THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Circuit Court Judge

Case No. 2007-CP-26-7459

Clint A. Chestnut, Rebatt Frankie Jefford, Mary Lou Nance, Margaret Ramsey, Nicholas Ramsey, Harold Cushman, Julia Edwards, Don Emery, Eula Cooke, and Glenda Rabon Harper, Individually and as Class Representatives — Appellants,

v.

AVX Corporation, — Respondent.

INITIAL BRIEF OF APPELLANT

Gene M. Connell, Jr.
L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587-4547
(843) 238-5648
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN HOLDING SOUTH CAROLINA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR PROPERTY DAMAGE WHEN THE PROPERTY HAS NOT BEEN PHYSICALLY IMPACTED BY CONTAMINATION?

II. DID THE COURT ERR IN DISMISSING THE NUISANCE CAUSE OF ACTION?

III. DID THE TRIAL COURT ERR IN NOT ADOPTING THE RESTATEMENT OF TORTS (2D) §821(D)?

IV. DID THE COURT ERR IN DISMISSING THIS CASE UNDER SCRCP 12(B)(6) THE ERROR BEING THE ISSUE IN THIS CASE IS NOVEL?

V. DID THE TRIAL COURT ERR IN DISMISSING THE NEGLIGENCE CAUSE OF ACTION?

VI. DID THE COURT ERR IN DISMISSING THE COMPLAINT AS SUCH IS A DRASTIC REMEDY?

VII. DID THE COURT ERR IN FAILING TO CONSIDER ADDITIONAL EVIDENCE AT THE MOTION TO RECONSIDER HEARING?

VIII. DID THE COURT ERR IN DISMISSING PLAINTIFFS' CLAIM FOR STRICT LIABILITY?

VIX. DID THE COURT ERR IN DISMISSING THE CASE IN LIGHT OF THE SOUTH CAROLINA PROPERTY DISCLOSURE ACT?

STATEMENT OF THE CASE

This matter is before the court on Plaintiffs' appeal of the Trial Court's Order which holds South Carolina Law does not recognize a cause of action that will compensate an owner for alleged property damage due to contamination when the subject property is in close proximity to contaminated properties, but has not been physically impacted by the contamination. (R. ____) In its Order, the court dismissed in entirety the cases of Chestnut, Jefford, Nance, and Ramsey under S.C.R.C.P. 12(b)6. The Plaintiffs have brought claims against AVX for negligence, products liability, trespass, and nuisance. The Trial Court's original hearing was held on October 6, 2010, however, the Court did not actually execute a written Order dismissing Plaintiffs' cases until March 9, 2012. In the meantime, extensive discovery was conducted by the Plaintiffs. The Plaintiffs filed their Motion for Reconsideration on March 19, 2012 and the Court heard the Motion for Reconsideration and denied the Plaintiffs' Motion for Reconsideration in its Form Order dated May 30, 2012. At the hearing on the Motion for Reconsideration, the Plaintiffs proffered Exhibits 1 through 12 to the Court. The Trial Judge refused to review the Exhibits and indicated he would not consider anything not previously offered to the Court at the original motion hearing.

BACKGROUND FACTS

This Class Action involves two subclasses of Myrtle Beach residents who filed a lawsuit on November 27, 2007 against AVX Corporation in Myrtle Beach, South Carolina. Class A are those people who own real property which is contaminated. Class B are those people who own real property in close proximity to the contamination. AVX, with its principal place of business in Myrtle Beach, manufactures electronic parts at a plant located in the City Limits. AVX, in its manufacturing process, had used a chemical known as trichloroethylene ("TCE") as a degreaser at the plant starting in the early 1980's. (TCE is a known cancer causing agent and highly toxic chemical. It is a volatile organic compound – VOC.) In 1995, almost fourteen years after using TCE, AVX informed the South Carolina Department of Health and Environmental Control (DHEC) that it had violated certain state and environmental laws and that it had been secretly attempting to clean up various trichloroethylene ("TCE") spills which had migrated into the ground water underneath homes in a subdivision near the plant where the Plaintiffs live.

The South Carolina Department of Health and Environmental Control, in its initial report, found that the TCE had contaminated the ground water in a ten block section north of the AVX Corporation headquarters located at 801 17th Avenue South, Myrtle Beach, South Carolina. AVX is now under order by DHEC to clean up the contamination.

The Plaintiffs, Clint A. Chestnut, Rebatt Frankie Jefford, Mary Lou Nance, Margaret Ramsey, and Nicholas Ramsey live on the west side of Beaver Road in small homes in close proximity to the contaminated area which is within sight of the AVX Plant. Ronald and Janice Camp, who are not named Plaintiffs (but witnesses) live in the same area and are directly in front of AVX at 1408 Beaver Road.

The Plaintiffs have alleged in their lawsuit that contamination from the AVX Plant has spread to adjoining land owners and that Plaintiffs' property has been depreciated and lost value (stigma damages) because their property is in close proximity to the contaminated property. The Trial Court had previously certified a Class Action of all individuals who had contamination on their property pursuant to the attached plume map which has been prepared by Plaintiffs' expert, Dr. C. W. Fetter. (Exhibit 12) (R. ____)

The Court in its Order in dismissing Plaintiffs' claims found that there must be "physical impact" on the Plaintiffs' property from contamination in order to bring this lawsuit under any of the theories presented by the Plaintiff which include trespass, strict liability, nuisance, and negligence. (R. _____) For the reasons set forth below, Appellants request the Court reverse its Order and remand this matter to the Circuit Court for trial.

