interest[s] are affected. *His silence is acquiescence and it estops him.*" *Jordan v. Judy*, 413 S.C. 341, 348-349, 776 S.E.2d 96, 101 (Ct. App. 2015) (quoting *McClintic v. Davis*, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955) (emphasis added).

[49] R. p. 998, l. 23 – p. 1000, l. 6; p. 999, l. 2 – p. 1000, l. 11; p. 1022, ll. 5-19.

[50] *Id.*

[51] *Gardner v. Mozingo*, 293 S.C. 23, 26, 358 S.E.2d 390, 392 (1987) quoting *Klapman v. Hook*, 206 S.C. 51, 32 S.E.2d 882 (1945); *Kirkland v. Gross*, 286 S.C. 193, 332 S.E.2d 546 (Ct. App. 1985). R. p. 999, l. 19 – R. p. 1000, l. 6; R. p. 1002, ll. 4-23.

driveway and turnaround from 2013 to 2017.[52] Owners Porter and Watkins saw the slabs and awnings Brent Click erected in 2014 on their property and said nothing.[53] Watkins admitted he did not object to Brent's use.[54] Porter's and Watkins' silence in 2015 encouraged Brent Click to purchase the property in 2017 and to treat the driveway and turnaround as part of his property. Their silence was acquiescence to the inclusion of the entire driveway and turnaround in the Click Property.

> If adjoining landowners occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in for a long period of time, they are precluded from claiming the boundary line thus recognized and acquiesced in is not the true one.[55]

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

Finally, there was consistent testimony and documentary evidence defining the new boundary that was acquiesced to between the properties.[56] Therefore, this Court should affirm the jury's finding of acquiescence, along with the Court of Appeals.

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[52] R. p. 898, ll. 15-22.
[53] R. p. 736, l. 5 – p. 738, l. 16.
[54] R. p. 1106, l. 20 – p. 1107, l. 2; p. 1108, ll. 18-24.
[55] *Gardner, supra.* Petitioners cited *Croft v. Sanders*, 283 S.C. 507, 323 S.E.2d 791 (Ct. App. 1984). *Croft* is distinguishable as there was evidence Croft erected a fence on his property to secure a farm loan and not to mark the boundary of the property. There was sufficient evidence in the present case to support the reasonable conclusion that both parties recognized the true property line. Petitioners' cited case of *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005) is not an acquiescence case, but rather a prescriptive easement case. There, the initial owner interrupted the other's use; there was no evidence that the Thomas property owners ever interrupted the use.
[56] Respondents' witnesses described their use of the driveway and turnaround. R. p. 719, ll. 21-23; p. 720, ll. 15-23; p. 898, ll. 8-22; p. 999, ll. 16-25; p. 1022, ll. 5-19. The 1996 Ramey Survey (R. 1323) outlined the area of use by the Rameys and subsequent owners. The area, as it presently exists, is shown on David Hall's "S-1" drawing (R. p. 1372).

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

As set forth above, Respondents presented evidence that Petitioners and their predecessors acquiesced to the boundary line created by the driveway and turnaround that followed the natural topography of the land and were depicted on the 1996 Ramey Boundary Survey. There was consistent testimony and documentary evidence defining the acquiesced boundary.[57] Taking the evidence and testimony in the light most favorable to the Respondents, the trial court properly denied Petitioners' Motion for Directed Verdict or JNOV.

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

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

A. Evidence Supporting Prescriptive Easement

The Jury (Judge Gravely, and the Court of Appeals by affirming) accepted the testimony of Respondents' predecessor owners and the Clicks, by clear and convincing evidence, that they did not seek or receive permission to use the driveway and turnaround, and these areas were adversely used.[58] "To establish a prescriptive easement, one must show: (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse[,] or under claim of right."[59] The years of use by Dobson, Smith, and Click are allowed to be "tacked" together in order to satisfy the 20-year requirement.[60]

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[57] See notes 49 and 56 *supra*.
[58] R. p. 726, ll. 12-19; p. 909, ll. 24 – p. 910, l. 1; p. 1000, l. 1 – p. 1001, l. 6; p. 1022, ll. 5-14.
[59] *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169-170 (2015).
[60] *See Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997); *Carolina Ctr. Bldg. Corp. v. Enmark Stations, Inc.*, 433 S.C. 144, 857 S.E.2d 16 (Ct. App. 2021). Dobson testified to his use of the Click property 24 years before this lawsuit was filed (R. p. 998, l. 19 – p. 999, l. 25; pp. 1320-1322) and the similar use by his

