UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Perrin and Debbie Babb, Wayne and Sarah Elstrom, Alan and Kathy Jackson,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:10-CV-01724
Lee County Landfill SC, LLC;	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT AS MATTER OF LAW OR FOR A NEW TRIAL OR REMITTITUR

COME NOW Plaintiffs, by and through undersigned counsel, file this Memorandum of Law in Opposition to Defendant's Motion for Judgment as Matter of Law or for a New Trial or Remittitur, and show this Honorable Court as follows:

I. The Punitive Damages Verdict Should Not be Set Aside under Rule 50(b) or Subjected to a New Trial under Rule 59(e).

A verdict for punitive damages in a South Carolina state court may generally be reviewed for excessiveness under an abuse-of-discretion standard. Mattison v. Dallas Carrier Corp., 947 F.2d 95, 100 (4th Cir. 1991). Appellate courts will reverse a trial court's refusal to set aside an award only when the award is "so shockingly excessive as manifestly to show that the jury was actuated by caprice, passion or prejudice." Id.

The scope of review of a case in federal court has been described as mirroring the state court review, subject to the following:

> When the verdict is returned in a federal court and is subject to review under Rule 50(b) and 59, no significantly greater restraint is provided. The verdict is permitted to stand unless, under Rule 50(b), no substantial evidence is presented to support the award, or, under Rule 59, the verdict is "against the clear weight of

> the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice."

Id. (internal citations omitted).

Defendant has failed to meet its burden demonstrating that the unanimous verdict rendered by the jury in this case is against the clear weight of evidence or should be subject to a new trial or remittitur.

A. Standard for a motion to set aside under Rule 50(b).

Rule 50(b) of the Federal Rules of Civil Procedure provides the method for renewing a motion for judgment as matter of law after trial. An order granting a motion for judgment as a matter of law is appropriate "only if 'there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue.'" Robinson v. Equifax Information Servs., LLC, 560 F.3d 235, 240 (4th Cir. 2009) (quoting Brown v. CSX Transp., Inc., 18 F.3d 245, 248 (4th Cir. 1994)).

"In assessing the sufficiency of the evidence, our power of review continues to be limited by the *Seventh Amendment*, which provides that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'" Tights, Inc. v. Acme-McCrary Corp., 541 F.2d 1047, 1055 (4th Cir. 1976). In making the determination whether a judgment notwithstanding the verdict is appropriate, courts are not permitted to retry factual findings or credibility determinations reached by the jury. Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 301 (4th Cir. 1998).

Instead, when ruling upon a motion for directed verdict, courts must view the evidence in the light most favorable to the party against whom the motion is made, giving him or her the benefit of all reasonable inferences from the evidence. Tights, Inc., 541 F.2d at 1055-56.

Appellate courts review *de novo* the grant or a denial of a motion for a judgment as a matter of law. Robinson, 560 F.3d at 240.

B. Standard for a motion for new trial under Rule 59(e).

When deciding Rule 59 motions for new trial, a new trial may be granted: (1) if the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. Cline, 144 F.3d at 301.

A district court is to determine whether the jury's verdict is within the confines set by state law, and determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. Atlas Food Sys. and Servs., Inc. v. Crane Natl. Vendors, Inc., 99 F.3d 587, 593 (4th Cir. 1996). A trial court's denial of a Rule 59 motion for new trial is reviewed for abuse of discretion. Robinson, 560 F.3d at 242.

A court reviewing the propriety of a motion for judgment notwithstanding the verdict and a motion for new trial may resolve both motions upon the same evidence. See e.g., Cline, 144 F.3d at 302. As such, Plaintiffs address Defendant's Rule 50(b) and Rule 59(e) arguments collectively.

C. Defendant has failed to meet its burden under both Rule 50(b) and 59(e) because Plaintiffs have presented substantial evidence showing punitive damages are appropriate in this case.

1. Standard for awarding punitive damages.

"In order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." Welch v. Eptstein, 342 S.C. 279, 301 (S.C. App. 2000) (citing S.C. Code Ann. § 15-33-135). The issue of punitive damages must be submitted to the jury if

more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. Id. A conscious failure to exercise due care constitutes willfulness. Id.

The test by which a tort is characterized as reckless, willful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights. Cody P. v. Bank of Am., N.A., 395 S.C. 611, 625 (S.C. 2011). Stated another way, intent is proved by showing that the defendant acted voluntarily and that he knew or should have known that the result would follow from his act. Snow v. City of Columbia, 305 S.C. 544, 553 (S.C. App. 1991); see Restatement (Second) of Torts, § 821 D, comment e; Environmental Law in South Carolina, Third Edition, Samuel L. Finklea, III and Branford W. Wyche, S.C. Bar, 2011, p.19). An interference with the use and enjoyment of property is "intentional" if the defendant "(a) acts for the purpose of causing it or (b) knows that it is resulting or is substantially certain to result from his conduct." Restatement (Second) of Torts, § 822, cmt. a. It is not necessary to show that the act was inspired by malice or ill will. Restatement (Second) of Torts, § 825.

A jury question as to punitive damages is presented when there is evidence of a statutory violation. Tant v. Dan River, Inc., 289 S.C. 325, 326 (S.C. 1986); Fairchild v. S.C. DOT, 2012 S.C. LEXIS 77 *10 (S.C. April 11, 2012). "[I]n order for the violation of a regulation to warrant a finding of willful or wanton conduct, there must be some evidence that the defendant appreciated the likelihood of harm to the plaintiff and acted with indifference to the requirements of the regulation." Ravan v. Greenville County, 315 S.C. 447, 458 (S.C. App. 1993). Whether or not a statutory violation contributed as a proximate cause to the injury is a question for the jury. Id. at 458-459; Fairchild, 2012 S.C. LEXIS 77 at *10.

2. Punitive damages were appropriately submitted to the jury because there is evidence of multiple statutory violations that bear a causal relation to the stench to which Defendant subjected the Plaintiffs.

One basis for the imposition of punitive damages is evidence of a statutory violation. In this case, there is evidence that statutory violations that contributed to the offsite odors that Plaintiffs experienced at their properties. Greer McLaurin testified that on December 5, 2008 and May 23, 2009, Defendant had failed to properly cover portions of the landfill, which were violations of state regulations. (See Trial Tr. 1406:23-1407:2, March 28, 2012, Greer McLaurin). Those failures constituted violations of Defendant's permit conditions, in addition to state statute. (Trial Tr. 1407:21-1408:6, March 28, 2012, Greer McLaurin). At trial, this testimony was corroborated by Defendant's own representative, James Amick, Jr., area President for Republic Services and who is responsible for the day-to-day operations of the Lee County Landfill. (Trial Tr. 203:9-19, March 19, 2012, James Amick, Jr.). Mr. Amick testified as to the violations and the offsite odors caused by them:

> **Q:** Of course you would agree that on a couple of occasions DHEC came and found that you all had waste that wasn't covered at all overnight?
>
> **A:** Yes, sir.

(Trial Tr. 217:13-16, March 19, 2012, James Amick, Jr.).