ARGUMENT

I. THE COURT ERRED IN DISMISSING THE NUISANCE CAUSE OF ACTION AND HOLDING PHYSICAL IMPACT WAS REQUIRED.

The Court in its Order cited Ravan v. Greenville County 315 S.C. 447, 434 S.E.2d 296 (S.C.App. 1993) for the proposition that Plaintiffs cannot recover under a theory of nuisance. The Plaintiffs maintain that nuisance does not require "physical impact" and the Court erred in dismissing this cause of action. In Ravan, the Court of Appeals held that the issue of nuisance should have been submitted to the jury (315 S.C. at 465). Further, the court held that there was no prejudice because the same damages were sought in separate causes of action. 315 S.C. at 465.

The Ravan court went on to hold "whether a Defendant's enterprise constituted a nuisance was a question for the jury." See Lever v. Wilder Mobile Homes, Inc., 283 S.C. 452, 322 S.E.2d 692 (Ct. App. 1984).

In this state, anything that works hurt, inconvenience, or damage, or interferes with the enjoyment of life or property, is a nuisance. Strong v. Winn Dixie, Inc., S.C. 244, 125, S.E.2d 628 (1962). (No South Carolina cases require physical impact to real property to bring a cause of action for nuisance.)

Plaintiffs also submit that two early South Carolina cases allow a nuisance cause of action without "physical impact." In Ryan v. Copes, 11 Rich. 217, 45 S.C.L. 217 (S.C.App.L.), (1858) the South Carolina Court of Appeals held that a Plaintiff could maintain a nuisance action against an adjoining property owner who was using a working steam cotton press. In that case, the Judges found that the increased danger of fire and liability from boiler explosions was a jury question in regard to the impairing of the value of the Plaintiff's property. The court also noted that it is sufficient to allege increased danger from fire and from boilers even though there has not been an actual occurrence (i.e. physical impact).

The Supreme Court also considered this very issue in Emory v. The Hazard Powder Company, 22 S.C. 476, 1885 WL 3612 (S.C. 1885). In Emory, another case from the City of Charleston, the Plaintiff owned real property in close proximity to (200 yards) to an active gun powder magazine. The Plaintiff's property was also within 25 feet of a road leading to a shipyard in which the owners of the magazine intended to move large quantities of gunpowder and also store that same gunpowder. The Plaintiff alleged that the magazine greatly endangered the lives of her family, friends, and servants even though there had been no problem with the powder magazine at that point. The jury heard the case and awarded the Plaintiff $500 (a significant sum in those days). The court noted "The main question in the case was one of fact and that was whether the magazine endangered the lives of the

Plaintiff, her family and servants residing on her own premises." Further, the Supreme Court turned back the defense argument that the powder magazine only affected a few people. The court noted "it is not the number of persons affected by a matter that makes it is nuisance but it is its injurious, offensive, noxious character; and it is nonetheless a nuisance because it affects only one or two instead of a multitude." The Supreme Court affirmed the verdict and thus held that "apparent danger" can be considered a nuisance.

In Neal v. Darby, 282 S.C. 277, 318 S.E.2d 18 (Ct.App. 1984), the Plaintiffs challenged the constitutionality of a Chester County ordinance pertaining to the handling and storage of dangerous chemicals. Chester County and its Council Members counterclaimed alleging the company's landfill site was a nuisance to other landowners in close proximity. The Neal court, citing Young v. Brown, 212 S.C. 156, 46 S.E.2d 673 (1948), affirmed the Trial Court and held "a lawful business should not be enjoined on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or oversensitive person, but on the other hand, no one, whatever his circumstances or condition may be, should be compelled to leave his home or live in mental discomfort, although caused by a lawful and useful business, carried on in its vicinity." 318 S.E.2d at 23.

The Neal court reaffirmed that a nuisance is anything which works hurt, inconvenience or damage, or anything which essentially interferes with the enjoyment of a person's life or property. It is important to understand that none of the cases cited above or any case Plaintiffs were able to find requires that Plaintiffs prove their property be physically impacted; the cases only require that some hurt or inconvenience interferes with the enjoyment of life or property. (See depositions of Chestnut, Jefford, and Nance as to the

concerns each Plaintiff has over their property in close proximity to other property which is contaminated.) (Exhibit ___ R. ___).

The Court's attention is also directed to Professor Patrick Hubbard's book "The South Carolina Law of Torts" (3rd Ed.) (2004). In that book, Professor Hubbard notes:

> The requirement of a physical entry distinguishes trespass from nuisance, which protects the right to enjoyment of land rather than the right of possession. In South Carolina "anything" working inconvenience or damage or interfering with the elements of life or property is a nuisance.

This Court's attention is also directed to Gray v. Southern Facilities, 256 S.C. 558, 183 S.E.2d 438 (1971). In Gray, the Plaintiff brought a lawsuit against Southern Facilities as a result of a fire which occurred in a creek near his home. The court found that while the property had no physical damage to it, the value of the property itself was depreciated. 183 S.E.2d at 439. The Supreme Court affirmed the Trial Court but took the opportunity to discuss the nuisance theory and the fact that the Plaintiffs only pled a negligence cause of action in their Complaint.

