STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

PERRIN BABB; DEBBIE BABB; WAYNE ELSTROM; SARAH ELSTROM; ALAN JACKSON; and KATHY JACKSON;
Plaintiffs;

v.

LEE COUNTY LANDFILL SC, LLC;
Defendant.

Appellate Case No. 2012-212741

On Certification Pursuant to Rule 244 of the SCACR
Hon. Joseph F. Anderson, Jr.
United States District Court Judge for the District of South Carolina

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STATEMENT OF ISSUES CERTIFIED

Pursuant to Rule 244 of the South Carolina Appellate Court Rules (SCACR), the United States District Court for the District of South Carolina requested this Court to answer the following questions:

1. Under South Carolina law, when a plaintiff seeks recovery for temporary trespass or nuisance (asserting claims for annoyance, discomfort, inconvenience, interference with their enjoyment of their property, loss of enjoyment of life, and interference with their mental tranquility and abandoning all claims for loss of use, diminution of value, and personal injury), are damages limited to the lost rental value of the property?
2. Does South Carolina recognize a cause of action for trespass solely from invisible odors rather than a physical invasion such as dust or water?
3. Is the maximum amount of compensatory damages a plaintiff can receive in any trespass or nuisance action (temporary or permanent) the full market value of the plaintiffs' property where no claim for restoration or cleanup costs has been alleged?
4. When a plaintiff contends that offensive odors have migrated from a neighbor's property onto the plaintiff's property, may the plaintiff maintain an independent cause of action for negligence or is the plaintiff limited to remedies under trespass and nuisance?
5. If an independent cause of action for negligence exists under South Carolina law when a plaintiff contends that offensive odors have migrated from a neighbor's

property onto the plaintiffs' property, does the standard of care for a landfill operator and breach thereof need to be established through expert testimony?

STATEMENT OF THE CASE

Perrrin and Debbie Babb, Wayne and Sarah Elstrom, and Alan and Kathy Jackson (hereinafter collectively "Plaintiffs") originally filed a Complaint on behalf of themselves and all others similarly situated on June 4, 2010 in the Court of Common Pleas for the Third Judicial Circuit, Lee County, South Carolina.[1] (Doc.1, Attachment1). Plaintiffs, who are six (6) residents who live near the Lee County Landfill in Bishopville, South Carolina, initiated this action seeking actual and punitive damages against the landfill for odors emanating from the landfill. (Doc.278). Plaintiffs brought an action for nuisance, trespass, negligence/gross negligence and recklessness, intentional acts, an injunction and restraining order. (Doc. 1, Attachment1).

Plaintiffs sought to recover damages for the following types of injuries, resulting from the landfill odors: annoyance, discomfort, inconvenience, interference with their enjoyment of their property, loss of enjoyment of life, and interference with mental tranquility.[2] (Doc. 278) (Trial Tr. 35:7-11, March 19, 2012, Court). At the time of trial, Plaintiffs were not seeking to recover for any depreciation or reduction in the value of their real estate. (Trial Tr. 35:13-14, March 19, 2012, Court). Additionally, Plaintiffs did not seek to recover for any types of personal injuries; that is to say, medical bills and the like for any physical injury. (Trial Tr. 35:15-17, March 19, 2012, Court).

[1] Class action was removed from the case on March 19, 2012. (Doc. 169).
[2] Hereinafter collectively referred to as "inconvenience and discomfort damages" or "damages for inconvenience and discomfort."

On July 1, 2010, Republic Services of South Carolina LLC, Republic Services Inc, and Lee County Landfill SC LLC[3] (hereinafter collectively "Defendants") filed Notice of Removal. (Doc.1). Defendants filed Answer to Complaint on July 7, 2010 with twenty-seven defenses. (Doc.6).

The Plaintiffs moved for Remand to State Court on July 23, 2010. (Doc.10). The United States District Court for the District of South Carolina denied Plaintiffs' Motion to Remand to State Court. (Doc.44). The March 30, 2011 Order found that the parties met the requirements of 28 U.S.C. § 1332(a) for diversity jurisdiction. (Doc. 44).

Jury selection and a pretrial conference was held on March 1, 2012. (Doc.143). On March 19, 2012 the jury trial began. (Doc. 169). At trial, Defendant Lee County Landfill SC, LLC testified that it has owned and operated, the self-admittedly problematic, Lee County Landfill since approximately 1995. (Trial Tr. 492:10-18, March 21, 2012, James Amick, Jr.). Plaintiffs and other witnesses testified that the odors were nauseating and almost constant, preventing them from virtually any outdoor activity. (Doc. 278). Plaintiffs further testified that their homes were in close proximity to Lee County Landfill.

The magnitude of Lee County Landfill's problems were detailed by the testimony of Republic Services' President and Engineer, James Amick Jr. Republic Services' President, testified that the odors at Lee County Landfill were awful and that he was embarrassed by them. (Trial Tr. 205:18-206:15, March 19, 2012, James Amick, Jr.). Additionally, he acknowledgedthat the Lee County Landfill still have off-site odors. (Trial Tr. 489:14-17, March 21, 2012, James Amick, Jr.).

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[3] Defendants Republic Services of South Carolina LLC and Republic Services, Inc. were dismissed from this case on February 9, 2012. (Doc.120).

Republic Services' Area President testified further that in a twenty-one (21) year career, Lee County Landfill has had the worst odor problems of any landfills he has dealt with. (Trial Tr. 492:10-18, March 21, 2012, James Amick, Jr.). Furthermore, Republic Services' Area Environmental Manager Henry Ludwig testified that Lee County Landfill was the biggest challenge he has ever faced in thirty-three (33) years in the business. (Trial Tr. 296:4-13, March 20, 2012, Henry Ludwig Jr.). Lee County Landfill is the largest permitted landfill in South Carolina, and is permitted to receive more tons per year than any other landfill in the State.

Lee County Landfill receives over half of its current take of waste by railcars from places as far as 554 miles, straight-line distance away from Bishopville, South Carolina. (Trial Tr. 490:11-14, March 21, 2012, James Amick, Jr.). Close to half of the waste at Lee County Landfill comes from out-of-state. (Trial Tr. 222:12-15, March 19, 2012, James Amick, Jr.). James Amick agreed that these railcars often deliver waste that is decomposing over a period of a couple weeks. (Trial Tr. 474:13-19, March 21, 2012, James Amick, Jr.).