"[W]hen it appears that claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse."[61] Once the presumption applies, the servient owner bears the burden of rebutting the presumption, which can be done by showing permissive use.[62] While Petitioners continue to argue the use of the area was permissive, the Jury weighed this claim and rejected it, and the Court of Appeals affirmed. The issue of credibility is for the jury alone.[63]

The proper standard to find a prescriptive easement is not "hostility," as Petitioners claim, but rather open, notorious, continuous, and uninterrupted use. "Notorious" generally means that the use is actually known to the owner or is widely known in the neighborhood.[64] Respondents and their predecessors openly used the driveway and turnaround as if they were the owners. Brent Click further exerted open signs of use by pouring permanent concrete slabs and adding three awnings at different times to the turnaround area, with no objections from Watkins, Porter, or Thomas.

Respondents met their burden (by clear and convincing evidence) that the use was open, notorious, continuous, and uninterrupted. The burden then shifted to Petitioners to rebut the presumption. The Jury rightly concluded that Petitioners failed to rebut the presumption, and the Court of Appeals affirmed.[65]

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predecessor in title. (R. p. 993, l. 14 – p. 994, l. 23). His use was without permission and thus adverse to the ownership of the Thomas property. (R. p. 1001, ll. 1-6). Dobson sold the Click property to Mark Smith in 2005. (R. p. 1017, ll. 2-4). Smith's use was also without permission and was adverse. (R. p. 1022, ll. 13-19). Smith sold the property to Brent Click in 2017 (who titled the property to Click Properties LLC), who continued to use the driveway and turnaround in an adverse manner. (R. p. 1025, ll. 2-5; p. 867, l. 13 – p. 868, l. 24).

[61] *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 229, 797 S.E.2d 387, 390 (2016) quoting *Williamson v. Abbott*, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917).

[62] *Carolina Ctr. Bldg. Corp. v. Enmark Stations, Inc.*, 433 S.C. 144, 154, 857 S.E.2d 16, 22 (Ct. App. 2021).

[63] *Parsons v. Georgetown Steel*, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995).

[64] *Simmons v. Berkeley Elec. Corp. Inc.*, 419 S.C. 223, 234, 797 S.E.2d 387, 392 (2016). *See Morrow, supra.*

[65] *See Poole v. Edwards*, 197 S.C. 280, 15 S.E.2d 349 (1941).

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

The trial court properly denied Petitioners' motions for directed verdict and JNOV because the evidence presented by the Respondents, as a whole, was susceptible of more than one reasonable inference.[66] Petitioners claim that they presented evidence that they gave permission to Respondents and their predecessors to use the disputed property; however, Petitioners only presented testimony of an "unspoken understanding"[67] while Respondents presented testimony that neither they nor their predecessors sought nor received permission. Therefore, the Motions were properly denied as to prescriptive easement.

VI. ACQUIESCENCE AND PRESCRIPTIVE EASEMENT ARE NOT INCONSISTENT

Petitioners do not raise in their Petition all arguments made in the Court of Appeals except to state this Court should consider the previous briefing. Therefore, Respondent will respond to arguments originally raised by Petitioners. Petitioners' assertion that the verdicts of acquiescence and prescriptive easement are inconsistent is incorrect. The law of prescriptive easement and acquiescence are not at odds with one another. Although these theories have different effects, they share common elements of proof.

Each requires that Respondents openly enjoyed the property at issue and each can be satisfied by the tacit agreement of the Petitioners.[68] Adverse possession is akin to "adverse easement," or prescriptive easement. Other courts have held that the law of adverse possession is not at odds with the law of acquiescence.[69] Both causes of action begin with the premise that

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[66] *Parrish v. Allison,* 376 S.C. 308, 319, 656 S.E. 2d 382, 388 (Ct. App. 2007).
[67] R. p. 1102, ll. 8-10.
[68] *See e.g. Kelley v. Westover*, 938 S.W.2d 235, 236 (Ark. App. 1997) ("The foundation of a right by prescription is acquiescence of the owner of the servient tenement in the acts relied on to establish the easement by prescription. Acquiescence is here used in its ordinary sense; it does not mean license or permission in the active sense, but means passive assent or submission, quiescence, or consent by silence.")
[69] *See Houston v. Mint Group, LLC*, 968 N.W.2d 9 (Mich. Ct. App. 2021).

although real property belongs to one party according to legal title, the actions of another party in openly and adversely using the property for a certain period of time, creates equitable title in the other party. The primary difference in the two causes of action is whether the Respondents acquired ownership up to a new boundary-line or a permanent right to use the property in dispute.