> **Q:** Then six months later it happened again. This is Plaintiffs' Exhibit 50. It happened again. You were notified that DHEC came one early morning and found that at least there was some area that was only partially covered?
>
> **A:** Yes, sir.

(Trial Tr. 217:25-218:4, March 19, 2012, James Amick, Jr.).

> **Q:** And you would agree with me that if something like this is exposed all night long like the garbage odors, likely gas odors are coming off that landfill, aren't they?

A: Yeah. I mean you're supposed to cover it at night. That's the purpose of covering it.

(Trial Tr. 218:5-9, March 19, 2012, James Amick, Jr.).

Q: In fact there's a state regulation and a federal regulation for daily cover that says to control odors at the site?

A: That's right.

Q: You would agree the regulation says that for daily cover?

A: Yes, sir.

Q: To control odors at the site?

A: Yes, sir. That's purpose of the cover at night.

(Trial Tr. 218:10-18, March 19, 2012, James Amick, Jr.). Furthermore, Defendant's Environmental Manager, Henry Ludwig, Jr, (Trial Tr. 234:17-24, March 20, 2012, Henry Ludwig Jr.) provided further evidence of the violations:

Q: What was it that initially got your attention about Lee County Landfill within a day or two after the merger?

A: Actually we were keeping the state advised as to how the merger, South Carolina DHEC, how the merger was progressing. So when I let the agency know that the merger had been consummated, they let me know that they had an issue with cover that we needed to address immediately, that there had been a problem with the site not covering that very morning. So that was my first, you know, initiation or introduction to the site.

Q: And that is the very first morning of the merger?

A: It was the morning after.

Q: That your site had no daily cover?

A: That's correct.

(Trial Tr. 236:8-21, March 20, 2012, Henry Ludwig Jr.).

Q: All right. On that one day. It happened again a few months later, didn't it?

A: A few months later there was an insufficient with insufficient cover. It wasn't covered to their satisfaction. Initially they did not cover that night. The second time it was not done to the state's satisfaction.

(Trial Tr. 237:4-9, March 20, 2012, Henry Ludwig Jr.).

Q: And when you say it wasn't covered to the state's satisfaction, you're not telling the jury that this is some minor technical issue? You would agree this is not in compliance with the regulations?

A: It's not in compliance with their regulations or our standards. There was dirt there. There was just not enough dirt to hide the garbage, which is what's expected.

Q: Wasn't enough dirt to cover the garbage?

A: Correct.

(Trial Tr. 237:15-23, March 20, 2012, Henry Ludwig Jr.).

Q: And the actual regulation that's 258.11, the actual regulation, both state and federal, say that six inches of daily cover is to be used at the end of each working day to control odors, doesn't it?

A: State solid waste regulation requires six inches of clean soil or an approved alternate type cover, and controlling odors is one of numerous purposes for covering.

(Trial Tr. 238:3-9, March 20, 2012, Henry Ludwig Jr.).

Q: And you would agree that when the landfill goes overnight uncovered like this that that is a violation of the state and federal regulations?

A: I would agree that violates the state solid waste regulations, yes.

Q: And the purpose as stated in the regulation, the purpose of that daily cover is to, one of the purposes, is to control odors at the site?

A: One of the numerous purposes listed, yes.

(Trial Tr. 238:20-239:3, March 20, 2012, Henry Ludwig Jr.). Additionally, Bart Keller, who is in charge of the day-to-day operations at the Landfill also testified concerning the violation in which Defendant was cited by DHEC. (Trial Tr. 1550:17-1551:13, March 29, 2012, Bart Keller).

Also, see Plaintiffs' Exhibit No. 6, an e-mail from Angela Leonard, a high-level Republic engineer, noting that an inspection found "several areas of exposed waste that need repair."

This undisputed evidence adduced at trial satisfies the standard set out by Tant, Fairchild, and Ravan – the statutory violations committed by Defendant warrant the jury consideration of punitive damages. The jury was instructed as to punitive damages and concluded that punitive damages were appropriate in regards to each Plaintiff. See Tant, 289 S.C. at 326 (evidence that defendant was aware of emission problems prior to complaint sufficient to submit punitive damages to jury considering "evidence of a statutory violation").

Defendant argues that Fairchild is inapplicable to this case because there is no testimony that "odors from the Landfill traveled to plaintiffs' properties on those two evenings;" Defendant contends there is no "causal connection" between the two regulatory violations and the damages at issue in this case, i.e. the stench created by Defendant's conduct related to the Landfill.

First, see Defendant's Exhibits 225 and 246, the DHEC Inspection Reports of December 5, 2008 and May 23, 2009, which show findings of off-site doors on the days of the statutory violations of daily cover. Also, at trial, the testimony of Mr. McLaurin established his appearance on December 5, 2008 in response to receiving odor complaints.

Second, Fairchild and Ravan quickly dispose of Defendant's assertion because the issue of whether a statutory violation proximately caused injury is a question for the jury. In this case, the evidence was submitted to the jury and the jury found for Plaintiffs on all claims and all damages, including punitive damages.[1] Also, in Fairchild, the Supreme Court of South Carolina

[1] It should also be noted that Plaintiffs requested the Court instruct the jury that if it determined that Plaintiffs proved willful, wanton, reckless, or malicious violation of their rights, then it was not only the right of the jury to award punitive damages, but its ***duty***. See Magnolia North Property Owners' Assn., Inc. v. Heritage Communities, Inc., 2012 S.C. App. LEXIS 50 *20 (Feb. 15, 2012). The Court refused that instruction, however, the jury still returned unanimous verdicts concerning Plaintiffs' entitlement to punitive damages and the amounts.

noted that it was only necessary to show that the defendant "might have violated" the statute and from that violation there was an "inference that that the violations were the proximate cause of the accident," which rendered the jury's consideration of punitive damages appropriate because of the inference of reckless, willful, or wanton conduct. Fairchild, 2012 S.C. LEXIS 77 at *14. Moreover, citing long-standing South Carolina precedent, the Supreme Court of South Carolina has noted that a violation of a statute constitutes negligence *per se*, and negligence *per se* is some evidence of recklessness and willfulness that requires the submission of the issue of punitive damages to the jury. Id. at **5-6.

Third, Defendant's attempt to compare its statutory violations to those in Ravan are unconvincing. In Ravan, there was no evidence at all regarding the liquid waste at issue on the "couple of occasions" that a driver carried it to the landfill. Ravan, 315 S.C. at 470. "[T]he evidence provides no hint of the content of that waste, that it was toxic, or that it in any way contributed to Ravan's ground water contamination." Id.

Unlike Ravan, in this case, there is substantial evidence that Defendant's landfill produces off-site odors and stench. Furthermore, it is undisputed that the regulations that Defendant violated are intended to address such odors. The violations at issue occurred during the timeframe for which Plaintiffs are entitled to recover for the nuisance and stench created by the landfill. This evidence is sufficient that "some inference of causation" has been shown between the statutory violation and the injuries complained of in this case. See Fairchild, 2012 S.C. LEXIS 77 at *10 (citing Cartee v. Lesley, 290 S.C. 333, 338 n. 3 (1986)).