The Gray court held that, because this was a single isolated incident, the fire in the creek would most likely not be a nuisance. 183 S.E.2d at 439. However, the court further observed that a nuisance generally involves the idea of continuity or recurrence other than an occasional or temporary injury or annoyance. 183 S.E.2d at 439. Finally, the court found no error on the Trial Court, because the pleadings raised no issue as to the creation and maintenance of a nuisance. 183 S.E.2d at 439.[1]

In this case, the Plaintiff cites examples of nuisance from the TCE spills at AVX. The deposition testimony from the South Department of Health and Environmental Control

Hydrologist Expert Carol Minsk indicates that TCE will be in the soil in close proximity to the Plaintiffs' home for the next 15 to 25 years and that the clean-up would continue in that period. (See deposition transcript of Carol Minsk pp 164-210). Further, this is not a single isolated incident as in the Gray case but a continuing nuisance which has been ongoing at least since the early 1980's when the TCE was first released by AVX into the neighborhood ground water. (Minsk indicated it could take up to 25 years to clean up the TCE in the ground water adjoining Plaintiffs' property. (See Depo. Minsk pp 164-210). Also, the named Plaintiffs discussed their concerns in their depositions. (R.___) Suffice it to say, Plaintiffs fear living next to a contaminated cleanup site.

The Plaintiffs also cited other South Carolina cases which the Trial Court rejected. In LeFurgy v. Long Cove Club Owners Ass'n, 443 S.E.2d 577 (S.C.App. 1994), the court held a business may, while legitimate, become a nuisance per accidens by reason of location, surroundings, or manner in which it is conducted. (See also Johnson v. Phillips 433 S.E.2d 895 (S.C.App. 1993), an action for private nuisance will lie for wrongful interference with the owner's right to free use and enjoyment of his land.)

The Trial Court's Order also cites Clark v. Greenville County, 313 S.C. 205, 437 S.E.2d (1993), for the proposition that there must be physical impact on Plaintiff's property in order to recover on nuisance, negligence, or strict liability. In fact, Clark holds only that a private nuisance cannot be alleged against one who has no control over the property at the time of the nuisance. Obviously, in this case, AVX has full control over the property which has created the nuisance and DHEC found they were the source of the contamination. In Clark the Court noted:

---

[1] Because Gray did not answer the question does property damage require physical impact, Plaintiffs believe this is a novel question under South Carolina law which justifies certification to the South Carolina

> In this case, Appellants neither alleged nor produced any evidence the corporate Respondents had control over the landfill or the hazardous waste once it was deposited at the landfill. We conclude the Trial Court correctly ruled that the corporate Respondents could not be liable for nuisance because they had no control over the property allegedly used as a nuisance. 437 S.E.2d at 118.

Thus, Clark has no applicability to this case and the court's citation of it in its Order is erroneous, since AVX is currently under a Consent Order to clean up the affected areas. (R.____) (See attached proposed plan for site remediation dated October, 2011) (Exhibit 9).

Accordingly, the Plaintiffs respectfully submit a traditional concept of private nuisance requires the Plaintiffs to demonstrate the Defendant unreasonably interfered with the possession of land. The Plaintiffs have shown that by owning adjoining property to contaminated property their enjoyment of their property has been affected. Further, the question of unreasonableness in a nuisance claim is ordinarily one for the jury.[2] See Ravan v. Greenville County, 434 S.E.2d at 297. Thus, the Trial Court should not have dismissed this case.

II. THE RESTATEMENT OF TORTS DOES NOT REQUIRE PHYSICAL IMPACT FOR A NUISANCE CLAIM.

The Restatement of Torts (2d) defines private nuisance as a non-trespassory invasion of another's interest in the private use and enjoyment of land. See Restatement 2d of Torts §821(D) (1977) emphasis added.[3] The Restatement does not speak exclusively in terms of physical or a tangible invasion of land. Rather, it states:

Supreme Court.

[2] Mental tranquility is an important element of a nuisance claim. See Young v. Brown, 212 S.C. 156, 465 S.E.2d 673 (1948) (right to mental comfort and repose in the home); Fraser v. Fred Parker Funeral Home, 201 S.C. 88, 21 S.E.2d 577 (1942) (right to comfort, repose and enjoyment of cheerful home situation); Morison v. Rawlinson, 193 S.C. 25, 32, 7 S.E.2d 635 (1940) (public nuisance from activity which "tends to shatter the nervous system.").

[3] No South Carolina State Court has ever been faced with this issue in regard to a claim for nuisance.

> The interest in use and enjoyment also comprehends the pleasure, comfort, and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance, while using land is often as important to a person as freedom from physical interruption or freedom from detrimental change in the physical condition of the land itself.

While South Carolina Courts have not spoken since 1858 on the issue of physical impact to maintain a nuisance cause of action, a number of courts have considered this issue.[4] See Exxon Corp. v. Yarema, 69 Md.App. 124, 516 A.2d 990 (Md.App.1986); (A disturbance of the comfort of the occupant such as loud noises is a nuisance if substantial and unreasonable); E. H. Wilson v. Interlake Steel Corp. 32 Cal. 3d 229, 185 Cal. Rptr. 280, 649 P.2d 922 (1982) (Sound waves emitted without damage to property sufficient to support nuisance action.); Ralley v. General Electric 165 Misc.2d 803, 630 NY 52d 452 (NY Sup.Ct. 1995) (holding loss of sale of property due to the existence of a polluted site nearby creates issue of fact to withstand summary judgment on nuisance claim); Lewis v. General Electric 39F.Supp.2d 55 (DMass. 1999) (holding private nuisance claim to adjoining property owners who are not contaminated interferes with use and enjoyment of land.); Adkins v. Thomas Solvent Co. 44 Mich. 293, 487 NW2d 715, 721 (1992) (This case suggests that a condition created by the Defendant causing Plaintiff fear that interferes with the use of enjoyment of land might give rise to a nuisance suit (487 NW2d at 725); and Scheg v. Agway, Inc., 229 AD2d 963 645 NYS 687 (1996) (Plaintiffs nuisance claim "insofar as it alleges that the value of Plaintiffs' property was diminished as a result of its proximity to the landfills, does state a cause of action"). Acadian Heritage Realty v. City of

[4] Ryan v. Copes, 18 S.C. L. (11 Rich.) 217, 73 Am. Dec. 146 (1858) (Value of adjacent property reduced by threat of boiler explosion even if no actual explosion has yet occurred.) See also Hubbard, The Law of Torts, 3rd Edition (2004) p. 232: Emory v. The Hazard Powder Company 22 S.C. 476, 1885 WL 3612 (S.C.) (gunpowder magazine within 200 hundred yards of the dwelling of the Plaintiff actionable and greatly endangered the life of the Plaintiff and her family.)