The contents of the out-of-state waste are problematic as well. Lee County Landfill accepts human and industrial waste, sludges by railcar that creates a challenge with landfill gas. (Trial Tr. 945:11-20, March 26, 2012, Steve Lamb). The acceptance of sludges make the landfill wet, causing both operational problems for the landfill and problems with landfill gas odors. (Trial Tr. 519:2-522:10, March 21, 2012, Timothy Townsend, Ph.D). Republic Services' Area Environmental Manager, Hank Ludwig,

testified that sludge presented a gas control problem. (Trial Tr. 265:13-19, March 20, 2012, Henry Ludwig Jr.).

Additionally, Republic Services' Area President testified to regulatory violations for Lee County Landfill's failure to use daily cover to control odors. (Trial Tr. 217:13-16, March 19, 2012, James Amick, Jr.) (Trial Tr. 237:15-23, March 20, 2012, Henry Ludwig Jr.). He testified that daily cover's primary purpose is to keep garbage odors and gas odors from coming off the landfill site. (Trial Tr. 218:5-9, March 19, 2012, James Amick, Jr.). Hank Ludwig testified that the failure to use daily cover violated a state solid waste regulation designed to control odors at the site. (Trial Tr. 238:20-239:3, March 20, 2012, Henry Ludwig Jr.). Additionally, James Amick testified that a landfill must prevent landfill odors from going to its neighbor's properties. (Trial Tr. 491:18-24, March 21, 2012, James Amick, Jr.).

On March 30, 2012, the jury returned a verdict in favor of the Plaintiffs.[4] (Docs. 202, 203, 204, 205, 206, and 207). For Plaintiff Perrrin Babb, the Jury returned a verdict for actual damages in the amount of seventy-seven thousand five hundred dollars ($77,500.00). (Doc. 202). The Jury returned a verdict for Plaintiff Debbie Babb for actual damages in the amount of one hundred thousand dollars ($100,000.00). (Doc. 203). For Plaintiff Wayne Elstrom, the Jury returned a verdict for actual damages in the amount of seventy-seven thousand five hundred dollars ($77,500.00). (Doc. 204). The Jury returned a verdict for Plaintiff Sarah Elstrom for actual damages in the amount of seventy-seven

[4] In the Special Interrogatories on the Verdict Form, the Jury based their theory of recovery on temporary nuisance, negligence, and temporary trespass for all Plaintiffs, with the exception of Plaintiff Perrin Babb. Plaintiff Perrin Babb was found to recover under the theory of nuisance and negligence. Plaintiff Perrin Babb did not bring a trespass claim.

thousand five hundred dollars ($77,500.00). (Doc. 205). The Jury returned a verdict for Plaintiff Alan Jackson for actual damages in the amount of one hundred thousand dollars ($100,000.00). (Doc. 206). The Jury returned a verdict for Plaintiff Kathy Jackson for actual damages in the amount of one hundred thousand dollars ($100,000.00). (Doc. 207).

Furthermore, the Jury, through Special Interrogatory, found that all six (6) Plaintiffs proved by clear and convincing evidence that Defendant Lee County Landfill SC, LLC was willful, wanton, or reckless during the relevant time period so as to support an award of punitive damages. The punitive phase resulted in favor of all six (6) Plaintiffs[5]. (Docs. 217, 218, 219, 220, 221, 222). It was Ordered, that post-trial motions would be resolved prior to the injunction phase of trial. (Doc. 225). Defendant filed Motion for Judgment as a Matter of Law or for a New Trial or Remittitur on April 27, 2012. (Doc. 231).

On August 13, 2012, pursuant to South Carolina Appellate Court Rule 228, the United States District Court certified five (5) questions to the South Carolina Supreme Court. (Doc. 278). On October 17, 2012, the South Carolina Supreme Court agreed to answer all five (5) certified questions.

ARGUMENT

I. UNDER SOUTH CAROLINA LAW, WHEN PLAINTIFFS SEEK RECOVERY UNDER TEMPORARY TRESPASS OR NUISANCE, ONLY ASSERTING CLAIMS FOR ANNOYANCE, DISCOMFORT, INCONVENIENCE, INTERFERENCE WITH THEIR NORMAL ENJOYMENT OF THEIR PROPERTY, LOSS OF ENJOYMENT OF LIFE, AND INTERFERENCE WITH THEIR MENTAL TRANQUILITY,

[5] The Jury awarded each Plaintiff punitive damages in the sum of three hundred thousand dollars ($300,000.00).

DAMAGES SHOULD NOT LIMITED TO THE LOST RENTAL VALUE OF THE PROPERTY.

A. Nuisance and Trespass Generally.

A private nuisance is "a civil wrong, based on a disturbance of rights in land." Samuel L. Finklea, III & Bradford W. Wyche, Envtl. Law in S.C. 13 (South Carolina Bar 3d ed. 2011) (citing Prosser and Keeton, Handbook on the Law of Torts 618 (5th ed. 1984)). Nuisance is the substantial and unreasonable interference with a plaintiff's use and enjoyment of property. Ravan v. Greenville County, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct. App. 1993).

Whereas, trespass is the interference with one's right to exclusive, peaceable possession of property." Ravan v. Greenville County, 315 S.C. 447, 434 S.E. 2d 296, 306 (Ct.App. 1993) (citing Stratos v. King, 282 S.C. 501, 504, 319 S.E.2d 356, 359 (Ct.App. 1984); see Daniels v. Coleman, 253 S.C. 218, 169 S.E.2d 593 (1969).

"A trespass is a direct and forcible invasion of one's property, producing a direct and immediate result, and a nuisance is species of invasion of another's property, producing indirect or consequential injury by agencies wrongfully operating outside of the property injured." Samuel L. Finklea, III & Bradford W. Wyche, Envtl. Law in S.C. 19 (South Carolina Bar 3d ed. 2011) (citing Allen v. Union Oil Mfg. Co., 59 S.C. 571, 578, 28 S.E. 274, 276-277 (1901)).

For the purposes of addressing the first question certified by the United States District Court for the District of South Carolina, Plaintiffs will address the issue of

damages under the law of private nuisance exclusively because damages recoverable for trespass are the same.[6]

B. The Purpose and Definition of the Tort of Private Nuisance.

South Carolina defines the term "nuisance" as "anything which works hurt, inconvenience, or damage; anything which essentially interferes with the enjoyment of life or property." Wyche, 45 S.C. L. Rev. at 339 (citing State ex rel. Lyon v. Columbia Water Power Co., 82 S.C. 181, 191, 63 S.E. 884, 889 (1909)); see AVX Corp. v. Horry Land Co., 686 F. Supp. 2d 621, 628 (D.S.C. 2010).

