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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
William P. Keesley, Circuit Court Judge

Appellate Case No. 2026-000031
Trial Court Case No. 2023-CP-32-03506

Alan J. Baumann and Kayla D.
Baumann,

Respondents,

v.

Ivan Chernev and Ignatova Petia
Chernev,

Appellants.

INITIAL BRIEF OF APPELLANTS

Kathleen McDaniel (SC Bar No. 74826)
BURNETTE SHUTT & McDANIEL, PA
912 Lady Street, Second Floor (29201)
PO Box 1929
Columbia, South Carolina 29202
Telephone: (803) 904-7913
Facsimile: (803) 904-7910

ATTORNEY FOR APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in granting a permanent injunction requiring Appellants to remove berms constructed on their own property to protect their septic system.
2. Whether the trial court erred in denying Appellants' motion for JNOV on their nuisance counterclaim.

STATEMENT OF THE CASE

This is a dispute between neighboring landowners on Corley Mill Road in Lexington, South Carolina, concerning the management of surface water flowing between their adjacent properties. Respondents Alan J. Baumann and Kayla D. Baumann filed suit against Appellants Ivan Chernev and Petia Ignatova in the Lexington County Court of Common Pleas, asserting claims for trespass, negligence, nuisance, and tortious interference with contract. (R. p. __.) Appellants answered and asserted a counterclaim for nuisance and injunctive relief, alleging that Respondents had collected and concentrated surface water through artificial structures and cast it onto Appellants' lower-lying property, damaging their septic system. (R. p. ____.)

A jury trial was conducted in August 2025 before the Honorable William P. Keesley. The jury returned a verdict in favor of Respondents on their trespass claim, awarding \$350 in actual damages and \$10,000 in punitive damages. The jury also found for Respondents on their nuisance per se claim, awarding \$400 in actual damages and no punitive damages. The jury found against Appellants on their nuisance counterclaim. (R. p. __.) Following the verdict, Respondents were required to elect their remedy and chose the trespass verdict, rendering the nuisance claim of no further force and effect. (R. p. __.)

Appellants filed post-trial motions for judgment notwithstanding the verdict, new trial absolute, and new trial nisi remittitur and for Respondents to elect their remedy. (R. p. __.) Respondents filed a post-trial motion for injunction. (R. p. __.)

On December 5, 2025, the trial court issued its Order Regarding Post-Trial Motions, denying all of Appellants' motions and granting Respondents' motion for injunctive relief. (R. p. ____.)

On December 29, 2025, the trial court issued the Injunction, requiring Appellants to remove existing berms from their property and prohibiting Appellants from constructing, placing, or maintaining any obstructions that divert surface water back onto Respondents' property. (R. p. ____.)

Appellants filed their Notice of Appeal on January 2, 2026, appealing both the Order Regarding Post-Trial Motions and the Injunction. This Court temporarily granted Appellants' Petition for Writ of Supersedeas on March 5, 2026, recognizing that compliance with the Injunction could render the appeal moot. The circuit court has under consideration the issuance of a supersedeas staying implementation of the Injunction.

STATEMENT OF FACTS

Respondents purchased their home at 937 Corley Mill Road, Lexington, South Carolina, in 2018. Appellants purchased the adjacent property at 929 Corley Mill Road in October 2022. (R. p. ____.) The properties are situated on a slope, with Respondents' property generally occupying the higher ground and Appellants' property lying downgradient. (R. p. ____.) Both parties acknowledged that surface water naturally flows from Respondents' higher-elevation property down toward and across Appellants' property. (R. p. ____.)

Respondents admitted that they took multiple steps to manage surface water on their property through the construction and installation of artificial structures. Specifically, Respondents: (a) added a berm at the front of their property; (b) installed two drains by

the gate to their backyard; (c) added a gutter on the back of their house; and (d) connected the two drains and the gutter by a pipe that traveled through their yard and discharged collected water along the fence line bordering Appellants' property. (R. p. __.) The effect of this interconnected system of artificial structures was to collect diffused surface water from multiple points on Respondents' property, funnel it through a single pipe, and discharge it at one concentrated point along the shared fence line. (R. p. __.) That discharge point sits directly above Appellants' septic drain field. The concentrated water from Respondents' artificial drainage system created a "water bubble" around the septic system's drain field, endangering its proper operation and threatening environmental contamination. (R. p. __.)