3. There is substantial evidence in the case showing that Defendant has intentionally maintained the Lee County Landfill in a manner to cause injury to Plaintiffs.

Another independent basis for the imposition of punitive damages is the evidence of Defendant's conscious failure to exercise due care over the Landfill, which can be shown through a myriad of ways in this case. This evidence demonstrates that Defendant has been conscious of the invasion of Plaintiff's rights similar to Cody P. and Restatement (Second) of Torts § 822. Defendant had actual knowledge of the results of its conduct yet failed to rectify the situation, which is sufficient to show intentional conduct under Snow. This evidence is of the highest level demonstrating that Defendant's conduct is willful, wanton, and in reckless disregard of Plaintiff's rights.

a. Length of time that Landfill has been a nuisance.

Defendant's Landfill has been a nuisance, caused injury and damage to Plaintiffs and interfered with their basic way of life for a significant period of time. At trial, Plaintiff Kathy Jackson testified to the stench for the last five or six years. Her testimony highlights how the stench from Defendant's landfill has impacted her life and her use and enjoyment of her property. (Trial Tr. 781:24-782:15, March 23, 2012, Kathy Jackson). Furthermore, Plaintiff Sarah Elsrom testified that her family has not enjoyed being outside of her home for some three years. (Trial Tr. 745:6-9, March 23, 2012, Sarah Elstrom).

b. Defendant's conduct creates substantial odors and stenches.

There is substantial evidence from the Plaintiffs, and other, demonstrating how awful the odors and stenches that Defendant emits from its Landfill and how Plaintiffs lives are affected by them. (See Trial Tr. 747:16-19, March 23, 2012, Sarah Elstrom (filed lawsuit because of the smell); (Trial Tr. 446:2-11, March 20, 2012, Wayne Elstrom Jr) (cannot even go outside many evenings); (Trial Tr. 139:6-17, March 19, 2012, Kenneth Babb) (smells landfill approximately four or five days a week can even smell it inside his home); (Trial Tr. 781:24-782:15, March 23,

2012, Kathy Jackson) (stench has been bad for past five or six years and has had to stop planning events at her home because stench is unpredictable); (Trial Tr. 688:3-5, March 21, 2012, Alan Jackson) (odors are bad enough to force him to go indoors); (Trial Tr. 182:6-14, March 19, 2012, Donald Mathis) (strength of stench from landfill varies, but sometimes is strong enough to make a person vomit); (Trial Tr. 201:3-8, March 19, 2012, Donald Mathis) (Defendant has not honored its assurances to eliminate or control the odor because it still persists); (Trial Tr. 761:20-762:10, March 23, 2012, Stephen Welch) (odor from landfill prevents people from enjoying outdoor activities); (Trial Tr. 663:3-5, March 21, 2012, Randall Gooding) (odors are bad enough to make a person run back into his or her home).

Plaintiff Debbie Babb summarized the horrendous nature of the problems Defendant has caused to the Plaintiffs:

> **Q:** Have you ever been awakened in the middle of the night by the landfill odors?
>
> **A:** Absolutely. Particularly in my memory, specifically that 2008. And I remember it because of my son's surgery. But being home, we would smell it, you know, in early evenings when we were awake. But somewhere in the wee hours of the night I would wake up and it would be horrible, horrible coming into our home. And that -- that was multiple times. And I can't remember exactly. This would have been in 2009. But Perrin and I were like out where our computer is, kind of towards the Florida room, and we looked at each other at the same time and said, there is the landfill. It's almost like this living monster that haunts us.

(Trial Tr. 114:21-115:8, March 19, 2012, Debbie Babb).

> **Q:** Ms. Babb, how have the odors affected the quality of your life and the life of your family?
>
> **A:** Well, they have affected us in that the very place that we enjoy being, home, the very place that we would be able to feel like is our private place of the world, has these smells coming to it that we didn't ask for. We did not ask for any of that. And it makes us feel helpless. It makes us feel belittled. It makes us feel like you can't really plan five years out or ten

years out not knowing if you're going to be able to stand it anymore. And at what point do you just say this is enough? This is enough.

(Trial Tr. 116:16-117:1, March 19, 2012, Debbie Babb).

c. Defendant is aware of the stenches its operation creates and the harm caused to Plaintiffs, but affirmatively chooses to conduct activities that fail to address the odor or actually worsen those harms.

There is substantial evidence that Defendant was made explicitly aware of the harms and damages it was causing to its neighbors. The testimony of James Amick, Jr. provides as follows:

Q: And you -- at a meeting in March of 2009, you recall being at a public DHEC public meeting in March of 2009 regarding the Lee County Landfill?

A: Yes, sir.

Q: And in March of 2009 there were DHEC officials there; is that right?

A: Yes, sir.

Q: And there were local citizens, 100, 200, somewhere in that number of citizens there?

A: Yes, sir.

Q: Fair to say that most of the citizens were there complaining about the odor at Lee County Landfill?

A: That's correct.

Q: And this was your first DHEC public meeting relating to Lee County Landfill, was it not?

A: That's correct.

Q: Tell the jury, with DHEC present and these 100 to 200 people present how you described the odors at Lee County Landfill at the March meeting?

A: The odors were awful and I was embarrassed by them.

Q: In fact, you stood up at that meeting and said the odors were awful and you were embarrassed?

A: That's right.

(Trial Tr. 205:18-206:15, March 19, 2012, James Amick, Jr.). This testimony demonstrates the culpability of Defendant's conduct. Defendant was fully aware of the injury it caused its neighbors, yet ***intentionally*** continued the very activities that were causing those conditions and even worsening them.

Plaintiff Alan Jackson's testimony is evidence of the Plaintiff's sense of the Defendant's total defiance to address the intolerable odor issue. Plaintiff Alan Jackson's testimony as follows:

Q: Mr. Jackson, Mr. Dunlap asked you at your deposition if you had any reason to believe that any of the actions and conduct of the landfill was I believe he said intentional; is that correct?

[Objection noted]

(Trial Tr. 694:1-6, March 21, 2012, Alan Jackson).

Q: What was your answer when he asked you that?

A: I said that I didn't think this the landfill was intentionally trying to put odors in my yard. I didn't feel that they were.

Q: Having sat through this trial and heard the testimony what is your opinion today?

A: I've got a different.

Q: So have you changed your opinion?

A: I have. I've got a different opinion. If they are saying that I don't currently smell these odors and that I can't tell the difference between garbage, trash smell, and Alpaca manure or chicken mature, then obviously they think everything is okay. So that makes me think that they either don't care or they're saying I'm not being truthful. So it's almost as if it is intentional, that there is other things that are more important, whether it's the bottom line of the business, than my personal freedom to go in my yard and not have the smell the odors from the trash dump.

(Trial Tr. 694:12-695:4, March 21, 2012, Alan Jackson).