A nuisance may be anything that works hurt, inconvenience, or damages – anything that essentially interferes with the enjoyment of life or property. Strong v. Winn-Dixie Stores, Inc., 240 S.C. 244, 253, 125 S.E.2d 628, 633 (1962); Peden v. Furman Univ., 155 S.C. 1, 17, 151 SE. 907, 912 (1930); Deason v. So. Ry. Co., 142 S.C. 328, 334, 140 S.E. 575, 577 (1927); O'Cain v. O'Cain, 322 S.C. 551, 562, 473 S.E.2d 460, 467 (Ct. App. 1996); Ravan v. Greenville County, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993); see 66 CJS Nuisance § 9.

The modern trend in nuisance law is to give more consideration to the comfortable enjoyment of property, which means mental as well as physical comfort.

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[6] See Lever v. Wilder Mobile Homes, Inc., 283 S.C. 452, 454, 322 S.E.2d 692, 694 (Ct. App. 1984) (the torts of nuisance and trespass have been to support a general verdict under the two-issue rule); see also Samuel L. Finklea, III & Bradford W. Wyche, Envtl. Law in S.C. 73 (South Carolina Bar 3d ed. 2011) (the three basic remedies that are potentially available to a plaintiff who successfully establishes' the defendant's liability under the common law include: actual damages, punitive damages, and injunctive relief); Catherine A. Haselden & Joyce Marshall, 11 S.C. Jur. Damages § 15 (as with trespass, if a private nuisance is shown to exist, the law imports damages for injury to the right of free use and enjoyment, and at least nominal damages may be recovered to protect the right); Save Charleston Foundation v. Murray, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct. App. 1985) (when an identical set of facts entitled the plaintiff to alternative remedies, he may plead and prove entitlement to either or both, but not recover for both).

Young v. Brown, 212 S.C. 156, 169, 46 S.E.2d 673, 679 (1948). This does not require a private nuisance to be detrimental to the health or physical senses of those living near the nuisance. Id. at 170, 679. However, "[a]s a general principle of law, the unlawful use of property causing material annoyance, discomfort, or hurt to another person constitutes a nuisance." Green v. Blanton, 294 S.C. 14, 18, 362 S.E.2d 179 n. 2 (Ct. App. 1987) (citing 66 C.J.S. Nuisance section 8 (1950), and Supp. (1987)). That is because, "[n]uisance law is based on the premise that 'every citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property.'" Clark v. Greenville County, 313 S.C. 205, 209, 437 S.E.2d 117, 119 (1993).

A claim for nuisance may rest upon various types of conduct and interference with the use and *enjoyment* of property. See Young, 212 S.C. at 156 (there is a right to mental comfort and health in one's home, a violation of which may give rise to a claim for private nuisance); 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); Emory v. The Hazard Powder Co., 22 S.C. 476 (1885) (plaintiff's fear of injury from gunpowder stored on defendant's property gives rise to nuisance claim even though no fire or explosion occurred); O'Cain v. O'Cain, 322 S.C. 551, 473 S.E.2d 460 (Ct. App. 1996) (odor and flies from hog pen); Blank v. Rawson, 296 S.C. 110, 370 S.E.2d 890 (Ct. App. 1988) (odor from dog pen).

C. The Elements of a Cause of Action for Private Nuisance.

"A private nuisance exists where the defendant's conduct results in an 'unreasonable interference' with the plaintiff's use and enjoyment of land, which

interference is continuous or at least potentially recurring." F. Patrick Hubbard & Robert L. Felix, The S.C. Law of Torts 219 (S.C. Bar 3d ed. 2004).

The basic elements of the private nuisance cause of action are considered: (1) interests in land; (2) interference with the use and enjoyment of that land; and (3) the nature of the defendant's conduct. Samuel L. Finklea, III & Bradford W. Wyche, Envtl. Law in S.C. 2 (South Carolina Bar 3d ed. 2011).

D. Remedies Available in Nuisance Actions.

The three basic remedies that are potentially available to a plaintiff who successfully establishes' the defendant's liability under the common law include: actual damages, punitive damages, and injunctive relief. Samuel L. Finklea, III & Bradford W. Wyche, Envtl. Law in S.C. 73 (South Carolina Bar 3d ed. 2011).[7]

There are two critical factors in determining the type of damages recoverable in a nuisance action. The first factor rests on whether the nuisance is categorized as temporary or permanent.[8] See Bradford W. Wyche, A Guide to the Common Law of Nuisance in South Carolina, 45 S.C. L. Rev. 337, 370 (1994). The second factor is whether the party is seeking to recover for damage to real property or damage to the person. Allen v. Union Oil and Mfg. Co., 59 S.C. 571, 578-579, 38 S.E. 274, 277 (1901).

More specifically, private nuisance claims are actionable either for abatement or for damages. Home Sales, Inc. v. City of North Myrtle Beach, 299 S.C. 70, 81, 382 S.E.2d 463, 469 (Ct. App. 1989).

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[7] As no questions concerning injunctive relief have been certified to this Court, Plaintiffs will not address that issue in this brief.

[8] The District Court's Order for Certification, (Doc. 278), specifically shows that Plaintiffs only pursued claims for temporary nuisance and temporary trespass; there were no allegations of permanency.

1. Damages recoverable for injury to real property.

The general rule states that in cases of permanent injury to "real property," the proper measure of damages is the diminution of the market value by reason of the injury, and, in cases of temporary injury to "real property," the measure of damages is the loss of rental value of the property.[9] Gray v. So. Facilities, Inc., 256 S.C. 558, 569, 183 S.E.2d 438, 443 (1971); see Ravan v. Greenville County, 315 S.C. 447, 465, 434 S.E.2d 296, 307 (1993).

In addition, when there is temporary, non-physical injury to property, lost profits are also recoverable. People Fed. Savings and Loan Assn. of S.C. v. Resources Planning Corp., 358 S.C 460, 473, 596 S.E.2d 51, 58 (2004).

2. Other damages recoverable in nuisance actions, including those caused by the loss of enjoyment of property.

Plaintiffs' claims for damages in this case are more properly analyzed as damages to the person caused by the loss of enjoyment of their property. Such claims for damages are supported under South Carolina law, which does not contain any limitation as to the amounts recoverable for such damages.

a. Nominal damages

"As with trespass, if a private nuisance is shown to exist, the law imports damages for injury to the right of free use and enjoyment, and at least nominal damages may be recovered to protect the right." Johnson v. Phillips, 315 S.C. 407, 415, 433 S.E.2d 895,

[9] Plaintiffs specifically disclaimed any damages for diminution in property value as claims in the case. (See Doc. 278). Instead, Plaintiffs limited their remedies for damages for: annoyance, discomfort, inconvenience, interference with their enjoyment of their property, loss of enjoyment of life, and interference with mental tranquility. (See Doc. 278). As such, these claims are not properly analyzed as damages for injury to property, but instead, as damages to the person incurred through the loss of enjoyment of the property.

