

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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Case No. 2007-CP-26-7459

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

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**FINAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN DISMISSING APPELLANTS' CLAIMS FOR PROPERTY DAMAGE UNDER THEORIES OF NEGLIGENCE, STRICT LIABILITY AND NUISANCE WHERE APPELLANTS' AFFIRMATIVELY ALLEGE THEIR PROPERTIES HAVE NOT BEEN CONTAMINATED BY RESPONDENT?
- II. DID THE TRIAL COURT ERR IN DISMISSING APPELLANTS' CLAIMS FOR PROPERTY DAMAGE WHERE APPELLANTS' ALLEGED INJURIES CONSIST OF POTENTIAL FUTURE HARM IN THE FORM OF DIMINISHED ABILITY TO SELL THEIR PROPERTIES?
- III. DID THE TRIAL COURT ERR IN DISMISSING APPELLANTS' STRICT LIABILITY CLAIMS, WHERE THE PURPORTED BASIS FOR STRICT LIABILITY WAS THE PREMISE THAT RESPONDENT'S USE OF A HAZARDOUS MATERIAL IN ITS MANUFACTURING PROCESS CONSTITUTED AN "ULTRAHAZARDOUS ACTIVITY?"
- IV. DID THE TRIAL COURT ERR IN DECLINING TO CONSIDER INFORMATION AND MATERIALS EXTRANEIOUS TO THE PLEADINGS IN CONJUNCTION WITH APPELLANTS' MOTION TO RECONSIDER THE DISMISSAL OF THEIR CLAIMS PURSUANT TO RULE 12(b)(6), SCRC?

## STATEMENT OF THE CASE

Appellants' property is not contaminated. If it were, Appellants would be part of an existing certified class of property owners with contaminated property. Instead, based on *mere proximity* to contamination located entirely on property *they do not own*, Appellants attempted to assert claims against Respondent AVX Corporation ("AVX").<sup>1</sup> (R. p. 50, ¶ 22.) The trial court dismissed Appellants' claims in their entirety, relying on: (i) the South Carolina Supreme Court's clear holding in Clark v. Greenville County, 313 S.C. 205, 437 S.E.2d 117 (1993) that negligence and strict liability claims such as Appellants' claims in this action fail in the absence of actual contamination on the subject properties; and (ii) the decision of the United States Court of Appeals for the Fourth Circuit in In re Wildewood Litigation, 52 F.3d 499 (4<sup>th</sup> Cir. 1995), applying South Carolina law to reject a nuisance claim in the absence of evidence that there was actual contamination at a level of toxicological concern. (R. p. 3.) Appellants now seek reversal of the trial court's dismissal order.<sup>2</sup>

Appellants filed the original Complaint on November 27, 2007 and an Amended Complaint on May 7, 2010. (R. pp. 30, 43.) The Amended Complaint asserts claims on behalf of two distinct groups: (i) Appellants and a putative class of similarly situated property owners whose property was not contaminated but which adjoins or is in

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<sup>1</sup> Negligence, strict liability, trespass and nuisance.

<sup>2</sup> Appellants have not argued that the trial court erred by dismissing their trespass claim, which is therefore not at issue in this appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("No point will be considered which is not set forth in the statement of issues on appeal.") (citing State v. Bray, 342 S.C. 23, 28, 535 S.E.2d 636, 639, n. 2 (2000)); Barnes v. Cohen Dry Wall, Inc., 357 S.C. 280, 287, 592 S.E.2d 311, 314, n. 11 (Ct. App. 2003) (declining to address issues that were not set forth in appellant's statement of issues on appeal).

proximity to property that Appellants allege to have been contaminated by AVX; and (ii) five additional plaintiffs and a putative class of property owners who allege that AVX caused actual contamination on their properties (“Contaminated Property Plaintiffs.”) (R. p. 50, ¶ 22.)

On May 24, 2010, AVX moved to dismiss all claims alleged in the Amended Complaint. The trial court held a hearing on AVX’s Motion to Dismiss on October 6, 2010. On October 15, 2010, the Honorable Benjamin Culbertson wrote to all parties stating his intent to grant AVX’s Motion to Dismiss as to those plaintiffs *who allege that their properties are not contaminated.* (R. p. 118 (emphasis added).) Discovery as to Appellants ceased on October 15, 2010 when Judge Culbertson notified the Parties of his decision to dismiss Appellants’ claims. (R. p. 118.) The parties then conducted extensive discovery on class certification issues pertaining to the claims of the Contaminated Property Plaintiffs. On August 30, 2011 the trial court certified a class of over 200 persons, partnerships, or corporations who own real property that *is* contaminated by chemicals which allegedly migrated from AVX. (R. p. 24.)