Additionally, Defendant affirmatively chose to stop using risers and misters to abate the stench of its operations. (Trial Tr. 219:2-13, March 19, James Amick, Jr.); (Trial Tr. 489:1-3, March 21, 2012, James Amick, Jr.). Close to half of the waste Defendant takes comes from out-of-state. (Trial Tr. 222:12-15, March 19, 2012, James Amick, Jr.). Defendant chooses to take about 800 tons of waste a day by rail. (Trial Tr. 220:7-11, March 19, 2012, James Amick, Jr.). That waste sits in rail cars for weeks at a time and, if it arrives on a Thursday or Friday, it will continue to sit at the site for several days before it is added to the Landfill. (Trial Tr. 221:15-222:6, March 19, 2012, James Amick, Jr.). Those rail cars present a significant odor problem for the Landfill. (Trial Tr. 472:20-473:1, 474:13-19, March 21, 2012, James Amick, Jr.); (Trial Tr. 3:17-24, March 21, 2012, James Amick, Jr.); (Trial Tr. 474:13-19, March 21, 2012, James Amick, Jr.). They come from places as far as 564 miles away. (Trial Tr. 490:11-14, March 21, 2012, James Amick, Jr.). Defendant's refusal to stop accepting rail car waste is another example of a manner in which Defendant could reduce the stench of the landfill yet affirmatively chooses not to do so. (Trial Tr. 645:16-22, March 21, 2012, Timothy Townsend, Ph.D).

Additionally, Defendant elects to accept "challenging material" that may present an "odor challenge" for the Landfill. (Trial Tr. 479:8-480:2, March 21, 2012, James Amick, Jr.). In those situations, Defendant merely charges a higher price for accepting and attempting to dispose of those materials. (Trial Tr. 479:8-480:2, March 21, 2012. James Amick, Jr.). Defendant made the "choice" to accept the problematic sludge waste at its landfill. (Trial Tr. 945:11-20, March 26, 2012, Steve Lamb); (Trial Tr. 954:11-14, March 26, 2012, Steve Lamb); (Trial Tr. 956:1-9, March 26, 2012, Steve Lamb).

Defendant has also refused to reduce the capacity of its Landfill. (Trial Tr. 485:13-25, March 21, 2012, James Amick, Jr.). Defendant's permit allows it to accept up to 1.9 million tons of waste a year and Defendant wants to keep that capacity entirely open. (Trial Tr. 485:6-8, 16:10-23, March 21, 2012, James Amick, Jr.). Defendant's intent to keep the Landfill running to capacity is despite the fact that the increased capacity has worsened the odors. (Trial Tr. 731:21-732:3, March 23, 2012, Thomas Drayton).

Defendant has also affirmatively chosen not to permanently cap the landfill, which would help to reduce odors. (Trial Tr. 642:17-22, March 21, 2012, Timothy Townsend, Ph.D). Moreover, Defendant does not apply more daily cover than necessary, despite the fact that the regulation states that more daily cover should be applied "as necessary." (Trial Tr. 1405:9-16, March 28, 2012, Greer McLaurin).

When the gas collection system Defendant installed is not working property, the landfill gas escapes off the site. (Trial Tr. 216:2-5, March 19, 2012, James Amick, Jr.).

Moreover, Defendant expressly acknowledges that it has off-site odors. (Trial Tr. 489:14-17, March 21, 2012, James Amick, Jr.). However, Defendant's representative has testified that is affirmatively obligated to prevent such odors:

Q: I talked about the rules a few times so far in this case. Let me run through this. Would you agree, number one, the landfill must control odors at the site?

A: It's our obligation to do that, yes.

Q: Do you agree, number two, the landfill must prevent landfill odors from leaving the site?

A: That's correct.

Q: Number three, do you agree if landfill must prevent landfill odors from going onto its neighbor's properties?

A: Yes.

Q: Number four, the landfill must prevent landfill odors from harming the rights of its neighbors?

A: Right.

Q: And, number five, would you agree the landfill must use procedures and equipment sufficient to prevent landfill odors from leaving the site?

A: Absolutely.

(Trial Tr. 491:18-492:2, March 21, 2012, James Amick, Jr.; see also Trial Tr. 345:10-23, 348:8-13, March 20, 2012, Henry Ludwig, Jr.). In fact, Mr. Amick further testified as to the severity of the odor problem with the Lee County Landfill:

Q: Mr. Amick, in wrapping up, I just ask that you've been in the landfill business 21 years or so now. Of all the landfills you've dealt with at any time in your 21-year career, if I were to ask you the question, which single landfill has had the worst odor problems, which landfill would it be?

A: This one.

Q: Lee County?

A: Yes, sir.

(Trial Tr. 492:10-18, March 21, 2012, James Amick, Jr.).

d. The problem has not gotten any better.

Furthermore, there is substantial evidence in this case that despite Plaintiffs' complaints concerning the odors and Defendant's assurances that the problems would be solved, the problems with the odor has not gotten any better. (See Trial Tr. 444:23-445:1, March 20, 2012, Wayne Elstrom Jr); (Trial Tr. 448:9-11, March 20, 2012, Wayne Elstrom Jr) (severity of odors has not diminished since 2009); (Trial Tr. 201:3-8, March 19, 2012, Donald Mathis) (Defendant has not honored assurances to control odors); (Trial Tr. 660:8-20, March 21, 2012, Randall Gooding) (Defendant promised to correct odors, but has not solved the problem).

This evidence demonstrates Defendant's improper conduct, knowledge of its consequences, and refusal to take full and proper steps to rectify the situation. As such, punitive damages are warranted. See Wimberly v. Barr, 359 S.C. 414, 424 (S.C. App. 2004) (denial of judgment notwithstanding the verdict as to punitive damages appropriate where there is evidence that defendant was informed about its wrongful conduct, yet still persisted in continuing it); Ravan, 315 S.C. 447 (for "the violation of a regulation to warrant a finding of willful or wanton conduct, there must be some evidence that the defendant appreciated the likelihood of harm to the plaintiff and acted with indifference to the requirements of the regulation"); Jackson v. Atlantic Coast Line Railroad, 317 F.3d 95 (4th Cir. 1963) (punitive damages are also appropriate in South Carolina where the defendant failed to correct a problem after he became aware of it).

4. The testimony of Dr. Townsend does not invalidate the award of punitive damages, but rather, demonstrates that Defendant has not taken the steps necessary to correct the problem it knows itself to have created.

Defendant cites the testimony of Dr. Townsend for the proposition that because he did not use the terms "egregious," "reckless," "malicious," "grossly mismanaged," or "extraordinary conduct," that somehow punitive damages are unwarranted in this case.[2]

Defendant's argument is premised upon the mistaken assumption that the use of certain buzzwords or speaking points is all that is necessary to trigger the application of punitive damages. That is not the law of South Carolina. Instead, the factual background related to the issues in the case is what needs to be examined, not the use of certain words that appear in case law and statutes.