900 (Ct. App. 1993), aff'd in part, rev'd in part, remanded sub nom., Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995). An award of nominal damages can support an award of punitive damages. Save Charleston Foundation v. Murray, 286 S.C. 170, 179, 333 S.E.2d 60, 65 (Ct. App. 1985).

b. South Carolina allows for the recovery of other actual and special damages caused by the loss of enjoyment of property in cases of private temporary nuisance.

The plaintiff in a nuisance action is entitled not only to recover for the harm to his property interest "but also for any special damages, such as 'damages for loss of peace of mind, unhappiness, annoyance, and deprivation of enjoyment of property, livestock and crop losses, injury to cattle and decreases in milk production, damages to domestic animals, plants, clothes on the line and paint on the house, and a variety of other out-of-pocket expenses.'" Samuel L. Finklea, III & Bradford W. Wyche, Envtl. Law in S.C. 75 (South Carolina Bar 3d ed. 2011); Wyche, 45 S.C. L. Rev. at 371-372.

South Carolina has recognized that damages for the inconvenience and discomfort caused by nuisances are recoverable. See Allen v. Union Oil Mfg. Co., 59 S.C. 571, 578, 38 S.E. 274, 277 (1901) (recognizing that actionable nuisance claim in South Carolina may be for injury to real estate, as opposed to annoyance, discomfort, inconvenience or bodily injury to the person of the owner); Hollis v. Stonington Dev., LLC, 394 S.C. 383, 393 (Ct. App. 2011) ($400,000 in actual damages were awarded under private nuisance cause of action for loss of use and enjoyment of ponds).

c. Several South Carolina cases specifically illustrate that damages for the annoyance, inconvenience, and discomfort caused by the deprivation of the use and enjoyment of property are recoverable in private temporary nuisance causes of action.

i. Lever v. Wilder Mobile Homes, Inc., 283 S.C. 452, 322 S.E.2d 692 (Ct. App. 1984).

Lever v. Wilder Mobile Homes, Inc., 283 S.C. 452, 454, 322 S.E.2d 692, 693-694 (Ct. App. 1984) stands for the proposition that actual and punitive damages are recoverable for a nuisance that is caused by "annoying or injurious odors." In Lever, the plaintiff brought claims for trespass and nuisance for the improper maintenance of a sewage lagoon. Id. at 453, 693. The jury returned a verdict for actual and punitive damages. Id.

The sewage lagoon in Lever emitted "offensive odors" and leaked sewage in the plaintiff's pond, which resulted in killing fish. Id. The trial court denied the defendant's motion for directed verdict and motion for judgment notwithstanding the verdict. Id. at 453-454, 693.

In affirming the decision of the trial court to deny those motions, the Court of Appeals of South Carolina noted that, in South Carolina, a nuisance is anything "working inconvenience or damage, or interfering with the enjoyment of life or property." Id. The Court of Appeals held that the evidence supported the verdict because:

> There is evidence in the record Wilder's actions inconvenienced Lever and interfered with the enjoyment of his life and property: Lever's wife testified the offensive odors from Wilder's property (1) precluded the couple from continuing to host family picnics and church groups, and (2) interfered with Lever's gardening activities.

Id. at 454, 694.

Plaintiffs' claims for the inconvenience and discomfort caused by the deprivation of the use and enjoyment of their property mirror those in Lever. No limitation for the loss of rental value was applied in Lever. Indeed, it would not have any application because the loss or rental value is a measure of damages applied for the recovery of

damages limited solely to injury to real property. As such, no such limitation should be applied in this case.

ii. Woods v. Rock Hill Fertilizer Co., 102 S.C. 442, 86 S.E. 817 (1915).

Woods v. Rock Hill Fertilizer Co., 102 S.C. 442, 86 S.E. 817 (1915) involved a private nuisance claim brought against fertilizer plant by residents of a nearby home who claimed that the plant produced noxious odors which interfered with the use and enjoyment of their property. In Woods, the plaintiffs alleged that the odors, dust, gases, and noise from the plant deprived them of their ability to entertain guests and interfered with the quiet enjoyment of their home. Id.

The defendant moved to strike certain testimony and for a directed verdict. Id. at 448, 10. Although the motions were denied, the jury failed to agree on a verdict and a mistrial was declared. Id. The defendant appealed each of the trial court's rulings. Id.

The Supreme Court of South Carolina affirmed the decision of the trial court, holding that the plaintiff had properly stated a claim for private nuisance. Id. at 451, 13. The Court further held that the trial court properly refused to strike certain testimony because it tended to prove the allegations of the complaint; that testimony included:

> The allegation that plaintiff's mother and sister live with her and suffer as alleged, though not strictly necessary to the statement of plaintiff's cause of action, was not irrelevant thereto, because it tends to show the nature and extent of plaintiff's damages, since she has the right to have them live with her and enjoy the comforts of her home. In a like case, a plaintiff might allege injuries to his wife and children, or the keeper of a hotel or boarding house, to his guests, not to enable him to recover damages for what they suffered, but to show the nature and extent of his own damages.

Id. at 449, 10.

Again, Woods demonstrates that damages for the loss of enjoyment of property are recoverable in South Carolina. Those damages are not dictated by the rules applicable to claims of loss of rental value.

iii. Davis v. Palmetto Quarries Co., 212 S.C. 496, 48 S.E.2d 329 (1948)

Davis v. Palmetto Quarries Co., 212 S.C. 496, 48 S.E.2d 329 (1948) involved an action for damages and to abate a nuisance caused by a stone quarry by a nearby resident. Id. at 497, 329. In Davis, the plaintiff claimed that the quarry caused vibrations, noise, and other substances to be thrown on the plaintiff's premises. Id. The plaintiff alleged that nuisance caused the depreciation of the property and "'the comfort of the plaintiff and her family and their health and welfare has been and are greatly impaired,'" all to the plaintiff's damage in the sum of $3,000.00." Id.

The defendant appealed from an adverse judgment, alleging that the trial court erred in refusing to strike the allegation that the comfort of the plaintiff and her family were impaired. Id. at 499, 330. The Supreme Court of South Carolina affirmed the decision of the trial court, stating:

> The allegation will not support a verdict in this action which includes damages to the members of plaintiff's family; but it is proper for a full statement of the alleged damages to the plaintiff as the owner of her home which the members of her family occupy with her.

Id. at 499-500, 331.