Lafayette 446 So. 2d 375, 379 (La. Ct. App. 1984) (Allowing stigma damages for the existence of a landfill adjacent to Plaintiffs' property), In re Tutu Wells Contamination Litig., 909 F.Supp. 991, 996-97 (D.V.I. 1995) (Virgin Islands law does not require physical harm to real property to assert nuisance claim under the Restatement of Torts 2nd).

The Plaintiffs also refer to Allen v. Uni-First Corporation, 558 A2d 961, 964 (Vt. 1988). In that case, the Plaintiff landowners brought a nuisance action against a dry cleaning plant which improperly disposed of contaminated water directly into the local sewage system. Several organic chemicals including dangerously high concentrations of perc, were discovered in private wells. The Plaintiffs claim that property values had declined due to the widespread contamination and the resulting public perception that the town was unsafe. The Plaintiffs presented evidence regarding:

1. The real estate values prior to media reports;

2. The marked decrease in values.

The Trial Court instructed the jury to limit its consideration of the contamination issues to questions regarding only the wells and schools. The Vermont Supreme Court determined that the Trial Court erred in limiting the Jury's ability to evaluate the evidence and held that the Plaintiffs presented sufficient evidence to establish a causal connection between the Defendant's conduct and the devaluation of the local property values. The Court reasoned that the Plaintiffs' testimony, stating that the sudden decrease in value could be attributed to no other factor, was sufficient evidence to allow lay persons of average intelligence to determine causation based on their own knowledge and experience. See also Acadian Heritage Realty v. City of Lafayette, 446 So. 2d 375, 379-80 (La. Ct. App. 1984) (holding that stigma damages can be recovered due to the negligent operation of landfill).

Numerous cases have recognized this second subclass as being actionable although South Carolina has not passed on this issue since 1858. See Sterling v. Velsicol Chemical Corporation, 647 F.Supp. 303 (W.D. Tenn. 1986), affirmed and remanded 1988 U.S. App. LEXIS 11811 (6th Cir. 1988) (Class action affirmed by 6th Circuit with regard to Plaintiff's recovery under theories of strict liability, common law negligence, trespass and nuisance). Sterling was a class action suit brought by residents who had lived within a three mile radius of Velsicol Chemical Corporation's 242 acre chemical waste burial site. See also DeSario v. Industrial Excess Landfill, 68 Ohio App. 3d 117, 587 N.E.2d 454 (1991) (class action approved irrespective of actual land contamination). See also Ayers v. Jackson Township, 106 N.J. 557, 525 A.2d 287 (N.J. 1987) (holding nuisance cause of action allows for award of life damages under Restatement (Second) of Torts § 929.

See also Leaf River Forest Products v. Ferguson, 662 So.2d 648 (1995) (Mississippi Supreme Court implied it would entertain a cause of action for stigma if defendant's acts significantly interfered with plaintiff's use and enjoyment of their property. In this case, no stigma because alleged contamination occurred eighty miles upstream). See also Exxon Corp. v. Yarema, 516 A.2d 990 (MD Court of Special Appeals 1986) (nuisance claim upheld based on indirect impact of defendant's pollution); See also Bernbach v. Timex, 989 F.Sup. 403 (D.Conn. 1996) (motion to dismiss denied on stigma damage claims in respect to properties of plaintiff not physically impacted by contamination. Physical invasion is not "sine qua non" thus case implicitly recognizing cause of action for stigma damages for homeowners whose properties are in close proximity).

III. THE COURT ERRED IN DISMISSING THIS CASE UNDER SOUTH CAROLINA RULE OF CIVIL PROCEDURE 12(B)(6) SINCE THE ISSUE IS NOVEL.

The Plaintiffs in this case claim property damage (stigma damages) from contamination that emanated from the AVX Plant. While Plaintiffs' property has not been contaminated, the Plaintiffs' neighbors' properties are contaminated and South Carolina has not had an opportunity to have its highest courts review this issue since 1858. Further, our courts have held that when the dispute is not as to the underlying facts but as to the interpretation of the law, and development of a record is important, normally novel issues will not be decided on a 12(b)(6) motion. See Keiger v. Citgo Coastal Petroleum, Inc., 325 S.C. 360, 482 S.E.2d 702 (1997). (Employers alleged retaliatory discharge of employee who threatened to invoke her rights under payment of wages act was a violation of clear mandate of public policy, so as to fall under public policy exception to the at will employment, was a novel issue that could not be decided on a Motion to Dismiss for failure to state a claim.)

Accordingly, because this is a novel issue, the Plaintiffs are entitled to develop a record, and the Plaintiffs proffer at the Motion for Reconsideration hearing of Exhibits 1 through 12 is an attempt to provide this court with a clear record of this issue. (R. _____) The Plaintiffs obtained evidence to support their claims after discovery was engaged in between the parties during the 17 months between the time the Motion to Dismiss was heard and the Order was actually filed with the Court.