In this case, Plaintiffs have presented substantial evidence demonstrating that the jury was correct in returning a verdict for punitive damages. Defendant committed statutory

[2] It should also be noted that Defendant repeats this argument, using a witness from the DHEC as well as its expert witnesses and representatives. (Doc. 231-1, pp. 6-11). Plaintiff incorporates its response in reference to Dr. Townsend against those witnesses.

violations which bore a causal connection to the injuries in this case. Defendant had knowledge of the foul odor, stench, and harm it was causing its neighbors, including Plaintiffs, yet it affirmatively chose to continue its activities in a manner that prolonged and even worsened those harms. Those actions demonstrate that Defendant consciously chose to invade Plaintiff's rights. Continuing that course of action in light of the consequences renders Defendant's conduct reckless, willful, and wanton pursuant to Welch, Cody P., Snow, and Restatement (Second) of Torts § 822, *supra.*

The fact that Plaintiffs' expert, Dr. Townsend, did not use the buzzwords contained in the jury instructions for punitive damages does not change the result. Indeed, if Dr. Townsend had used those terms, but Plaintiffs had failed to present real evidence of Defendant's intentional and willful violation of Plaintiffs' rights, then Defendant would have objected to the use of legal conclusions and Dr. Townsend invading the province of the jury. See United States v. Barile, 286 F.3d 749, 760-761 (4th Cir. 2002) (expert testimony containing mere legal conclusions excluded on a variety of bases).

As such, the use of certain terms should not influence the propriety of the punitive damages award in this case. See e.g., T.C. v. A.I. DuPont Hosp. for Children, 368 Fed. Appx. 285; 288 (3d Cir. 2010) (unpublished opinion) (the Informed Consent Statute of the Delaware Code "does not require the use of 'magic words' or impose a burden on medical experts to 'couch their opinions in legal terms'"); Green v. Weiner, 766 A.2d 492, 495 (Del. 2001) (medical experts not required to couch their opinions in legal terms or to articulate the standard of care with a high degree of legal precision or with "magic words").

Furthermore, Dr. Townsend's testimony demonstrates that Defendant's conduct fell far short of addressing the problems it knew it was causing. As such, Dr. Townsend's testimony is

additional evidence of Defendant's willful and reckless conduct. (See Trial Tr. 528:3-13, March 21, 2012, Timothy Townsend, Ph.D) (gas system inadequate to address amount of gas produced and contributed to strong odors experienced in neighborhood); (Trial Tr. 546:11-547:4, March 21, 2012, Timothy Townsend, Ph.D) (exceedences a result of Defendant's landfill being a wet landfill that creates gasses in excess of those that are being collected at the site, which leads to offsite odors); (Trial Tr. 518:25-522, March 21, 2012, Timothy Townsend, Ph.D (landfill is wetter than normal, which worsens odors associated with it); (Trial Tr. 565:21-566:2, March 21, 2012, Timothy Townsend, Ph.D) (expert opinion that landfill door is impacting the residential neighborhoods surrounding the landfill); (Trial Tr. 641:18-642:4, March 21, 2012, Timothy Townsend, Ph.D) (in response to questions about "egregious" or "reckless" conduct, expert opined gas odors and landfill odors are still leaving the site); (Trial Tr. 645:23-646:7, March 21, 2012, Timothy Townsend, Ph.D) (there are other things that can be done to control offsite odor that should be done to meet Defendant's obligations); (Trial Tr. 642:8-12, March 21, 2012, Timothy Townsend, Ph.D) (installation of more vertical and horizontal walls would help control offsite odors); (Trial Tr. 642:17-22, March 21, 2012, Timothy Townsend, Ph.D) (permanently capping the other sides of the landfill would help control odors); (Trial Tr. 647:20-648:6, March 21, 2012, Timothy Townsend, Ph.D) (Defendant is making an affirmative choice not to forego some of the landfill's capacity by capping during the process to help control odor and leachate); (Trial Tr. 643:2-8, March 21, 2012, Timothy Townsend, Ph.D) (Defendant is choosing not to use misters, which is another method of reducing offsite odors); (Trial Tr. 643:23-644:7, March 21, 2012, Timothy Townsend, Ph.D) (Defendant could be using more soil and different type of soil as daily cover to help reduce odors); (Trial Tr. 645:6-10, March 21, 2012, Timothy Townsend, Ph.D) (Defendant could use a intermediate cap to help reduce odors); (Trial Tr. 645:16-22,

March 21, 2012, Timothy Townsend, Ph.D) (Defendant could stop taking rail car waste to reduce the amount of odors); (Trial Tr. 640:20-25, March 21, 2012, Timothy Townsend, Ph.D) (it is very possible to be in complete compliance with regulations and still experience offsite odors).

D. Plaintiffs Have Demonstrated that Defendant Breached Its Duty to Plaintiffs, Which is Sufficient to Show Willful, Wanton, and Reckless Conduct.

Defendant attempts to argue that this case is akin to an action for medical malpractice and that Plaintiffs are precluded from recovering because they have allegedly failed to present expert testimony concerning the standard of care and breach thereof. It is unclear as to which causes of action for which the jury returned verdicts for each of the Plaintiffs Defendant is referring. However, based upon the legal elements Defendant contends are lacking, this argument is only applicable to Plaintiffs' negligence claims. As such, even if Defendant were correct in the argument that medical malpractice-type expert testimony is required in this case, there is no reason a verdict should be directed as to punitive damages that were premised upon any number of Plaintiffs' causes of action.

Next, at a bare minimum, Plaintiffs were entitled for the jury to consider the issue of negligence due to Defendant's statutory violations. The violation of an applicable statute is negligence *per se*, and whether or not such breach contributed as a proximate cause to the plaintiff's injury is ordinarily one for the jury. Fairchild v. S.C. DOT, 2012 S.C. LEXIS 77 *11 (S.C. April 11, 2012). Causative violation of an applicable statute constitutes actionable negligence and is evidence or recklessness, willfulness and wantonness. Id. As such, the jury properly returned verdicts for each of the Plaintiffs.

Furthermore, Defendants own admissions demonstrate that the jury was authorized to find it had breached multiple duties to Plaintiffs. Defendants own representatives specifically admitted the following: (1) that Defendant was obligated to prevent off-site odors (Trial Tr.

492:10-18, March 21, 2012, James Amick, Jr.; Trial Tr. 345-346, 348:8-13, March 20, 2012, Henry Ludwig, Jr.); (2) that it is entirely possible for Defendant to prevent those odors (Trial Tr. 994:12-21, March 26, 2012, Steve Lamb); and (3) that Defendant acknowledges that it still produces off-site odors. (Trial Tr. 489:4-13, March 21, 2012, James Amick, Jr.).

This testimony provides further proof of the willful and reckless behavior of Defendant because, while it is entirely possible for the owners of the landfill to prevent off-site odors, it depends upon them making the correct choices. Instead of making those choices, Defendant is cutting the very activities that could correct the situation and even accepting waste materials that present odor "challenges" so that it can charge more money for such waste.