Again, no limitation as to loss of rental value was applied in Davis. Instead, both the trial court and this Court allowed evidence of the discomfort of the plaintiff's family members as evidence to how the use and enjoyment of the property had been impaired by the nuisance.

iv. **Wiggins v. Moskins Credit Clothing Store, Inc., 137 F. Supp. 764 (E.D.S.C. 1956).**

Wiggins v. Moskins Credit Clothing Store, Inc., 137 F. Supp. 764 (E.D.S.C. 1956) involved claims brought for harassing telephone calls made to the plaintiff at her residence in reference to some debt or account. Id. at 764. The employee of the defendant used abusive language to the plaintiff and continued to call for three months, which annoyed and harassed the plaintiff, prevented her from sleeping, and caused her nervousness and emotional distress. Id.

The defendant moved to dismiss the case on the grounds that the complaint did not state a cause of action. Id. at 764. In denying the motion, the Eastern District of South Carolina noted that the calls were made over a three-month timeframe, which annoyed and harassed the plaintiff, and that accordingly the "complaint thus charged defendant with conduct amounting to a nuisance, constituting an invasion of plaintiff's home and an interference with her right to use and enjoy it." Id. at 766.

Wiggins further stands for the proposition that nuisance damages caused by the loss of enjoyment of property are not limited by lost rental value. The conduct at issue in Wiggins survived a motion to dismiss because it constituted a nuisance. Damages were allowed for the inconvenience and discomfort caused to the plaintiff.

d. **Many secondary source support the view that inconvenience and discomfort damages are recoverable without reference to loss or rental or fair market value.**

Strong authority exists, which supports Plaintiffs' analysis that inconvenience and discomfort damages are not limited by the damages recoverable for injury to the property, such as loss of rental or fair market value. See Tracy A. Batemen, Annotation, Nuisance as Entitling Owner or Occupant of Real Estate to Recover Damages for Personal

Inconvenience, Discomfort, Annoyance, Anguish, or Sickness, Distinct from, or in Addition to, Damages for Depreciation in Value of Property or Use, 25 A.L.R.5th 568 (1994); Alan Kanner, Environmental and Toxic Tort Trials, 305, § 12.11 (Michie 1991) (citing 28 A.L.R.2d 1070, 1087) ("damages for annoyance, anguish, irritation, emotional distress and mental suffering have been awarded in most jurisdictions where there were special circumstances showing that psychological injuries were a direct result of the defendant's trespass, nuisance, or ultrahazardous activity"); 58 Am. Jur. 2d Nuisances § 233 ("[a] plaintiff in a private nuisance action may seek compensation for interference with personal comfort as well as diminution in property value, although a complaining party need not demonstrate diminution in value as a prerequisite to recovery for annoyance and inconvenience"); 58 Am Jur. 2d Nuisances § 242 (stating that a plaintiff may recover not only for physical injuries in a nuisance action, but also for annoyance discomfort and inconvenience, which are recoverable in addition to depreciation in the market or rental value of the realty).

e. In addition to South Carolina, many other courts have recognized that inconvenience and discomfort damages caused by nuisance should not be limited by loss of rental or fair market value.

Since 1883, when the United States Supreme Court decided Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S. Ct. 719 (1883), the law has been the same – claims for the inconvenience and discomfort associated with nuisances are not limited to the lost rental or fair market value of property. Fifth Baptist Church involved claims brought by a congregation for the "discomfort occasioned" by an engine house and machine shop for the defendant railroad.

In Fifth Baptist Church, the plaintiff complained that the rumbling of the engines, noise, smoke, and offensive odors of the railroad constituted a nuisance, which annoyed and disturbed the congregation, "rendering its ordinary use or occupation physically uncomfortable to him." Id. at 329, 726. The United States Supreme Court held that the allegations in the complaint demonstrated that the railroad constituted a "nuisance in every sense of the term, because they interfered with enjoyment of the property" and "they disturbed and annoyed the congregation and Sunday School." Id.

The Court further stated that "[f]or such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance." Id. Demonstrating that the building was less valuable "for the purpose to which it was devoted" was sufficient to maintain a cause of action for nuisance. Id. at 330, 726.

It did not matter that the railroad was authorized by an act of Congress to build that railroad within the limits of the city of Washington because "works should not be so placed as by their use to reasonabl[y] interfere with and disturb the peaceful and comfortable enjoyment of others in their property." Id. at 331, 728.

In affirming the judgment of the court, the Supreme Court noted that the trial court's instruction as to damages was correct, Id. at 335, 731, which held that the jury could take into account all the circumstances of the injury to the plaintiff, including any depreciation in the value of the property. The Supreme Court noted that depreciation of the property may not even be an accurate measure of damages:

> *Mere depreciation of the property* was not the only element for consideration. That might, indeed, be *entirely disregarded.* The plaintiff

> was entitled to recover because of the inconvenience and discomfort cause[d] to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of it house for church purposes than a private gentleman has to the comfortable enjoyment of his own house, and *it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure*.

Id. at 335, 731 (emphasis added); accord Vinson v. Hartley, 324 S.C. 389, 408, 477 S.E.2d 715, 725 (Ct. App. 1996) ("South Carolina law requires the jury to be the sole judge of issues of fact, including the issue of damages"); Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 710 (1964) (internal citations omitted) ("[d]amages for pain and suffering are unliquidated and indeterminate in character and the assessment of unliquidated damages must rest in the sound discretion of the jury...Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. Hence, the amount of damages to be awarded for pain and suffering must be left to the judgment of the jury, subject only to correction by the courts for abuse"); 58 Am. Jur. 2d Nuisances § 243 (it is usually within the sound discretion of the trier of fact to determine the amount of damages appropriate for discomfort or annoyance caused by a nuisance because no precise rule has been given and "there need not be testimony of any witness as to the amount of dollars and cents necessary to compensate the plaintiffs").

McCracken v. Swift & Co., 212 Mo. App. 558, 250 S.W. 953 (Mo. App. 1923) held that although a business owner may recover the loss of rental value of business property resulting from a temporary nuisance and that a resident can recover exclusively for the loss of use and enjoyment of property of that residence, such damages may also include annoyance and inconvenience caused by the loss of enjoyment of the property.

In McCracken, the Missouri Court of Appeals held that the suffering as a result of the loss of use and enjoyment should be the basis upon which to estimate damages sustained and "not the diminution of rental value." The issue in McCracken was the proper measure of damages for injuries suffered by a plaintiff in the use and occupancy of his home. The defendant in that case claimed it should be the rental value alone, but the court held that the plaintiff had not sustained any loss or rental value and that the plaintiff was allowed to recover from the physical suffering, annoyance, and discomfort resulting from the invasion of his home by the foul odors, loud and unusual noises, and the pest of flies, all of which were sent there by the poultry facility and which constituted the suffering, annoyance and discomfort, upon which damages should be estimated.