Plaintiffs offer the following additional evidence (through the proffer) (R. ___) which supports their position that the South Carolina Appellate Courts would recognize Plaintiffs' claim including trespass without physical invasion of their property by

trichloroethylene ("TCE"). Plaintiffs' evidence includes the following: First, Plaintiffs' Exhibit 12 is a map drawn by Plaintiffs' expert regarding the area of contamination and the Plaintiffs' properties in this case in close proximity to the red line. Second, Carol Minsk of the South Carolina Department of Health and Environmental Control has testified that the contamination runs from AVX down to 11th Avenue South. See Carol Minsk Exhibit No. 1, Page 167, lines 8-11. Third, Plaintiffs produced the deposition of the Camps who live at 1408 Beaver Road which is directly across the street from AVX. Although the Camps property is not contaminated, the Camps attempted to get a loan to repair their property and were denied such a loan because the property nearby was being cleaned up (See deposition of Camp, Exhibit 2, Page 222, lines 15-18.) Also, the Camps produced a voicemail from a bank official which indicated that the home could not be used as collateral for the loan. (Deposition of Camp, Page 24, lines 1-25) (and telephone recording attached to deposition.)

Other exhibits introduced include Exhibit No. 3 a letter from Tanya Haun of Carolina Trust Federal Credit Union wherein Ms. Haun advised Plaintiffs' counsel:

> To reiterate, we simply made a business decision to delay lending in that area until the legal issues regarding contamination are resolved. (R. _____).

Plaintiffs' Exhibit No. 4 was proffered to the Court from Henry Beckham, a licensed South Carolina Real Estate Appraiser who testified:

> It is my professional opinion that properties which are in the vicinity of and near contaminated properties have had a drop in the value because of limited marketability, limited financing by financial institutions, limited rent ability and limited appeal because the properties are located in neighborhoods which have TCE contamination. (Affidavit of Henry Beckham, Exhibit 4, Page 2.) (R._____).

Plaintiffs also produced Exhibit No. 5 for the Court to consider which is a supplemental Affidavit of John Kilpatrick, a nationally known expert in the field of evaluating contaminated properties and those properties near contamination. Kilpatrick opined:

> It is my opinion, to a reasonable degree of certainty, that those properties which abut the class area are affected and have damages because of their proximity to the class area. (R. _____).

Other Exhibits Plaintiffs produced for the Motion for Reconsideration include Exhibit No. 9 which is the Consent Order between AVX and the Department of Health and Environmental Control regarding the cleanup of the trichloroethylene and other volatile organic compounds at the facility. Further of note is Exhibit No. 9 and the Department's finding that:

> AVX carried out a number of soil remedial actions during the mid-1980's without notifying the Department. (Consent Order of DHEC with AVX, Page 3.)

Finally, Plaintiffs produced to the Court Exhibit No. 10, an Opinion from the United States District Court on a similar issue in this very case in which the District Court found that summary judgment could not be granted to AVX on the issue of "stigma damages." That court noted that it has found several cases where "Courts in other jurisdictions have held that stigma damages may be recoverable under certain circumstances." Exhibit No. 10, Order of Judge Terry L. Wooten, AVX v. Horry Land Company, Inc., 686 F.Supp.2d 621 (D.S.C. 2010). (R. _____). Despite this evidence, the court refused to reconsider its original decision and dismissed this case by form Order without comment. (R.___).

IV. THE COURT ERRED IN DISMISSING THE NEGLIGENCE CAUSE OF ACTION.

The Trial Court in its Order dismissed all claims brought by the Plaintiffs against the Defendant including Plaintiffs' negligence claim. The Court in its Order cited two Federal Court cases, including In re Wildewood Litigation, 52 F.3d 499 (4th Cir.1995). The Wildewood Litigation case concerned ground water contamination from TCE and while the Fourth Circuit dismissed the nuisance cause of action, the negligence cause of action was sent to the jury. The Plaintiffs in In re Wildewood Litigation produced expert testimony from real estate brokers describing a 60% to 80% decrease in values of the Plaintiff's property as a result of the TCE plume. Further, the In re Wildewood Litigation supports Appellants' position that the negligence cause of action should not have been dismissed and the Court's decision to dismiss the negligence cause of action was error.

The proffered evidence presented at the Motion for Reconsideration hearing show that AVX violated South Carolina pollution law and that such violations constitute negligence per se. Tante v. Dan River, Inc. 286 S.E. 140, 332 S.E.2d 534 (1986) (DHEC pollution regulations used in upholding an award of actual and punitive damages for negligence admission of sooty material.)

In Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (S.C.App. 1995), the Plaintiff brought a tort action for ground water contamination against the Defendant. The causes of action were nuisance, trespass, negligence and strict liability. Eighty-eight cases were consolidated for trial. The central issue in the case involved the geographical location of the property of each Plaintiff in relation to contaminated water. The cases were broken down into categories. One category included those properties which the Defendant claimed would be within the plume. A second category consisted of those

properties outside the plume. The Trial Court, at the conclusion of the trial, told counsel he intended to give the jury a color coded map as a court exhibit which depicted the location of each Plaintiff using the classifications argued by the parties.

On appeal of the jury verdict, the court noted "There was no agreement to aggregate land owners who adjoined the creek and no agreement for extrapolation of the verdict on that basis. Therefore, any inference to be derived by the geographic location of the landowners' properties in relation to the creek and the damages allegedly suffered by their neighbors, the Brockmans and Cunninghams was a factual issue for the jury to decide. A resolution of the evidentiary conflicts is within the province of the jury, not this court." 453 S.E.2d at 913. Accordingly, based on Johnson, those properties outside the affected area were allowed to go to the jury.