Finally, even if Defendant were correct in its assessment that expert testimony is necessary concerning the standard of care and its breach, Dr. Townsend's testimony satisfies this require; he identified multiple areas that Defendant has failed to address and follow through on to prevent off-site odors. (See *supra*).

E. The Court Should Not Order a New Trial for Punitive Damages under Rule 59(e).

In the alternative, Defendant argues that if the Court does not grant its motion for judgment notwithstanding the verdict, the Court should grant a new trial on the basis that the verdict is against the weight of the evidence and that the punitive damages verdict constitutes a miscarriage of justice. Plaintiffs have already addressed the evidence supporting the punitive damages award in this case. As such, the propriety of the punitive damages award under Federal law and the State of South Carolina will be addressed in the following section.

F. The punitive damages verdict in this case meets all the criteria for set out by the United States Constitution and South Carolina law.

1. Standard for review of punitive damages award.

When reviewing the propriety of an award of punitive damages, the trial court must conduct a post-verdict review, as required by Gamble v. Stevenson, 305 S.C. 104, 106 (S.C. 1991) and BMW of North Am., Inc. v. Gore, 517 U.S. 559 (1996). See GTR Rental, LLC v. DalCanton, 547 F.Supp.2d 510, 517 (D.S.C. 2008). This review ensures that a punitive damages award comports with due process. GTR Rental, LLC v. DalCanton, 547 F.Supp.2d 510, 517 (D.S.C. 2008).

2. Gamble test

The factors contained in the test set out by Gamble include: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. Gamble v. Stevenson, 305 S.C. 104, 111-12 (1991).[3]

Each of the factors set out in Gamble supported by the evidence in this case. As a practical matter, it should be noted that the jury instruction provided by the Court to the jury on punitive damages addressed the issues set out in Gamble. The jury unanimously returned verdicts for Plaintiffs on punitive damages.

First, Defendant is extremely culpable in this case. It has acknowledged that the odors and stench at Plaintiff's property have been a problem; its representatives have explicitly acknowledged that the odors are "awful" and that they were embarrassed by them. Defendant has acknowledged that it has a duty to prevent off-site odors and has promised to rectify the

[3] Because the sixth factor of the Gamble test mirrors the concerning the ration of compensatory damages to punitive damages mirrors that set out in Gore, Plaintiffs will address the factor in the latter punitive damage analysis.

situation. Instead of addressing the matter, Defendant has failed to follow through on its actions and, indeed, even engages in practices that worsen the odor.

Second, Defendant has been operating for quite some time. In fact, Plaintiffs claims extended back since through June of 2007. During that same time, Defendant took in more waste than any other landfill in South Carolina. (See Trial Tr. 481:13-15).

Third, Defendant's awareness of the harm and injury it causes are admitted. Although Defendant acknowledges it has a duty to prevent off-site odor, Defendant has breached that duty and those odors still exist.

Fourth, past similar conduct is also present for the same reasons.

Fifth, an award of punitive damages will likely deter similar conduct in the future. For multiple years, Defendant has accepted more waste than any other landfill in South Carolina. If Defendant does not reduce its current volume of waste, it technically has capacity to operate until the year 2052. (See Trial Tr. 276:7-13). However, even given that capacity, Defendant is contemplating acquiring an additional 340 acres to provide additional capacity for the landfill. (See Trial Tr. 274:8-275:3, 486:1-13). Perhaps the punitive award in this case will make Defendant reassess its policy of accepting "challenging" waste and, at the same time, not taking the steps it needs to seriously address the off-site odors experience by Plaintiffs and other members of the community.

Finally, although Defendant contends that it the amount of punitive damages is disproportionate to its net worth, there is no evidence in this case that Defendant will be unable to pay this judgment.

3. Gore analysis

Under Gore, the Court must review: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the remedy and the civil or criminal penalties authorized or imposed in comparable cases. Gore, 517 U.S. at 575, 583.

a. Reprehensibility

The reprehensibility factor, set out by the United States Supreme Court in Gore, is the most important indicator of the reasonableness of a punitive damages award. Id.

In evaluating the reprehensibility of a defendant's conduct, the court must look to whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm with the result of intentional malice, trickery, or deceit, or mere accident. GTR Rental, LLC v. DalCanton, 547 F.Supp.2d 510, 517 (D.S.C. 2008) (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003)).

i. Physical or economic harm

Although Defendants attempt to characterize the harm in this case as purely economic, stating that Plaintiffs have disavowed any claims for personal injuries, the characterization of the harm caused by Defendant and the damages recoverable in this case is more likely in the nature of physical harm, rather than purely economic. The elements of actual compensatory damages allowed the jury to taken into account: annoyance, discomfort, inconvenience, loss of enjoyment of life, interference with mental tranquility, apprehension, fears, stress, anxiety, and interference with Plaintiffs' enjoyment of their property.

ii. Indifference or reckless disregard

The indifference or reckless disregard factor is demonstrated by Defendant's specific acknowledgement of the stench and harm caused by its actions, but at the same time, failing to follow through with proper remediation efforts. Instead, Defendant is actually looking to expand the landfill and refuses to decrease the volume of waste, not to mention the type of "challenging" waste of which it disposes. Moreover, Defendant discontinued its use of misters and discontinued the temporary cap suggestion. Such actions demonstrate indifference and reckless disregard when multiple representatives of Defendant acknowledge that this landfill is the biggest challenge concerning odors that they have encountered in their entire work history.

Additionally, there is substantial evidence that Defendant has refused to reduce the intake. Instead, Defendant is making plans for vertical expansion and purchase of option for additional land in which it may expand the Landfill. Defendant has also refused to cap the top or more of the side and refuses additional methods of gas collection.

iii. Repeated violations

Although Defendant has only technically received two fines, there is substantial evidence that Defendant has had many exceedences, which are not regulated by DHEC because DHEC does not inspect the O&M reports. Testimony establishes hundreds of "exceedences" as defined by Federal Regulation, frequently more than 100 exceedences per month. (See Trial testimony of Dr. Townsend and Plaintiffs' Exhibit 35). 40 C.F.R. §§ 60.753(b) and (c) establish parameters for gas well pressure and gas well oxygen limits, and per said Regulations, noncompliance constitutes an "exceedence.' Defendant takes comfort that such does not constitute a regulatory "violation" if it is addressed in a specified number of days. But Defendant's noncompliance still constitutes "exceedences" of the Federal Regulation, in excessive occurrences, continuing every month, often in excess of 100 per month.

Moreover, Plaintiff's expert, Dr. Townsend, has testified that there can be full compliance with regulations, but still have off-site odors. (Trial Tr. 640:20-25, March 21, 2012, Timothy Townsend, Ph.D).

iv. Intentional malice, trickery, deceit

This factor also favors the imposition of punitive damages. Defendant made conscious decisions to bring waste into the area and even expand its operations and its size at the time it knew it had a serious odor problem. The Landfill in this case is the only landfill to bring waste by rail. Defendant decided to accept problematic industrial sludge from Dupont and other problematic sludges. Defendant decided to stop using misters and dismissed the temporary cap solution. Moreover, Defendant waited almost two years to install a second flare and allows its gas wells to have close to one-hundred exceedences per month.

b. Ratio of punitive to compensatory damages

With respect to the second factor set out in Gore, the proper inquiry is whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred. DalCanton, 547 F.Supp.2d at 517 (citing Gore, 517 U.S. at 581).