Prescriptive easement focuses primarily on the actions of the party seeking to establish the easement.[70] The only consideration to be given to the actions of Petitioners is whether permission has been given. Respondents and their predecessors in title testified that they had neither requested nor received permission to use the contested area. There was no testimony from the Petitioners or their predecessors to the contrary.

Under South Carolina law, property owners may acquiesce to a new property boundary.[71] The element of "mutual agreement" that must be shown to establish acquiescence does not require an explicitly voiced agreement of where on a plat the boundary line is shown. In acquiescence cases, the boundary line in a plat or deed (unless erroneously rendered in such instruments) is going to differ from the boundary acquiesced to over a period of time. Respondents presented evidence that the property at issue was recognized as a result of the topography of the land. The only testimony was that the owners of both parcels treated the boundary of the property as that created by the slope of the land and as shown as the driveway and turnaround area on the 1996 Ramey Boundary Survey (R. p. 1323). Respondents presented sufficient evidence to allow the Jury to conclude that the Petitioners' silence and treatment of the now disputed area as part of the Click Property constituted acquiescence, and the Court of Appeals affirmed.[72]

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[70] *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169-170 (2015).
[71] *Kirkland v. Gross*, 286 S.C. 193, 197, 332 S.E.2d 546, 548-49 (Ct.App.1985)("A disputed boundary line can be established by acquiescence of the parties.").
[72] *See Jordan v. Judy, supra,* 413 S.C. 341, 348-349, 776 S.E.2d 96, 101 (Ct. App. 2015).

The Jury's finding as to prescriptive easement and acquiescence are therefore consistent. The Jury found that Respondents were entitled to the disputed property, whether by way of prescriptive easement or acquiescence. The Court of Appeals properly upheld the jury verdict because it is possible to reconcile its various features.[73] A jury verdict is not overturned simply because alternative causes of action have been alleged. In the present case the Jury found Respondents are entitled to the property in question. Respondents obviously elect to set the boundary line as acquiesced to, if a formal election is required.

VII. RESPONDENTS ARE ENTITLED TO AN INJUNCTION

A. Evidence Supporting an Injunction

Respondents received a unanimous jury verdict finding Petitioners liable for nuisance *per se* and negligence arising out of Petitioners' excavation. Petitioners' excavation caused significant, ongoing damage to Respondents' driveway, turnaround, and back building. As set forth above, Respondents presented evidence at trial to reasonably support the Jury's finding of nuisance,[74] and the Court of Appeals affirmed. As the South Carolina Supreme Court has held:

> It has been too frequently held by this Court to require further discussion that, when the existence of a nuisance has been established by the verdict of the jury, the party injured is entitled as a matter of right to an injunction to prevent its continuance.[75]

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

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[73] *Camden v. Hilton*, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct.App.2004).

[74] David Hall, P.E. testified that erosion was continuing on the Click property. See notes 36, 39, and 42, *supra.* Mr. and Mrs. Click, Chris Eleazer, Chris Danner, testified, and photographic evidence was presented, that continuing erosion was occurring on the property with continuing impact on the building. See notes 36, and 41 *supra.*

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

The lower court in *Dill* issued an order, affirmed by the Supreme Court, that "enjoins the defendant from operating its terminal in such a manner as to continually and frequently cause the dust complained of to be cast upon the property of the plaintiff." The Supreme Court also held that the defendant was ". . . free to devise its own means to prevent damaging the plaintiff in the future."[76] In *Dill*, the Court issued an injunction, but it was up to the party to determine how to comply with the Order. Judge Gravely similarly ruled that Petitioners were free to devise their own means to prevent continuing damage.