On March 9, 2012, Judge Culbertson issued a written Order dismissing Appellants’ claims in their entirety for failure to state a claim for relief pursuant to Rule 12(b)(6), SCRCP. (R. pp. 1-4.) Appellants moved for reconsideration as to the dismissal of their claims on March 19, 2012. The trial court heard the Motion for Reconsideration

on May 22, 2012 and denied the Motion by Form Order dated May 22, 2012. Appellants served their Notice of Appeal on May 31, 2012.<sup>3</sup>

### STATEMENT OF FACTS

Appellants are citizens and residents of Horry County: (R. p. 48, ¶¶ 5-9.) AVX Corporation is a Delaware corporation which owns and operates a manufacturing facility in Horry County. (R. p. 48.) Appellants allege that AVX used the chemical trichloroethylene (“TCE”) as a cleaner and degreaser, that TCE was released on AVX’s property, and that TCE has migrated beyond the boundaries of AVX’s property. (R. pp. 48-49, ¶¶ 11-16.) Appellants’ properties are not contaminated with TCE from the AVX facility, but they allege to have suffered property devaluation by virtue of their proximity to contaminated properties. (R. p. 50, ¶ 22(b).) The only injuries alleged by Appellants are devaluation of or the inability to sell their properties. (R. pp. 49-55, ¶¶ 18-22(b), 31, 36, 52.)

### LEGAL STANDARD

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC, this Court must apply the same standard of review as the trial court. Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct.App.2010). This Court must consider whether the complaint, viewed in the light most favorable to the Plaintiffs, states any valid claim for relief. Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). A motion to dismiss must be granted when the pleadings fail to state facts sufficient to constitute a cause of action as a matter of law. Bergstrom v. Palmetto Health

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<sup>3</sup> Merits discovery on the claims of the Contaminated Property Plaintiffs is ongoing and the Contaminated Property Plaintiffs’ claims are pending in the trial court and not subject to a stay.

Alliance, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004). Furthermore, the trial court must grant a Rule 12(b)(6), SCRPC motion to dismiss if the facts alleged and the inferences reasonably deducible from the pleadings would not entitle a plaintiff to relief under any theory of the case. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct.App.1997). To survive a Rule 12(b)(6) motion, “[f]actual allegations must be enough to raise a right to relief above the speculative level” and have “enough facts to state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570, 127 S.Ct. 1955, 1965, 1974 (2007). Thus, the issue before this Court is whether the *pleadings* articulate any valid claim for relief for Appellants. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987); Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct.App.1999).

### ARGUMENT

As set out in greater detail below, this Court should affirm the dismissal of Appellants’ claims in this action because: (1) Appellants’ claims fail as a matter of law in the absence of allegations that their properties were actually contaminated; (2) Appellants have failed to allege actual economic injury and therefore lack standing; (3) AVX’s alleged use of hazardous chemicals is insufficient to constitute an ultrahazardous activity giving rise to strict liability under South Carolina law; and (4) the trial court properly declined to consider materials extrinsic to the pleadings – which were developed in association with the Contaminated Property Plaintiffs’ claims – in deciding AVX’s Motion to Dismiss Appellants’ Amended Complaint.

**I. APPELLANTS' CLAIMS FAIL AS A MATTER OF LAW BECAUSE APPELLANTS HAVE NOT ALLEGED THAT THEIR PROPERTIES ARE CONTAMINATED.**

Simply stated, South Carolina law does not recognize claims for negligence, strict liability or nuisance for property that is merely proximate to alleged contamination but is not, itself, contaminated. The trial court properly applied this legal standard to dismiss Appellants' claims, and the dismissal should therefore be affirmed.

**A. The Trial Court Correctly Found That Appellants Failed To State Claims For Negligence and Strict Liability Under South Carolina Law Because They Have Alleged That Their Properties Are Not Contaminated.**

**1. The Trial Court Properly Relied Upon And Applied Clark v. Greenville County.**

It is well-established under South Carolina law that mere allegations of "close proximity" to contamination are insufficient to state causes of action for negligence or strict liability. Clark v. Greenville County, 313 S.C. 205, 437 S.E.2d 117 (1993); (R. p. 50, ¶ 22(b).) To the contrary, claims for negligence or strict liability arising out of environmental contamination require allegations that the subject property is actually contaminated. Clark, 313 S.C. at 209, 437 S.E.2d at 119.

In Clark, several property owners sued Greenville County and various corporate defendants alleging claims of negligence and strict liability arising from Greenville County's operation of a landfill and the corporate defendants' disposal of hazardous waste in the landfill. Clark, 313 S.C. at 206, 437 S.E.2d at 118. The trial court granted summary judgment to the defendants for the negligence and strict liability claims, in part

because plaintiffs failed to present sufficient evidence demonstrating that their properties had been contaminated by hazardous chemicals originating from the landfill. Id.

On appeal, the South Carolina Supreme Court affirmed summary judgment in favor of the defendants. Clark, 313 S.C. at 209, 437 S.E.2d at 119. The South Carolina Supreme Court affirmed summary judgment even though plaintiffs produced *some evidence* of contamination to their properties because the plaintiffs failed to link the contamination to the landfill or to the defendants who disposed of hazardous waste in the landfill. Id. Appellants in this case not only fail to allege a causal link between contamination and chemicals that may have migrated from the AVX facility, but also plainly admit and allege that their properties have not been contaminated. (R. p. 50, ¶ 22(b).)