The Plaintiff alleging negligence need not show that the Defendant intended to enter his land (as in a trespass) nor that the Defendant intended to interfere with his use and enjoyment of the property (as in nuisance). The standard for liability in negligence is not one of intent but one of acting reasonably:

> A Defendant is negligent when it fails to do what a reasonable person would have done under the same or similar circumstances. See Restatement of Torts §283 (1977).

See Cottonaro v. Southwest Industrial, Inc., 625 NYS 2d 773, 774 (NY Appellate Div. 1995) (noting that "damages from a diminished market value of real property as a result of public fear of exposure to a potential health hazard constitutes a consequential damage"). See also Citizens for Equity v. New Jersey Dept. of Environmental Protection, 599 A.2d 516, 521 (NJ Sup.Ct. 1990), affirmed 599 A.2d 507 (NJ 1991) (Sanitary Land Fill Facility Contingency Fund shall be strictly liable for all direct and indirect damages, no matter by

whom sustained, proximately resulting from the operations or closure of any sanitary landfill).

V. DID THE TRIAL COURT ERR IN DISMISSING THE PLAINTIFFS' CLAIM FOR STRICT LIABILITY?

The trial court erred in its ruling dismissed Appellants' claim for strict liability concerning the release of hazardous chemicals. Such dismissal was inappropriate in that this was a novel issue of law. See Ravan vs. Greenville County, 315 S.C. 447, 461, 434 S.E.2d 296, 305 S.C.App. 1993) in which the court noted there was "a split of authority as to whether strict liability should apply to toxic waste." The Trial Judge in Ravan "instructed the jury that it could hold the corporate Respondent's activities abnormally dangerous by considering the factors outlined in Restatement (2d) of Torts §520. The Court of Appeals stated "Were we to accept the Restatement's criteria, we would not be inclined to hold the corporate Respondent's activities were abnormally dangerous as a matter of law. However, we leave the determination to our Supreme Court should it consider further review of this case." 434 S.E.2d at 305.

Appellants suggest to the Court that Restatement (2d) of Torts §519-520 is applicable. While the first Restatement refers to "ultra hazardous activities" the Second Restatement uses the term "abnormally dangerous activities". For purposes of dismissal, there is no difference. The court wrongfully dismissed the claim for "ultra hazardous activities" at the preliminary stages of the litigation. Section 520 of the First Restatement provides:

> An activity is ultra hazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, (b) it is not a matter of common usage.

Section 520 of the Second Restatement provides:

> In determining whether an activity is abnormally dangerous the following factors are to be considered:
>
> a. Whether the activity involves a high degree of risk of some harm to the person, land or channels of others;
>
> b. Whether the gravity of the harm which may result from it is likely to be great;
>
> c. Whether the risk cannot be eliminated by the exercise of reasonable care;
>
> d. Whether the activity is not a matter of common usage;
>
> e. Whether the activity is inappropriate to the place where it is carried on;
>
> f. The value of the activity to the community.

In sum, Ravan only holds that a court would not find strict liability as a matter of law. Indeed, the opinion indicates that the court would be inclined to allow this issue to be decided by the jury and not the court. Further, South Carolina recognizes the doctrine of strict liability with regard to chemicals. See Frost v. Berkeley Phosphate, 42 S.C. 402, 20 S.E.280 (1896) (factory emitting dust in midst of town).

In this case, AVX was using extremely dangerous chemicals (trichloroethylene) in its plant which adjoined a residential area. Further, AVX secretly attempted to clean up the spill for years and failed to notify DHEC that the TCE had contaminated a nearby neighborhood. TCE is a known cancer causing agent and is considered to be a potent and deadly chemical. The trial court did not consider the Restatement of Torts (1^{st}) or (2^{nd}) and summarily dismissed the case. The court did so finding there had to be "physical impact" to the Plaintiffs' property. (R. _____). Further, storage of hazardous waste in South Carolina results in strict liability for polluters under state environmental statutes. (See S.C. Code

§48-43-580, 600.) As a result, the trial court should not have dismissed the cause of action for strict liability in the preliminary stages of the case as this was a novel issue.

Under the negligence cause of action a groundwater user can be liable for pollution if the plaintiff approves the existence of the following: (1) a legal duty or obligation; (2) a failure by the defendant to conform; (3) a causal link between the conduct and the resulting injury; and (4) actual loss or damage. Kelly v. Para-Chem Southern, Inc., 311 S.C. 223, 428 S.E.2d 703 (1993).

It is settled in in this state that questions of negligence are for the jury and not for the court. J.J. Lawter v. Wen Chow Intl Trade & Inv, 286 S.C. 49, 331 S.E.2d 789 (1985). As previously has been argued, the deposition of Carol Minsk, resident hydrologist for the Department of Health and Environmental Control and the depositions of the Plaintiffs all support that fact that the TCE contamination will take years to clean up and sole source of the TCE contamination is from AVX. (See Depo. of Minsk, (R. ____)

VI. DISMISSAL OF APPELLANTS' COMPLAINT IS A DRASTIC REMEDY.

It is well settled in South Carolina that a cause of action should not be struck merely because the Court doubts the Plaintiff can recover. South Carolina law allows pleadings to be liberally construed so that substantial justice is done between the parties, thus a judgment on the pleadings is considered to be a drastic procedure by the Courts. Russell v. City of Columbia, 305 S.C. 86, 89 460 S.E.2d 338, 399 (1991).

The test before this court in deciding whether the lower court properly granted the Motion to Dismiss is to view the Complaint in the light most favorable to the Plaintiffs to determine whether there is any valid claim for relief. Morrow Crane Co. v. T.R. Tucker Constr. Co., 296 S.C. 427, 429, 373 S.E. 2d 701, 702 (S.C.App. 1988.) Using this standard,

the Trial Court's decision to dismiss the Complaint in toto including all four causes of action was improper and a drastic remedy which is not favored in this State.