The United State Supreme Court has provided guidance on this issue, by stating that "few awards exceeding a single-digit ratio between punitive and compensatory damages to a significant degree, will satisfy due process" while at the same time reiterated that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula...." Connelly Management, Inc. v. McNicoll, 2006 U.S. Dist. LEXIS 97580 **193-194 (D.S.C. March 21, 2006).

A low award of compensatory damages may properly support a higher ratio of punitive damages to compensatory damages and, likewise, a higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine. DalCanton, 547 F.Supp.2d at 518 (citing Gore, 517 U.S. at 582).

Defendant's contention that the 3.4:1 ratio of punitive to compensatory damages exceeds the outermost limit of the Due Process Guarantee is simply unfounded. It is well-within the single digit suggestion of the United States Supreme Court.

c. Disparity between punitive damages and legislatively established penalties for comparable conduct.

The third factor set out in Gore mandates that "the court accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." DalCanton, 547 F.Supp.2d at 517-18. In Gore, Justice Stevens shows that the Alabama statutes would not provide "fair notice that the first violation—or, indeed the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty." Gore, 517 U.S. at 584. Here, Defendant had ample notice and there was no unfair surprise that off site odors may subject Defendant to punitive damages. Furthermore, there is not a specific violation for off-site odors.

i. The December 5, 2008 and May 23, 2009 daily cover violations gave Defendant sufficient notice.

Defendant argues that DHEC's two regulatory violations should be the only basis in which to determine the disparity between punitive damages and legislatively established penalties. Defendant makes this argument despite South Carolina case law showing that civil penalties are not dispositive. In Cody P. the South Carolina Supreme Court upheld punitive damages when "no authorized civil penalties [were] applicable." 395 S.C. at 632. Here, Plaintiffs' off-site odor complaints are similar to Cody P., in that there lacks civil penalties for

off-site odors. The community meetings, odor complaints, and regulatory violations established that Defendant was not caught off-guard or surprised by punitive damage awards.

ii. Gas well exceedences are further evidence of Defendant's knowledge of potential damages.

Defendant argues that exceedences are not violations, if repaired in 15 days. However, DHEC inspector, Greer McLaurin, has never inquired whether the gas wells are within regulatory compliance or even adequately working. (Trial Tr. 1431:3-6, March 28, 2012, Greer McLaurin). Moreover, he testified that he does not know whether anyone actually checks whether the landfill is complying with federal regulations. (Trial Tr. 1415:21-1416:8, March 28, 2012, Greer McLaurin).

Greer McLaurin's testimony is evidence that regulatory agencies are not infallible. Here, the exceedences are not violations, because DHEC, through their inattentiveness, have made the gas well exceedences unregulated, thus, making Defendant's civil penalties analogous to Cody P.

G. The Court Should Not Order Remittitur of the Punitive Damages Award to One Percent of Defendant's Net Worth or Order New Trial.

Next, Defendant argues that the Court should order Plaintiffs to accept remittitur to one percent of the net worth of Defendant or order a new trial. Defendant would like to have the Court base any award, not on its culpability or reprehensibility of its conduct, but merely on the figures it produced for trial. Such an approach has been disapproved by various courts. See Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991) (noting that punitive damages should embrace the heinousness of the civil wrong, etc., but the factfinder should be guided by more than the net worth of the defendant so that punitive damages are not determined by the deep pockets of a defendant); Mitchell v. Fortis Ins. Co., 385 S.C. 570, 588 (S.C. 2009) ("[w]hile ability to pay remains relevant to the post-judgment due process review, a punitive damages award should

never be based solely on a percentage of the defendant's net worth"). Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 55 (S.C. 2010) (finding that "jury's award of [$216,600] in punitive damages was not grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment" when the defendant's net profit was $1,365,000).

II. The Court Should Not Grant Defendant's Motion for Judgment as a Matter of Law as to the Compensatory Damages Award.

A. Expert testimony is not necessary for Plaintiffs' claims.

Defendant has reasserted its argument concerning the expert testimony it alleges is necessary to prove Plaintiffs' claim for negligence. This matter has already been addressed above.

However, as a practical matter, it should be pointed out that even if Defendant were correct that expert testimony were necessary to prevail upon Plaintiffs' claim for negligence, such testimony is not necessary to prove a claim of nuisance. See e.g., O'Cain v. O'Cain, 322 S.C. 551, 562-563 (S.C. 1996) (testimony of plaintiffs concerning stress caused by flies and hogs and pungency of the odor sufficient to demonstrate existence of private nuisance).

1. Plaintiffs have proved damages within a reasonable degree of certainty.

The reasonableness of the amount of damages remains largely within the discretion of the jury. Gamble v. Stevenson, 305 S.C. 104, 112 (S.C. 1991). The discretion of the trial judge in determining the reasonableness of damages is heightened when the "elements of damage are intangibles and the appraisal depends somewhat on an observation of the witnesses and evaluation of their testimony." Id.

In this case, as the jury instructions point out, Plaintiffs were recovering damages only for: annoyance, discomfort, inconvenience, loss of enjoyment of life, interference with mental

tranquility, apprehension, fears, stress, anxiety, and interference with Plaintiffs' enjoyment of their property.

In this instance, the measure of the actual compensatory damages in this case was left to the enlightened conscience of the jury and should not be overturned because, in many instances, a jury verdict can be based upon pecuniary and/or non-pecuniary damages, which does not make it susceptible to a motion for new trial. See Welch v. Eptstein, 342 S.C. 279, 304 (S.C. App. 2000) (holding the trial court's refusal to grant new trial on size of award of actual damages was appropriate in wrongful death case where testimony included activities that father previously engaged in with his family in addition to evidence of pecuniary loss through loss of income).

2. Judgment as matter of law should not be granted as to the compensatory award because of rental values.

Next, Defendant attempts to argue that the compensatory verdict should be overturned because the jury disregarded the rental value of the properties at issue in this case. Notwithstanding the fact that Plaintiffs acknowledged they were not attempting to recover any lost rental values in this case, this cannot serve as a basis for granting Defendant's judgment as a matter of law.

Defendant alleges that award of damages was improper because it exceeded the evidence concerning rental values. Defendant has failed to cite any authority for the proposition that matters of general damages may not exceed special damages. Defendant attempted to introduce a measure of damages for an injury for which Plaintiffs were not seeking to recover. That is another possible explanation as to why the jury may have disregarded that "monetary yardstick." However, since no special interrogatory was submitted to the jury, there is no evidence that Defendant's evidence was disregarded by the jury.