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

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

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

VIII. THE TRIAL COURT PROPERLY ADDRESSED THE INCONSISTENT VERDICT ISSUE

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

> When the jury returns a verdict of "no damages" for the plaintiff, the judge should inform the jury that he cannot legally accept the verdict, and should return the case to them with instructions explaining nominal and compensatory damages and

[76] 247 S.C. at 163; 146 S.E.2d at 575.

charging them either to assess a definite dollar amount in damages (nominal or actual) for the plaintiff or to return a verdict for the defendant.[77]

This is what Judge Gravely did: he explained to the Jury the necessity to return to the Jury Room and to solve the problem. It is of no relevance that the Jury was able to quickly determine the damages attributable to the nuisance created by Petitioners. As a general rule, the shortness of time taken by a jury in reaching its verdict has no effect upon the validity of the verdict.[78] South Carolina law requires the jury to be the sole judge of issues of fact, including the issue of damages.[79] Therefore, there is no basis for reversal since this matter was handled as the Appellate Courts have instructed the trial court to do.

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

Petitioners argued in their original Brief that the Thirteenth Juror doctrine should apply to the issue of the corrected Jury Verdict. This doctrine entitles the trial judge to act as the thirteenth juror when he finds "the evidence does not justify the verdict," and then to grant a new trial based solely "upon the facts."[80] Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is "wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law."[81] This Court's "review is limited to consideration of whether evidence exists to support the trial court's order."[82]

Brent testified that the Click Property had lost approximately one-third of its value, or $83,000, as a result of the excavation.[83] As the property owner, Brent is qualified to give this

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[77] *Vinson, supra*, 477 S.E.2d at 724-726.
[78] *Youmans v. Dept. of Transp.*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008).
[79] *Johnson v. Phillips* 315 S.C. 407, 416-17, n. 7, 433 S.E.2d 895, 901, n. 7. (Ct. App. 1993) rev'd in part on other grounds 318 S.C. 453, 458 S.E.2d 427 (1995).
[80] *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990).
[81] *Folkens*, supra, (citing *South Carolina State Highway Dep't v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976)).
[82] *Id.* at 255, 387 S.E.2d at 267.
[83] R. p. 843, ll. 2-18.

testimony.[84] This testimony alone would support the Jury's finding of $28,000 in damages for nuisance.

The trial court gave a curative instruction to the jury. A curative instruction is generally deemed to have cured any alleged error.[85] The Jury did not need to be re-instructed on the law as they already had copies of the Judge's written instructions to refer to and the verdict form itself was explicit as to the options for decisions that could be made. A trial court may, in its discretion, submit its instructions on the law to the jury in writing.[86] All of this was affirmed by the Court of Appeals. Therefore, the trial court properly denied Petitioners' motion for a new trial.

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

The allowance of an amendment to pleadings is addressed to the sound discretion of the trial judge and his actions will not be disturbed on appeal absent an abuse of discretion.[87] Rule 15(a), SCRCP, sets forth the standard for granting motions to amend.[88] This case had been pending for two years and was scheduled to be tried during the May 23, 2022 Term when Petitioners filed their Motion to Amend. Judge Kinlaw found that a counterclaim at that late stage of litigation would be prejudicial to Respondents. (R. 13). He also found that such an amendment would be futile in that it would prolong litigation and would not serve the ends of justice, especially considering that Respondents' Third Cause of Action already requested a Declaratory Judgment

[84] *Seaboard Coast Line R. R. v. Harrelson,* 262 S.C. 43, 202 S.E.2d 4 (1974).
[85] *State v. White*, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct.App.2006).
[86] *State v. Turner*, 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007).
[87] *Porter Bros., Inc. v. Specialty Welding Co.*, 286 S.C. 39, 331 S.E.2d 783 (Ct. App. 1985); *Crowley v. Spivey*, 288 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985).
[88] It provides: "A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party."

to Quiet Title as to the common property line of the parties. (R. 13).[89] Petitioners stated no grounds that showed with "particularity" why amendment at such a late stage should be granted.[90] Respondents' own Motion and Memorandum established that the Counterclaim added nothing to the case and was unnecessary because "the issues set forth in Defendants' Counterclaim are already set to be adjudicated as part of Plaintiffs' claims."[91] Judge Kinlaw did not abuse his discretion in denying the Motion. The Court of Appeals agreed.