In response to the continuing damage to their septic system from Respondents' concentrated water discharge, Appellants constructed a berm to redirect the water down the side of their property toward the ditch system. Respondents contended that Appellants' actions caused water to back up onto Respondents' property. (R. p. __.)

Following a trial, the jury returned a verdict finding that Appellants had trespassed on Appellants' property. Notably, the Verdict states a finding of trespass in the past tense. There was no finding of an ongoing trespass either by the jury or the trial court. The jury awarded Respondents \$350 in actual damages and \$10,000 in punitive damages. (R. p. __.)

The jury also found in favor of Respondents on their nuisance claim, awarding \$400 in actual damages and no punitive damages. Following the verdict, Respondents were required to elect their remedy and chose the trespass verdict, rendering the nuisance claim of no further force and effect. (R. p. __.)

STANDARD OF REVIEW

Injunctive Relief

The grant or denial of injunctive relief rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). An abuse of discretion occurs when the trial court's ruling is based on an error of law, is without evidentiary support, or when the court's ruling is so arbitrary as to reflect a failure to exercise sound judicial judgment. *Clark v. Greenville Cty.*, 313 S.C. 205, 209, 437 S.E.2d 117, 119 (1993).

Actions for injunctive relief are equitable in nature. *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence. *Id.*

Judgment Notwithstanding the Verdict

When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.

RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012) (internal citations omitted).

ARGUMENT

1. **The trial court erred in granting a permanent injunction requiring Appellants to remove berms constructed on their own property to protect their septic system**

To obtain an injunction, a party must demonstrate: (1) irreparable harm; (2) a likelihood of success on the merits; and (3) the absence of an adequate remedy at law. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). Before granting an injunction, the trial court should also balance the equities. *Cedar Cove Homeowners Ass'n v. DiPietro*, 368 S.C. 254, 628 S.E.2d 284 (Ct. App. 2006) (reversing injunction where balancing of equities precluded issuance).

The trial court's Injunction of December 29, 2025, requires Appellants to remove berms constructed entirely on their own property and permanently enjoins Appellants from constructing any structures that divert surface water back onto Respondents' property. However, Appellants have not been able to identify any point in the record below where the court undertook the necessary analysis for the imposition of an injunction. There are no findings in the Order on Post-Trial Motions or the Injunction or the transcript of the November post-trial hearing making any determination as to the existence of (1) irreparable harm; (2) a likelihood of success on the merits; or (3) the absence of an adequate remedy at law. Further, the trial court conducted no balancing of the equities in reaching its decision to issue the Injunction. On this basis alone, this Court should reverse the trial court's grant of injunctive relief.

A prerequisite for injunctive relief is the absence of an adequate remedy at law. *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 907. Here, Respondents have already obtained the monetary judgment of \$10,350 with only \$350 in actual damages. If

Respondents believe they suffer harm from the berms in the future, they may seek additional money damages. The availability of money damages demonstrates that the harm, to the extent it exists, is compensable and does not require the extraordinary remedy of a permanent injunction.

Again, the jury's nominal actual damage award of \$350 confirms that Respondents' harm is the type of harm compensable with money. This is not a case involving irreparable injury to a unique resource or ongoing physical danger to persons. Money damages are adequate.

Before granting the Injunction, the trial court also should have balanced the equities. *Cedar Cove Homeowners Ass'n*, 368 S.C. at 261, 628 S.E.2d at 288. In *Cedar Cove*, this Court reversed an injunction requiring the removal of a brick patio that encroached approximately three feet onto a common area, finding that a "balancing of the equities preclude[d] the issuance of the injunction." *Id.* at 254, 628 S.E.2d at 284. If the balance of equities precluded the removal of a three-foot patio encroachment, it certainly precludes an order that prevents Appellants from protecting their septic system from Respondents' flow of water.

The harm to Appellants if the Injunction stands is great. Appellants' septic drain field will be exposed to the concentrated water being discharged by Respondents' pipe system with no means of defense. The trial court itself acknowledged that there was evidence that there is not enough room between the property line and the ends of the drain fields for Appellants to construct alternative drainage. In other words, the trial court recognized that compliance with its own Injunction could result in the Appellants' septic

system being harmed by the Respondents' water flow but ordered the berms be removed anyway.