Defendant also argues that the awards for general damages were improper because they exceeded the fair market value of two of the three properties of the Plaintiffs. This argument ignores the fact that Defendant was attempting to introduce evidence of damages that are only recoverable in cases of permanent nuisance. Plaintiffs have been unable to find South Carolina authority concerning this issue, however, in Owens v. Contigroup Cos., 344 S.W.3d 717 (Mo. App. W.D. 2011), the Western District of the Court of Appeals of Missouri upheld an award of damages for loss of use and enjoyment of property that exceeded the fair market values of properties, and stated:

> This was a temporary nuisance. The measure for damages for a permanent nuisance is the "difference in the land's market value immediately before and immediately after the injury...." An action for temporary nuisance includes, as was asserted in this case, non-economic damages, including inconvenience, discomfort and loss of quality of life...There is no authority for the proposition that a damage award is excessive if damages for the use and enjoyment of property exceed the fair market value of that property.

Id. at 729 (internal citations omitted) (emphasis added).

3. Plaintiffs properly maintained claims for trespass caused by the stench of the Lee County Landfill.

Defendant contends that judgment as a matter of law is proper as to Plaintiffs' trespass claims because they involve invisible odors that invade Plaintiffs' land. However, Defendant did not move for a directed verdict on this point prior to the case being submitted to the jury. Moreover, Defendant has not demonstrated what portion, if any, of the compensatory award was based upon Plaintiffs' trespass claims.

"[A] trespass is any interference with one's right to the exclusive, peaceable possession of his property." Ravan, 315 S.C. at 463.

> "There is a trend in evronmental law to recognize that the infiltration of contaminants onto a plaintiff's property constitutes as much an invasion of his possessory interest as cutting of a tree on his property."

Ravan, supra, 315 S.C. at 463; citing several treatises.

"The intangibility rule has been abandoned in many jurisdictions..." Finklea and Wyche, Environmental Law in South Carolina, 3d ed. 2011), p. 20 (citing Mactin v. Reyolds Metals Co., 342 P.2d 790 (Ore. 1959), cert. denied, 362 U.S. 918 (gases and particulate matter constitute a trespass). "[I]f one is without license from the person in possession of land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass by the very act of breaking the enclosure." Snow v. City of Columbia, 305 S.C. 544, 552 (S.C. App. 1991).

4. Plaintiffs have stated valid claims for nuisance.

Defendant makes the conclusory allegation that "plaintiffs' failure to prove damages and failure to prove lack of reasonableness, their nuisance claim also fails." Contrary to this assertion, Plaintiffs have presented considerable evidence that Defendant's activities substantially interfere with the use and enjoyment of Plaintiffs' properties. As such, Plaintiffs have stated valid claims for nuisance.

III. Court Should Not Set Aside Compensatory Award or Grant a New Trial on that Award.

A. The compensatory verdict was not a miscarriage of justice.

1. Verdict was not excessive

Plaintiffs refer the Court to their argument, supra.

2. Rulings on motions in limine did not result in miscarriage of justice.

The Court should disregard Defendant's argument that the Court's ruling on the motions *in limine* constituted a miscarriage of justice. Defendant was attempting to introduce evidence that was relevant to claims Plaintiffs were not even asserting in this case, i.e. permanent nuisance. In opposition to this aspect of Defendant's Motion, Plaintiffs incorporate their

argument presented concerning motions *in limine* and, for sake of brevity, will not repeat them here.

3. Court should not order remittitur on compensatory damages award.

Next, Defendant requests the Court order remittitur of compensatory damages to the rental value of Plaintiffs' properties. This argument ignores the fact that Plaintiffs did not seek to recover lost rental values in this case.

Instead, Defendant argues that there was necessarily a punitive element to the compensatory damages award in this case. Contrary to Defendant's argument, Plaintiffs sought damages only for non-pecuniary items that were left to the enlightened conscience of the jury. The jury returned compensatory verdicts for those damages. Those verdicts should be allowed to stand.

IV. The Compensatory and Punitive Damages Awards Were Not the Result of Passion or Prejudice.

In support of its last-ditch effort to obtain a new trial as to all the issues in the case, Defendant provides a catch-all argument concerning many issues in the case. Defendant does not demonstrate why any of this issues constitute "passion or prejudice" or why any of them alone, or in conjunction with the others, satisfies the standard for granting a motion for new trial. Plaintiffs will address some of the more salient points in turn.

A. Exceedences governing landfill gas collections systems were tantamount to regulatory violations

Exceedences are not violations of the law, this is because exceedences seem to be self regulated by LCL. DEHC had no information of exceedences. There is no evidence that the exceedences in this case were corrected at any time. (Trial Tr. 216:2-5, March 19, 2012, James Amick, Jr.); (Trial Tr. 292:2-13, March 20, 2012, Henry Ludwig Jr.).

B. There was no harm to Defendant in requesting punitive damages in the amount of the plastic cap.

There is testimony contrary to Defendant's position of purely experimental. It is also important to note that a LCL executive first suggested the temporary cover. Moreover, Dr. Townsend has done research on a facility that has installed a temporary cap. The cap figures were not a wild guess (Trial Tr. 1773). These issues were never ruled upon (Trial Tr. 1774).

C. Plaintiffs did not artificially inflate the alleged wealth of the Defendant by arguing gross revenue based on the total tonnage received by the landfill in 2008.

The argument is located on page 1770 and again on1783 – 1786. The Court allowed Plaintiffs to argue it either way, "And I just think it's in there and it can be argued either way." (Trial Tr. 1786:23-24). The testimony adduced at trial demonstrated amount of tons, the price per ton, and the total capacity of the landfill. (See Trial Tr. 220:7-11, March 19, 2012, James Amick, Jr.); (Trial Tr. 480:16-21, March 21, 2012, James Amick, Jr.); (Trial Tr. 485:6-8, March 21, 2012, James Amick, Jr.).

D. Individual punitive damage awards to each plaintiff

Defendant argues that punitive damages cannot be awarded on separate verdict forms. This practice has already been accepted by the Fourth Circuit Court of Appeals. See Mattison v. Dallas Carrier Corp., 947 F.2d 95, 98 (4th Cir. 1991) (where Court specifically noted that jury had awarded $50,000 in punitive damages to each of two plaintiffs); see also Austin v. Specialty Transp. Servs, Inc., 358 S.C. 298, 316 (S.C. App. 2004) (awarding punitive damages to plaintiffs separately).

E. Use of the words "noxious" or "harmful."

During Thomas Drayton's testimony, the word "noxious" was used inadvertently and "harmful" was used with another witness. The Court gave curative instructions each time. There is no evidence of passion or prejudice as to these issues.

F. Prior owners of the landfill (MAWS)

Prior to Defendant, MidAtlantic Waste owned the landfill. Throughout the trial, there was ample testimony that MAWS operated the Landfill for the first few years, so that there was no confusion by the jury. Much of the testimony regarding MAWS was brought out by Defendant. However, the Landfill was owned and operated by Defendant since approximately 1995.

WHEREFORE Plaintiffs respectfully request that the Court enter an Order DENYING Defendant's Motion for Judgment as Matter of Law or for a New Trial or Remittitur.

Respectfully submitted,

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May 14, 2012

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