Even if this Court were to find the lower court erred, it is harmless because Petitioners have not demonstrated prejudice. The issues that Petitioners claim they wanted to raise in their Amended Answer and Counterclaim, were the very issues presented by both parties at trial. Therefore, a new trial or any further proceedings are not warranted.[92]

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

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint.[93] If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper.[94]

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[89] *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' ... it may be denied where the proposed amendment would be futile."), rev'd on other grounds, 401 S.C. 1, 736 S.E.2d 242 (2012).

[90] Rule 7(b)(1), SCRCP requires that motions 'shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

[91] Petitioners' Motion to Amend Answer to add Counterclaim, R. p. 133.

[92] *McKissick v. J.F. Cleckley & Co.*, 479 S.E.2d 67, 325 S.C. 327 (Ct. App. 1996) citing *State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985) (errors are harmless where they could not have reasonably affected the trial).

[93] *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006).

[94] *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995).

A. Respondents Properly Plead Nuisance

Respondents properly plead a cause of action for nuisance. Petitioners claimed below that Respondents' Complaint fails to articulate how the alleged nuisance interferes with Respondents' use and enjoyment of their land. Rule 8, SCRCP, requires ". . . a short and plain statement of the facts showing that the pleader is entitled to relief . . . . ." "The purpose of a pleading is fair notice to the opponent and the court."[95] General damages, that is, those which naturally, logically, and necessarily result from the injury, do not have to be specially pleaded, but may be proved under a general allegation of damages.[96] Respondents' pleadings provided fair notice to Petitioners of its allegations and the trial court was correct in denying the Motion to Dismiss, and the Court of Appeals affirmed.[97]

B. Respondents Properly Plead Negligence

Respondents properly plead negligence. Respondents alleged Petitioners owed them a duty not to excavate their own property in such a manner as to cause damage to Respondents' property. (R. p. 50). It has long been held in South Carolina that a landowner owes a duty to adjoining landowners not to excavate his own property in such a manner that it damages either the soil on adjacent property or structures upon that property.[98] Respondents have alleged this duty of care and that it was breached by Petitioners. (R. pp. 48-49).[99] Respondents are not required to establish

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[95] *Watts v. Metro Sec. Agency,* 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001).

[96] *Kline Iron & Steel Co. v. Superior Trucking Co., Inc.*, 261 S.C. 542, 201 S.E.2d 388 (1973).

[97] Paragraph 24 of the Complaint provides: "Defendants excavated the Thomas Property in such a manner as to damage the stability of the soil on Plaintiffs' property. This excavation was unreasonable, intentional and/or reckless, and continues to interfere with Plaintiffs' use and enjoyment of their property." (R. p. 50.)

[98] *See Bailey v. Gray*, 53 S.C. 518, 31 S.E. 354 (1898). Petitioners admit on page 18 of their previous brief, citing *Contos v. Jamison*, 81 S.C. 488, 62 S.E. 867 (1908), that "...the general law is well settled that a proprietor excavating on his own premises is liable for damage done to the adjacent owner's soil..."

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

the "nature, degree, or specific location of the damage" as previously argued by Petitioners.[100] Respondents' pleadings provided fair notice to Petitioners of its allegations and the trial court was correct in denying the Motion to Dismiss.

C. Respondents Properly Plead Acquiescence and Prescriptive Easement

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

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

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party."[101] Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues."[102]

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[100] Rule 8(a), SCRCP. *See also Kline Iron & Steel Co. v. Superior Trucking Co., Inc.*, 261 S.C. 542, 201 S.E.2d 388 (1973). Petitioners previous reference to *Chestnut v. AVX Corp.*, 413 S.C. 224, 776 S.E.2d 82, (2015) is misplaced. In that case, the plaintiff alleged only that adjoining property had been contaminated. In the present case, Respondents clearly pled that Petitioners' excavation had undermined the stability of the soil on the Click Property, causing damage.

[101] *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009).