It is well settled in South Carolina that motions to dismiss are disfavored. The standard for this Court in dismissing a complaint is "no relief can be had under any theory." O'Laughlin v. Windham, 330 S.C. 379, 498 S.E.2d 689 (1998). Further, the Court in reviewing the matter should consider all inferences reasonably deducible under any theory of law. See Evans v. Gunter, 294 S.C. 525, 366 S.E.2d 44 (1988). Finally, motions to dismiss must be decided using substantial justice and in the light most favorable to the Plaintiff with all doubts resolved in his belief that the complaint states any claim for any relief. See Mr. G v. Mrs. G, 320 S.C. 305, 465 S.E.2d 101 (1995); Overcash v. SCE&G, 364 S.C. 569, 614 S.E.2d 619 (2005) (goal of motion to dismiss and the courts hearing of such is to do "substantial justice between the parties"); Lydia v. Horton, 343 S.C. 376, 540 S.E.2d 102 (2000) (pleadings must be so defective that no cause of action is sustainable).

VII. THE COURT ERRED BY FAILING TO CONSIDER ADDITIONAL EVIDENCE AT THE MOTION FOR RECONSIDERATION HEARING.

When Plaintiffs attempted to argue its Motion for Reconsideration, the Defendants objected to any new material being presented to the Court. During the hearing, the following occurred:

> THE COURT: And so it's going to be based upon what was presented at the last motion hearing without any additional evidence or anything of that nature. In other words, what you're asking me to do is reconsider my prior decision based upon the fact that I failed to consider something that was presented there or I did not address something that was presented at that hearing.
>
> MR. CONNELL: Yes, sir.
>
> THE COURT: But you can't produce anything that was not produced at the original hearing.

> MR. CONNELL: Your Honor, I'd still like to mark this as an exhibit, Exhibit Number One for purposes of the record.

The Plaintiffs believe that the Court's decision not to review and consider the Exhibits attached to the Motion for Reconsideration is error. Over 17 months had passed since the time the court had heard the Motion to Dismiss without a written Order. During that time, extensive discovery had occurred on a novel issue. This newly discovered evidence was not available at the time of the original motion hearing and clearly proves injury to these Plaintiffs.

The Court should have considered all of the evidence in Exhibit No. 1 (the proffer) in making its decision. The Plaintiffs could not have presented the evidence that was part of Proffer No. 1 at the original motion hearing because that evidence had not been discovered. The Plaintiffs assert that this evidence was of such a magnitude that had the Court known of it earlier, the outcome would have been different. Also the new evidence (the proffer) was material and not merely cumulative. Further, Plaintiffs were entitled to have the Court consider this evidence since the Court's Order was not final. See Chastan v. Hiltabidle, 381 S.C. 508, 673 S.E.2d, 826 (S.C. App. 2009) (Purchasers failed to preserve for Appellate review their claims that real estate agencies failed to comply with rule governing motions for summary judgment, where purchasers did not raise the claim in their motion in opposition or in their motion to alter or amend the judgment.)

The Trial Court issued its Order dismissing the Plaintiffs' case 17 months after the motion hearing in this case.[5] Extensive discovery had taken place and Appellant prepared a

[5] Also, on the same day the motion to dismiss was heard the Plaintiffs' Motion to Compel was granted which required Defendants to answer Plaintiffs' discovery. (R.___).

list of exhibits to show the progress of the discovery after the Court's oral decision to dismiss the case. Appellants' briefly cite those exhibits which the court refused to consider.

Exhibit 1 is a portion of a deposition of the DHEC Hydrologist Carol Minsk discussing the length and width of the plume of contamination outside of the AVX plant in the subdivision where the Plaintiffs lived. In Minsk's deposition, the Appellants point out that some areas of the plume had contamination in excess of 2,080 ppb for TCE when DHEC regulations requires TCE levels be less than 5 ppb (R. ____).

Exhibit 2 is the deposition of Janice Camp who lives directly in front of AVX at 1408 Beaver Road (R. ____). Although her property had not been physically impacted with TCE contamination, Appellant was unable to secure real estate loans. (Deposition of Camp) (R._____, Pg. 22). Further Camp presented evidence that she could not borrow $10,000 to upgrade her property because of the TCE contamination on property near her house. (Camp Record on Appeal, Page 23.) R. ____. Finally, Camp had a telephone answering machine recording which she played at the deposition of an employee of a bank advising Camp she could not use her home as collateral for a loan because of the contamination in the area. (Deposition of Camp, Page 24).

Exhibit No. 3. In further support of Camp's claim, Appellant presented Exhibit No. 3, a letter written by Carolina Trust Federal Credit Union in August 27, 2010 which Tanya Haun, a Vice President for lending and branch operations wrote:

> Inquiry from Mr. & Mrs. Camp regarding their loan request to not to proceed to the loan application phase. They inquired by phone and were advised verbally we are not able to assist them while the legal issues regarding the contamination are in progress. (Exhibit No. 3, letter of Tanya Haun dated August 27, 2010.

Exhibit No. 4 that was presented for the Trial Court's consideration was an Affidavit of a South Carolina licensed Real Estate Appraiser Henry Beckham. He stated:

> It is my professional opinion that properties which are in the vicinity of and near contaminated properties have had a drop in the value because of limited marketability, limited financing by financial institutions, limited rent ability, limited appeal because the properties are located in neighborhoods which have TCE contamination. (Exhibit No. 4, R. ____.)