Likewise, Duncanson v. City of Fort Dodge, 233 Iowa 1325, 11 N.W.2d 583 (1943) involved a claim for nuisance for the sickness, nausea, inconvenience, and discomfort the plaintiff and his family suffered as a result of the city's sewage-disposal plant and garbage dump. The plaintiff prayed for damages as a result of the inconvenience and discomfort.

In appealing the jury's verdict returning such damages for the plaintiff, the defendant argued that the plaintiff had not stated claims for damages because he did not submit evidence of loss of rental value or specific expenses (i.e. bills) for the alleged

sickness or discomfort. In essence, the defendant contended that the verdict should be overturned because it could not be based solely on evidence of inconvenience and discomfort. The Supreme Court of Iowa affirmed the jury's verdict for damages stating that it is only the general rule in that the measure of damages in a continuing nuisance claims is the loss in value of the land. Although a plaintiff may recover damages in a temporary nuisance claim on the loss of rental value, that is not required. Inconvenience and discomfort are part of the elements of a private nuisance claim and may properly constitute elements of recovery.

Many other states recognize claims for the discomfort and inconvenience created by private temporary nuisances as separate and independent from loss of rental value. See Miller v. Carnation Co., 39 Colo. App. 1, 4-5, 564 P.2d 127 (Ct. App. 1977) (holding that a verdict of $28,000 for loss of use and enjoyment of property was not duplicative of $72,000 award for annoyance, inconvenience, and loss of ability to enjoy lives element of private nuisance claim); Segars v. Cleland, 255 Ga. App. 293, 296, 564 S.E.2d 874 (Ct. App. 2002) (damages for discomfort and annoyance caused to owner are separate and distinct from damage to value of realty); Galouye v. A.R. Blossman, Inc., 32 So.2d 90, 93 (Ct. App. La. 1947) (discomfort and annoyance are primary consideration of damages in private nuisance action although there is no arithmetical rule for their estimation and is best left to province of the jury); Padilla v. Lawrence, 101 N.M. 556, 561, 685 P.2d 964 (Ct. App. 1984) (damages for diminution in property value in private nuisance action are not a precondition to recovery for annoyance, inconvenience, and interference of personal comfort); Gavigan v. The Atlantic Refining Co., 186 Pa. 604, 614, 40 A. 834 (1898) (in nuisance action where plaintiff was sick from odors, could not eat, was nauseous, and

could not sleep, jury was entitled to use best judgment in awarding damages for plaintiff's physical discomfort).

Like the other decisions cited in this brief, this Court should continue to recognize that damages caused by the annoyance, discomfort, inconvenience, interference with enjoyment of property, loss of enjoyment of life, and interference with mental tranquility are not limited to the lost rental value of the property.

Such limitations are relevant only to claims strictly limited to damage to property. Plaintiffs did not seek any such diminution in property value claims and, as such, the damages they sought to recover should not be limited. To allow such a limitation would be the equivalent of precluding a plaintiff in a car wreck case from recovering pain and suffering damages in excess of his or her medical bills. No such limitation exists under the law nor should it. Instead, such damages should be left to the sound discretion of juries.

II. SOUTH CAROLINA SHOULD RECOGNIZE A CAUSE OF ACTION FOR TRESPASS SOLELY FROM INVISIBLE ODORS BECAUSE THEY ARE CARRIED BY GASES AND OTHER PARTICULATE MATTER.

A. Elements of Trespass Cause of Action.

"[A] trespass is any interference with one's right to the exclusive, peaceable possession of his property." Ravan v. Greenville County, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993). Trespass requires proof of interference with the plaintiff's right to the exclusive possession of his property. Samuel L. Finklea, III & Bradford W. Wyche, Envtl. Law in S.C. 19 (South Carolina Bar 3d ed. 2011).

The gist of trespass is the injury to possession, and generally either actual or constructive possession is sufficient to maintain an action for trespass. Macedonia Baptist Church v. City of Columbia, 195 S.C. 59, 71, 10 S.E.2d 350, 355 (1940).

For a trespass action to lie, "the act must be affirmative, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of the invasion." Mack v. Edens, 320 S.C. 236, 240, 464 S.E.2d 124, 127 (Ct. App. 1995); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).

In Snow, the Court of Appeals addressed the meaning of intent under the law of trespass. "Intent is proved by showing that the defendant acted voluntarily and that he knew or should have known the result would follow from his act. Snow v. City of Columbia, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991), cert. denied, Feb. 4, 1992.

B. South Carolina Should Recognize a Trespass Cause of Action for Invisible Odors Because Ground Water Contamination Trespass Claims Have Also Been Introduced, Which is Necessary for Modern Day Environmental Litigation.

"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. Reynolds Metals Co., 221 Ore. 86, 342 P.2d 790 (1959), cert. denied, 362 U.S. 918 (gases and particulate matter constitute a trespass). Likewise, the Court of Appeals of South Carolina has recognized that even minute intrusions onto a person's property may constitute a trespass:

> There is a trend in environmental 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, 315 S.C. at 463, 434 S.E.2d at 306 (citing several treatises); accord AVX Corp. v. Horry Land Co., 686 F. Supp. 2d 621 (D.S.C. 2010) (denied summary judgment as to claim for trespass for ground water contamination).

"[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, 409 S.E.2d 797, 802 (Ct. App. 1991).

The Court should recognize that odors carried by particulate matter and other gases may constitute a trespass the same as will a twig, the unauthorized entry of a person, or a bucket of water. There is no reason to distinguish groundwater contaminants from odors carried by particulate matter. Both of them constitute the invasion and unauthorized entry onto another's property. Simply because they are invisible to the human eye does not render them any less dangerous than the unauthorized entry of any other persons or elements.

Instead, the focus should be on whether there is sufficient proof of entry onto a person's property. To hold otherwise would pardon the unauthorized trespass onto individuals' real property when the trespass cannot or has not been seen, i.e. when the trespasser has not been caught.

III. THE FULL MARKET VALUE OF THE PLAINTIFFS' PROPERTY IS NOT THE MAXIMUM AMOUNT OF COMPENSATORY DAMAGES A PLAINTIFF MAY RECEIVE IN ANY TRESPASS OR NUISANCE ACTION WHERE NO CLAIM FOR RESTORATION OR CLEANUP COSTS HAS BEEN ALLEGED.

A. Restoration and Cleanup Costs Do Not Affect the Recovery of Inconvenience and Discomfort Damages Incurred through the Loss of Enjoyment of Property.