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

A. Nuisance *per se*

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

Additionally, Petitioners argue that the only evidence presented was of a "anticipatory" nuisance. This is a misstatement of the evidence that was presented in opposition to Petitioners' Summary Judgment Motion. Respondents presented testimony from their expert, David Hall, that Petitioners excavated the Thomas Property at a dangerously unsafe angle that removed the lateral support previously enjoyed by the Click property (R. 397, ll. 7-18) as well as Geotechnical testing substantiating that Petitioners' excavation created a dangerous instability on the Click property. (R. 390). Hall testified that travel up the hill over that area is not safe. (R. 396, ll. 3-15). Rule 703, SCRE, allows an expert giving an opinion to rely on facts or data that are not admitted in evidence or even admissible into evidence.[103] Respondents also presented lay testimony.[104] This is not an anticipatory nuisance but rather a present condition that is continuing and worsening in nature. (R. p. 394, l. 16 - p. 395, l. 12). Taking the evidence in the light most favorable to the Respondents, the lower court properly denied Summary Judgment.

B. Negligence

Petitioners erroneously claim in previous arguments that Respondents failed to present any evidence of damages resulting from the excavation work in response to their Motion for Summary Judgment. Petitioners falsely suggest that the only evidence in response to their Summary

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[103] *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 523, 698 S.E.2d 822, 832 (Ct. App. 2010) (citing *Jones v. Doe*, 372 S.C. 53, 62, 640 S.E.2d 514, 519 (Ct. App. 2006)).

[104] Danner (R. pp. 414-417), Shelly (R. p. 402, l. 20- p. 412, l. 18), and Brent (R. p. 427, l. 4 - p. 432, l. 2; pp. 434-456) testified the back building on the Click Property has continued to show damage from the excavation. Brent testified that Hyper Formance has become limited in the work it can perform because the property cannot safely support large vehicles at the gravel turn-around. Respondents presented evidence they have experienced plumbing problems and cracking in the back building. (R. p. 427, l. 4 -p. 432, l. 2; pp. 434-456).

Judgment Motion was an affidavit from Brent Click, which they characterize as self-serving. As set forth above, Respondents presented testimony from their expert witness that the excavation on the Thomas Property had de-stabilized the soil on the Click Property, causing continuing problems. Respondents also submitted the affidavit of Chris Danner regarding damage he had observed on the Click Property since the excavation. As the owner of the property, Brent is competent to testify as to its value and as to his loss.[105]

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

C. Acquiescence

Again, Petitioners seem to assert there must be an explicit agreement between the landowners that they will recognize and accept a new property line for acquiescence to exist, ignoring that silence can constitute acquiescence.[106] Respondents presented evidence of such acquiescence, creating an issue for the jury.[107]

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[105] *See Seaboard Coast Line R. R. v. Harrelson,* 262 S.C. 43, 202 S.E.2d 4 (1974) (a landowner, who is familiar with his property and its value, is allowed to give his estimate as to the value of the land and damages thereto, even though he is not an expert*). See also State v. Brown*, 402 S.C. 119, 131, 740 S.E.2d 493, 499 (2013).
[106] *Jordan v. Judy*, 413 S.C. 341, 348-349, 776 S.E.2d 96, 101 (Ct. App. 2015).
[107] R. pp. 458-461; pp. 468-472; p. 420, ll. 17-25; p. 421, ll. 14-19.

D. Prescriptive Easement

Petitioners, in previous filings, argue summary judgment should have been granted as to prescriptive easement because Respondents were granted permission to use the property in question. Petitioners ignore the fact that Respondents presented testimony that neither they, nor their predecessors, sought or received permission to use the property.[108] This created a question of fact for the jury to decide.[109]

E. Injunction

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

CONCLUSION

The lower court properly handled the inconsistent jury verdict issue, properly denied Petitioners' Motion to Amend its Answer, properly denied Petitioners' Motions for Summary Judgment, Directed Verdict and Post-Trial Motions, and properly ruled that Petitioners are to abate the nuisance. The Court of Appeals unanimously affirmed.

Respondents provided sufficient evidence to support the Jury's finding of nuisance *per se* and negligence, that Respondents' predecessors acquiesced to the boundary between the Click and Thomas properties, for prescriptive easement, and an award of damages. There are no special and important reasons to reverse.

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[108] R. pp. 458-461; pp. 468-472; pp. 474-479.

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

Therefore, Respondents respectfully request this Court uphold the unanimous decision of the Court of Appeals, the award of the Jury, and the proper rulings of both Judge Gravely and Judge Kinlaw by denying the Petition.

Respectfully submitted,

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