The harm to Respondents should the grant of Injunction be reversed would be minimal when compared to substantial harm to Appellants should the Injunction stand. The nominal sum awarded to Respondents for actual damages (\$350) on their trespass claim reflects the minimal damage for any previous trespass. Further, there is no finding of ongoing trespass that would support the granting of an injunction.

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co.*, 361 S.C. at 121, 603 S.E.2d at 907. The scope of injunctive relief must be proportionate to the harm demonstrated. *Id.* The jury's minimal actual damages verdict undercuts the need for the sweeping injunctive relief imposed. This nominal award demonstrates that the jury did not find significant damages for past harm and, again, there is no finding of ongoing trespass. Yet the Injunction imposes the most drastic possible remedy: the physical removal of structures from Appellants' property, which they installed solely to protect their septic system from water flowing from Respondents' property.

In addition to failing to satisfy the requirements for the issuance of an injunction, the grant of the Injunction also contradicts the common enemy rule. Under this rule, a landowner may treat surface water as a common enemy and dispose of it as the landowner sees fit. *Lucas v. Rawl Family Ltd. P'shp*, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004). However, South Carolina recognizes two critical exceptions to the common enemy rule: (1) a landowner must not deal with surface water in a manner so as to constitute a nuisance; and (2) except by contractual or prescriptive right, an upper

landowner may not by means of a ditch, impoundment, or other artificial structure collect surface water on his land and cast it in concentrated form upon lower adjoining land. *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001); *Irwin v. Michelin Tire Corp.*, 288 S.C. 221, 225, 341 S.E.2d 783, 785 (1986); *Glenn v. Sch. Dist.*, 294 S.C. 530, 366 S.E.2d 47 (Ct. App. 1988).

Respondents violated the second exception. They admitted to installing a system of artificial structures that collected surface water from multiple points on their property and funneled it through a single pipe that discharged concentrated water at a single point along the shared fence line, directly above Appellants' septic drain field. This is precisely the conduct the second exception was designed to prevent: collecting diffused surface water and casting it in concentrated form upon lower adjoining land. *Irwin*, 288 S.C. at 225, 341 S.E.2d at 785.

The parallels between this case and *Johnson v. Phillips*, 315 S.C. 407, 433 S.E.2d 895 (Ct. App. 1993), *aff'd in part and rev'd in part on other grounds, remanded sub nom., Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995), are instructive. In *Johnson*, an upper landowner (Smith/Developer) sued lower landowners (the Phillipses) for nuisance and trespass, alleging that the Phillipses' structures on their own property were blocking and diverting surface water back onto the Developer's property. The Phillipses counterclaimed, alleging that the Developer had unlawfully discharged surface water onto their land. The jury returned a verdict for the Developer on the nuisance claim but awarded zero dollars in damages. Despite this zero-damage verdict, the trial court issued a mandatory injunction requiring the Phillipses to remove structures from their property and

restore it to its former condition. The trial court also directed a verdict against the Phillipses on their counterclaim.

The Court of Appeals reversed the injunction and reinstated the Phillipses' counterclaim. *Johnson*, 315 S.C. at 413, 433 S.E.2d at 899. The South Carolina Supreme Court affirmed the reinstatement of the counterclaim and remanded for further proceedings on the counterclaim and the request for injunctive relief. *Smith v. Phillips*, 318 S.C. at 455, 458 S.E.2d at 428.

The *Johnson* case demonstrates that a court cannot issue a one-sided mandatory injunction requiring only the lower landowner to remove structures from his own property while ignoring the upper landowner's own action. That is precisely what the trial court did here.

Like the Phillipses, Appellants are the lower landowners who constructed structures on their own property to protect themselves from water being cast upon them by the upper landowner. Like the Developer in *Johnson*, Respondents are the upper landowners whose own artificial structures collected and concentrated water and directed it onto the lower property. And like the trial court in *Johnson*, the trial court here issued a mandatory injunction against only the lower landowner while ignoring the upper landowner's contributing conduct. This Court reversed in *Johnson*. It should reverse here.

The Injunction rewards Respondents' conduct in violation of the common enemy rule. It requires Appellants to remove the berms they constructed in self-defense to protect their septic system from the concentrated discharge while imposing no obligation on Respondents to remove or modify the pipe, drains, gutter, or any other artificial structure that is collecting and concentrating the water in the first place. The practical

effect of the Injunction is to guarantee Respondents the unimpeded right to violate the second exception to the common enemy rule, free from any defensive measures by Appellants.