The rule adopted by this Court concerning restoration and cleanup costs first raised in Vaught v. Hardee & Sons, Inc., 366 S.C. 475, 623 S.E.2d 373 (2005). Vaught, however, dealt exclusively with the property damages recoverable for damage to ornamental trees, shrubs, and vegetation. Id. 366 S.C. at 479, 623 S.E.2d at 376.

Vaught did not address the damages incurred by a person by virtue of the loss of the enjoyment of his or her property. As such, the analysis of diminution of value versus fair market value should not control unrelated claims for damages.

B. Inconvenience and Discomfort Damages Should Not be Limited to the Fair Market Value of Property.

First and foremost, the damages recoverable for the loss of use and enjoyment of a person's property should not be based exclusively upon the economic value of such property. (See Section I.D.2(a)-(3), supra). The above-referenced authority demonstrates that value of the property should not be used to artificially cap the amount of damages a plaintiff may recover for the inconvenience and discomfort caused by the loss of enjoyment of his or her property.

Second, damages that refer to the "market value" of property are limited to cases of permanent nuisance when only damage to property is alleged. See Ravan v. Greenville County, 315 S.C. 447, 465, 434 S.E.2d 296, 307 (Ct. App. 1993) ("[t]he measure of damages for permanent injury to real property by pollution, whether by nuisance, trespass, negligence, or inverse condemnation is the diminution in the market value of the property"); see also Section I.B.1 supra. As such, the fair market value of property does not need to be addressed when cases of private "temporary" or "continuing" nuisance cases are involved.

Instead, the concept of the plaintiff's ability to recover all actual damages incurred as a result of the loss of the enjoyment of his or her property should govern. Actual damages have been described as:

> Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred.

Vaught, 366 S.C. at 480, 623 S.E.2d at 375 (2005) (internal citations omitted).

Plaintiff s should be able to recover the amount of damage he or she actually suffered as a result of being deprived of the enjoyment of his or her property. That matter should be left to the discretion of the jury.

In Owens v. Contrigroup 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).

It should be noted that Owens has recently been cited with approval by the Court of Appeals of Missouri. See McGuire v. Kenoma, 375 S.W.3d 157, 184 (Mo. App. W.D. 2012) (holding that evidence of fair market value of properties not relevant to temporary

nuisance damages and noting that legislature has recognized that there is "an inherent additional value in a homestead that exceeds the fair market value of the property").

Third, the notion that a man or woman's loss of enjoyment damages should be limited to the fair market value should be rejected as contrary to public policy. It would create a law that declares the rich and wealth are entitled to enjoy their property more than the poor.

The use and enjoyment of a person's property should be measured not for how much the property may be sold, but how a person's enjoyment, inconvenience, discomfort, and activities have been affected by a nuisance. The value of such activities and the inability to use and enjoy a person's property is not dictated by the property's square footage or number of bathrooms. Plaintiffs are not aware of any South Carolina case that has placed a limit on the amount a jury may award a plaintiff for such damages. See also Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 335, 2 S. Ct. 719, 731 (1883) ("it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages" and "[a]s with a blow on the face, there may be no arithmetical rule for the estimate of damages," but "an injury, the extent of which the jury may measure").

IV. WHEN A PLAINTIFF CONTENDS THAT OFFENSIVE ODORS HAVE MIGRATED FROM A NEIGHBOR'S PROPERTY ONTO THE PLAINTIFF'S PROPERTY, THE PLAINTIFF MAY MAINTAIN AN INDEPENDENT CAUSE OF ACTION FOR NEGLIGENCE.

A lawful activity can become a nuisance if it is conducted negligently. F. Patrick Hubbard and Robert L. Felix, The S.C. Law of Torts 219 (S.C. Bar 3d ed. 2004) (citing Conestee Mills v. City of Greenville, 160 S.C. 10, 158 S.E. 113 (1931)). However, it is not necessary for a plaintiff to prove negligence in order to recover damages caused by a

nuisance. FOC Lawshe Limited Partnership v. Intl. Paper Co., 352 S.C. 408, 415, 574 S.E.2d 228, 232 (Ct. App. 2002). "A nuisance may exist where no negligence is involved because lack of due care is not essential to a cause of action for a nuisance." F. Patrick Hubbard and Robert L. Felix, The S.C. Law of Torts 223 (S.C. Bar 3d ed. 2004) (citing Davis v. Palmetto Quarries Co., 212 S.C. 496, 48 S.E.2d 329 (1948)).

"A nuisance presupposes negligence in many instances, if not in most, and the two torts may be coexisting and practically inseparable if the acts or omissions constituting negligence create a nuisance." Ravan v. Greenville County, 315 S.C. 447, 465, 434 S.E.2d 296, 307 n. 4 (1993)

There are two fundamental differences between private nuisance and trespass doctrines and the doctrine of negligence, which include: (1) there is no requirement that a plaintiff have an interest in land in a negligence claim, and (2) negligence does not require proof of intent, but only a showing that the defendant's conduct was unreasonable. Samuel L. Finklea, III & Bradford W. Wyche, Envtl. Law in S.C. 21 (South Carolina Bar 3d ed. 2011).

According to the above-referenced authority, a party may pursue claim either for nuisance, negligence, or both. The ability to pursue negligence as a remedy deals with whether the defendant's conduct that caused the damages was negligent. If those elements have been met, then negligence serves as an alternative remedy. The issue as to whether the conduct giving rise to the damages is negligent or intentional is best left to the jury. Until that point, if there is sufficient evidence to survive a motion for summary judgment or motion for directed verdict, the plaintiff should be entitled to plead alternative theories of liability. The only prohibition is that a party is not entitled to a

double recovery when the same damages were alleged under each remedy. See Save Charleston Foundation v. Murray, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct. App. 1985) (when an identical set of facts entitled the plaintiff to alternative remedies, he may plead and prove entitlement to either or both, but not recover for both).

V. IN A NEGLIGENCE CAUSE OF ACTION WHERE A PLAINTIFF CONTENDS THAT OFFENSIVE ODORS HAVE MIGRATED FROM A NEIGHBOR'S PROPERTY ONTO THE PLAINTIFFS' PROPERTY, IT IS NOT NECESSARY TO ESTABLISH THE STANDARD OF CARE FOR A LANDFILL OPERATOR THROUGH EXPERT TESTIMONY.

A. Expert Testimony Was Not Required in This Case.

In considering the sufficiency of circumstantial evidence, the facts and circumstances should be assessed in light of ordinary experience and common sense. Prosser, Law of Torts, p. 242 (1971).