Exhibit No. 5 presented to the Trial Court for its consideration was an Affidavit of John Kilpatrick, an expert on diminution of values of property as a result of contamination. Mr. Kilpatrick in his Affidavit wrote:

> It is my opinion, to a reasonable degree of certainty, that those properties which abut the class area are affected and have damages because of their proximity to the class area. (Exhibit No. 5 Supplemental Affidavit of John L. Kilpatrick) (R. ____.)

Exhibit No. 6 is the case of Ravan v. Greenville County, 315 S.C. 447, 434, S.E.2d 296 (S.C. App. 1993). This case has been cited to the court continuously throughout this brief as has Exhibit No. 7, Johnson v. Hoechst, 317 S.C. 415, 453 S.E.2d 908 (S.C. App. 1995).

Exhibit No. 8 is the Trial Court's Order granting Plaintiffs' Motion to Certify Class filed August 30, 2011. The Order of Class Certification discusses the contaminated area physically impacted as "an accurate depiction of the area to the North of the AVX Plant where the groundwater has been impacted by dissolved TCE." Appellants also point to Exhibit No. 12 which is a map of the contamination circled by a red line. (R. ___.)

Appellants also presented extensive deposition testimony for the court, including the depositions of the Camps, the Chestnuts and the Jeffords along with the depositions of Henry Beckham, Dr. C. W. Fetter, and James Watson, all of which depositions describe the

property damage to the named Plaintiffs' property as a result of near proximity to the contaminated property. (Exhibit 10) (R. _____.)

Finally, Appellants presented the recent Order of the United States District Court Judge Terry Wooten in the case of AVX Corporation v. Horry Land, 686 F.Supp.2d, 621 (D.S.C. 2010). In that case listed as Exhibit No. 11, the court discussed South Carolina case law including the case of Gray v. Southern Facilities, Inc., 256 S.C. 558, 183 S.E.2d 438 (1971), Ravan v. Greenville County, 315 S..C. 447, 434 S.E.2d 296 (S.C. Ct. App. 1993) and Yadkin Brick Company v. Materials Recovery Company, 339 S.E. 640, 520 S.E.2d 764 (S.C. App. 2000).

The United States District Court in considering these cases in the Motion for Summary Judgment by the Defendant AVX stated:

> These cases do not provide explicit guidance regarding the issues at hand. In fact, only the Court in Gray acknowledges the issues directly. However, even Gray mentions stigma damages generally, rather than specifically.

The Court then found:

> This court does not conclude that Gray is a bar to stigma damages under all circumstances. The court in Gray decided it did not need to address the issue. Further, the court in Gray does cite a source which states that reputation damages to property have been held an improper measure of damages. However, immediately after noting this citation, the court stated that its own research revealed very few cases on the issue. Notably, the court then concluded that it did not appear that a definitive rule on the topic has been developed.

The United States District Court further stated:

> This court does not find that Gray stands for the proposition that stigma damages by their nature are speculative, and therefore cannot be recovered. As mentioned, the court in Gray withheld addressing the issue of stigma damages definitively.

In sum, the District Court denied the Motion for Summary Judgment on all causes of action, including strict liability, negligence and nuisance. Appellants respectfully suggest to the court that since the United States District Court refused to grant the Motion for Summary Judgment on the same legal theories that the Trial Court should not have done so on a 12(b)(6) Motion.

VIII. THE SOUTH CAROLINA RESIDENTIAL PROPERTY DISCLOSURE ACT PROHIBITS A DISMISSAL UNDER SCRCP 12(b)(6).

South Carolina has enacted the Residential Property Disclosure Act, S.C. Code Ann. § 27-50-10. The Act holds any owner liable who fails to disclose any material information on the disclosure form he knows to be false or misleading. S.C. Code Ann. § 27-50-65. This Act requires owners of real property to make certain disclosures prior to the sale of real property to any prospective purchaser. The depositions of Plaintiffs Chestnut, Jefford, Nance and Ramsey all have been taken by Defendants. R. ____. Each has testified that they believe their property was devalued. (See Depositions of Chestnut, Jefford, Nance and Ramsey.) Because South Carolina has adopted the Residential Property Disclosure Act, this State has found as a matter of law that honest and forthright disclosures should be made in the sale and purchase of real property. It is a public policy in the State of South Carolina to advise a potential purchaser of any defects regarding the sale of homes. Surely, Defendant would not argue to this Court that if Plaintiffs were to try to sell their property they should not advise any potential purchaser of the close proximity of contamination by AVX.

CONCLUSION

Imagine that you are a homeowner living in proximity to the AVX Corporation at 17th Avenue South. As a result of investigations, State and Federal Agencies disclose that toxic wastes are leaking from the plant into the nearby ground and surface water. Further,

the offender has been secretly cleaning up the toxic chemicals without regulatory approval for years. Furthermore, toxic water emanating from the plant travels through the soil and air into the homes and yards of nearby residents. All irrigation wells and ground water access have been closed by governmental authorities. Fortunately, your family's home has not been contaminated by the toxic substances and there is no need to relocate. Although the close proximity of the contaminated site concerns you, you assume that the area will be restored pursuant to the cleanup efforts. You soon discover that part of the cleanup includes not cleaning up the entire area but only cleaning up some toxic areas which will take up to 25 years. Even though the contamination seems to be contained, the fact that you reside amidst a publically known contaminated area is a serious factor that concerns the average home buyer. The public's perception and fear of the contaminated area created by the leaking toxic chemicals greatly diminishes the market value of your property. This issue should survive a motion to dismiss.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.

Gene M. Connell, Jr.
L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587-4547
(843) 238-5648
Attorneys for Appellants

July ___, 2012.