Respondents cannot have it both ways. They cannot install pipes and drains that violate the common enemy rule by concentrating and casting water onto their neighbor's property and then seek equitable relief to prevent that neighbor from taking defensive measures on his own land. This Court should reverse the trial court's grant of injunctive relief.

2. The trial court erred in denying Appellants' motion for JNOV on their nuisance counterclaim

As set forth above, South Carolina follows the "common enemy" rule regarding surface water. Under this rule, landowners may alter the flow of surface water on their property because surface water is considered a common enemy; however an upper landowner may not by means of a ditch, impoundment, or other artificial structure collect surface water on his land and cast it in concentrated form upon lower adjoining land.

Appellants' counterclaims for nuisance and injunctive relief are premised on Respondents' casting of concentrated water onto Appellants' property. Respondents' property sits at a higher elevation than Appellants' property. Both parties acknowledged that water naturally flows from Respondents' higher-elevation property down toward and across Appellants' property.

Respondents admitted at trial that they installed a system of artificial structures to manage surface water on their property within the meaning of the second exception. They were installed by Respondents for the specific purpose of collecting and redirecting

surface water. The pipe, in particular, serves no purpose other than to collect water from the drains and gutter and transport it to a discharge point.

The pipe discharged the collected water at a single point along the fence line bordering Appellants' property, which is directly above Appellants' septic drain field. Water that had previously been diffused across Respondents' property was funneled through a single pipe and discharged at a single concentrated point onto Appellants' lower-lying property.

This is the paradigmatic violation of the second exception: an upper landowner using artificial structures to collect diffused surface water and cast it in concentrated form upon lower adjoining land. *Irwin*, 288 S.C. at 225, 341 S.E.2d at 785.

The trial court denied Appellants' JNOV motion on the counterclaim, crediting the jury's apparent acceptance of Mr. Baumann's testimony that "the water would have ended up at that spot without the piping and his description of the drainage system as being ineffectual." This rationale is legally insufficient.

The second exception to the common enemy rule prohibits the use of artificial structures to collect surface water and cast it in concentrated form upon lower adjoining land. *Irwin*, 288 S.C. at 225, 341 S.E.2d at 785. The harm addressed by the second exception is not the mere presence of water on the lower property because some amount of water will always flow naturally downhill. The harm is the concentration of that water through artificial means. Diffused surface water spreads across a broad area and is absorbed gradually. Water that has been collected by gutters, funneled through drains, and discharged through a single pipe arrives at the lower property in a concentrated

volume at a concentrated point, with greater force and in greater quantity than would occur naturally.

The distinction matters because the concentrated discharge from Respondents' pipe was directed at the precise location of Appellants' septic drain field. Even if some amount of diffused surface water would have naturally reached that general area, it would not have arrived in the concentrated volume necessary to create a "water bubble" around the septic system. The pipe created that concentration. No reasonable juror could have found otherwise.

The combined effect of the trial court's rulings is this: Respondents may install any artificial structures they wish to collect and concentrate surface water and cast it upon Appellants' property, but Appellants may not place a single berm on their own property to protect their septic system from that concentrated discharge.

This result turns the common enemy rule on its head. The rule was designed to give landowners the right to protect their property from surface water. The second exception was designed to prevent upper landowners from abusing that right by artificially concentrating water and dumping it on their downhill neighbors. The trial court's rulings grant the upper landowner (Respondents) an unrestricted right to concentrate and discharge water while stripping the lower landowner (Appellants) of any right to defend against it.

This Court should not permit such a result. The second exception to the common enemy rule exists precisely to prevent upper landowners from doing what Respondents did here. The trial court erred in denying Appellants' JNOV motion on their counterclaims for nuisance and injunctive relief.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the trial court's grant of the Injunction of December 29, 2025, and reverse the trial court's denial of Appellants' motion for JNOV on Appellants' nuisance counterclaim and remand with instructions to enter judgment in favor of Appellants on their counterclaims.

Respectfully submitted,

s/ Kathleen M. McDaniel
Kathleen McDaniel (SC Bar No. 74826)
BURNETTE SHUTT & McDANIEL, PA
PO Box 1929
Columbia, South Carolina 29202
Tel. (803) 904-7913
Fax (803) 904-7910
KMcDaniel@BurnetteShutt.Law

ATTORNEY FOR APPELLANTS

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