The above-referenced statement of law has been applied in medical malpractice cases as an exception to the general rule requiring expert medical testimony to establish proximate cause. Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978). In Green, this Court stated:

> Admittedly, the general rule is that expert testimony is required in a malpractice case to show that the defendant failed to conform to the required standard, which is, such reasonable and ordinary knowledge, skill and diligence as physicians in similar neighborhoods and surroundings ordinarily use under like circumstances . . . However, . . . there is an Exception to the rule in situations where the common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts.

Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978).

South Carolina law recognizes that when a physician fails to address serious problems, which are obvious to a layperson, this circumstance is triable by jury under the common knowledge exception. King v. Williams, 276 S.C. 478, 483, 279 S.E.2d 618,

620 (1981); see Bessinger v. De Loach, 230 S.C. 1, 11, 94 S.E.2d 3, 8 (1956) (the issues are simple enough for the understanding of a jury of laymen without the aid of evidence of dental experts; which is not to say, however, that relevant testimony of such experts may not be adduced by the litigants, or either of them).

The common knowledge exception has been applied to professional negligence cases as well. Where professional negligence is alleged, expert testimony is usually necessary to establish both the standard of care and the professional's deviation from that standard, unless the subject matter is within the area of common knowledge and experience of the layman so that no special learning is needed to evaluate the professional's conduct. City of York v. Turner-Murphy Co., Inc., 317 S.C. 194, 196, 452 S.E.2d 615, 617 (Ct. App. 1994)

The fact finder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case. Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006); see Restatement (Second) of Torts § 285 (1965) (standards of conduct of reasonable man may be established by statute, regulation, court's interpretation of statute or regulation, judicial decision, or as determined by trial judge or jury under facts of a case). Additionally, the standard of conduct of a reasonable man may be:

> (a) established by a legislative enactment or administrative regulation which so provides, or
> (b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or
> (c) established by judicial decision, or
> (d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision.

Restatement (Second) of Torts § 285 (1965).

Where the evidence permits the jury to recognize or infer a breach of duty without the aid of expert testimony, such testimony is not required in order for the case to go to the jury. Stallings v. Ratliff, 292 S.C. 349, 353, 356 S.E.2d 414, 417 (Ct. App. 1987).

This case meets the standard set out by above-referenced authorities as being within the understanding of an ordinary layperson. Moreover, the standard of care and breach thereof by Defendant were established by the legislature and administrative regulation. In this case, the representatives of the landfill operator Defendant admitted that they have a duty to prevent landfill odors from leaving the site. They even admitted that Federal regulations require them to do so. They also admitted that it is possible to prevent such odors from leaving the landfill. Finally, they admitted that the odors have left the site of the landfill.

These admissions obtained by representatives of Defendant, in addition the testimony of the regulations, show that expert testimony is not required to establish the standard of care by landfill operator and breach thereof.

B. Even if Expert Testimony is Required as to the Standard of Care of a Landfill Operator, No Magic Nomenclature to Show the Standard or that Such a Duty Has Been Breached.

The issue of breach of duty does not turn on a ritual incantation of certain magic words by an expert witness. Breach of duty is a fact question to be decided by the jury on the evidence presented in each case. Stallings v. Ratliff, 292 S.C. 349, 353, 356 S.E.2d 414, 417 (Ct. App. 1987); 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").

Even if the Court were to determine that expert testimony is required to show the standard of care required by a landfill operator and the breach of that standard, Plaintiffs have presented more than sufficient expert testimony in this case. In fact, Plaintiff's expert, Timothy Townsend, Ph.D, testified that Defendant's efforts to reduce odors were "incomplete." Those issues resulted in Plaintiffs' experiencing off-site odors from Defendant's landfill. (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).

CONCLUSION

Under the foregoing authorities and argument, Plaintiffs respectfully request the Court answer each of the certified questions accordingly. In addition, Plaintiff are certainly willing to provide any supplemental briefs, citations to authority, records, transcripts, etc., if the Court deems such items would provide assistance in addressing the certified questions.

Respectfully submitted,

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November 19, 2012

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S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Perrin Babb; Debbie Babb; Wayne Elstrom, Sarah Elstrom, Alan Jackson; and Kathy Jackson v. Lee County Landfill SC, LLC
Case No. 2012-212741

Dear Mr. Shearouse:

Enclosed for filing please find 15 bound copies and one unbound copy of Plaintiffs' Brief, along with Certificate of Counsel and Certificate of Service upon attorneys for Defendants.

Thank you for your assistance with this matter.

With kindest regards, I am

Very truly yours,

Gary W. Poliakoff

GWP/tjd

Enclosures

cc: Kevin A. Dunlap, Esq. (with enclosures)
Steven D. Weber, Esq. (with enclosures)

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of Plaintiffs' Brief has been served this date via U.S. Mail, with adequate postage attached, to the following:

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November 19, 2012

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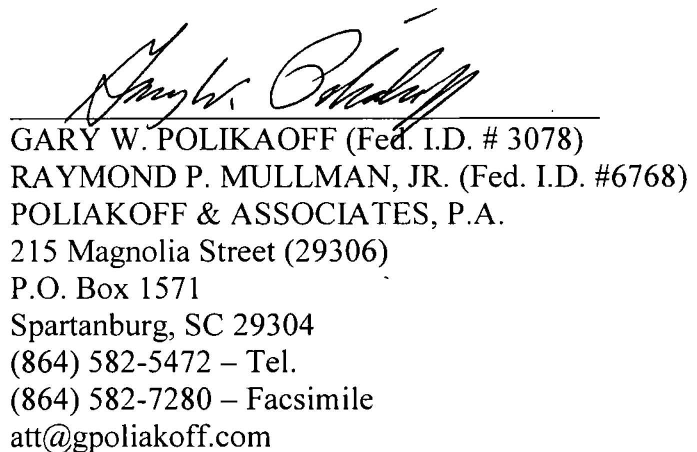

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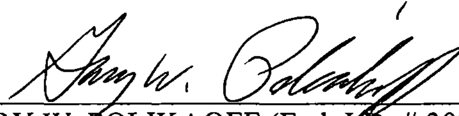
CERTIFICATE OF COUNSEL

The undersigned certified that this Plaintiffs' Brief complies with Rule 211(b), SCACR.

November 19, 2012



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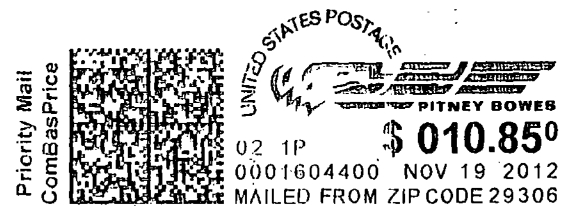

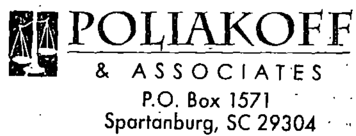

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