The plaintiffs in Clark could not sustain their claims because they could not establish that contamination of their properties was attributable to the defendants. Likewise, Appellants here affirmatively plead that there is no contamination of their properties attributable to AVX. Thus, the trial court correctly found that, under the Supreme Court's reasoning in Clark, Appellants failed to state claims for negligence or strict liability and appropriately dismissed these claims pursuant to Rule 12(b)(6), SCRCF.

**2. The Authority On Which Appellants Rely Does Not Support Their Position.**

Curiously, Appellants do not address the trial court's application of the Clark case when arguing that dismissal of their negligence claim was in error. Instead, they refer this Court to three inapposite cases – two South Carolina cases and one Fourth Circuit

case applying South Carolina law – in support of their argument that the trial court erred in dismissing their negligence claim. Each of the cases cited by Appellants differs from Clark and this matter because the plaintiffs in each case cited by Appellants, unlike Appellants in this action, alleged that their properties had been contaminated by the defendants.

a. **In re Wildewood**

Appellants attempt to rely on the Wildewood decision for the proposition that it “supports Appellants’ position that the negligence claim should not have been dismissed.”<sup>4</sup> 52 F.3d 499 (4th Cir.1995) (App. Brf. p. 16). Appellants conspicuously fail to acknowledge that the plaintiffs in Wildewood alleged actual contamination of their properties. Id. 52 F.3d at 501.

b. **Tant v. Dan River**

Appellants also cite Tant v. Dan River, Inc. to support their contention that the trial court erred in dismissing their claims. 286 S.C. 140, 142-42, 332 S.E.2d 534, 535 (Ct.App.1985) rev’d on other grounds, 289 S.C. 325 (1986) (App. Brf. p. 16). However, Appellants’ discussion of the Tant decision somehow manages to omit reference to the Tant plaintiffs’ allegations that the defendant “emitted a black, tarry soot that fell upon

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<sup>4</sup> Appellants appear to have misread or misunderstood the trial court’s Order. The trial court did in fact cite and rely upon In re Wildewood for its reasoning when considering Appellants’ nuisance claim as discussed in this brief, but the trial court did not rely on In re Wildewood for its reasoning when considering Appellants’ negligence claim.

and damaged their respective homes and items of personal property.”<sup>5</sup> Tant, 286 S.C. at 142-42, 332 S.E.2d at 535.

c. **Johnson v. Hoechst Celanese**

Appellants further cite this Court’s opinion in Johnson v. Hoechst Celanese Corporation to support their argument that they need not allege actual contamination to state a claim for negligence. 317 S.C. 415, 453 S.E.2d 908 (Ct.App.1995) (App. Brf. pp. 16-17). However, Appellants’ position only finds support in the Johnson decision by ignoring the critical fact that all of the Johnson plaintiffs “alleged contamination of their properties” in their pleadings. Id. at 418, 453 S.E.2d at 910. Only after discovery and at trial did the parties stipulate that *some* plaintiffs’ properties were not in fact contaminated and were not likely to be become contaminated in the future. Id. The jury then returned a verdict for the defense as to those plaintiffs.<sup>6</sup> Id. 317 S.C. at 419. Johnson thus cannot be read to hold that Appellants stated a claim through allegations that their properties are not contaminated but are merely proximate to contaminated property.

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<sup>5</sup> Appellants also cite to Tant for the erroneous assertion that violation of the South Carolina Pollution Control Act equates to negligence per se. There is no support for this assertion in the Tant case and this contention conflicts with the language of the Act. See e.g., S.C.Code Ann. § 48-1-250 (2011) (“A determination by the Department that pollution exists or a violation of any of the prohibitions contained in this chapter, whether or not actionable by the State, create no presumption of law or fact inuring to or for the benefit of persons other than the State”).

<sup>6</sup> There is no indication in the Johnson decision that the continued validity of claims on behalf of the Johnson plaintiffs later found to have no contamination on their properties was tested by any form of dispositive motion, much less that the court affirmatively found such plaintiffs’ allegations to state a claim.

**B. Appellants' Concession That Their Properties Are Not Contaminated Is Also Fatal To Their Nuisance Claims.**

To maintain an action for a private nuisance, Appellants must plead an unreasonable interference with the use and enjoyment of their properties. Ravan, 315 S.C. at 463, 434 S.E.2d at 306. Appellants concede that their properties have not been contaminated by AVX, instead asserting a claim for nuisance based solely on the allegation that their properties are “in such close proximity” to contamination from AVX that they have suffered an unreasonable interference with the use and enjoyment of their properties. (R. p. 50, ¶ 22(b).) The trial court noted correctly that, under South Carolina law, these allegations fail to state a claim for nuisance because in South Carolina – as in a majority of other jurisdictions – plaintiffs must plead and prove actual contamination in order to establish an actionable nuisance. (R. p. 3.)

**1. The Trial Court Properly Applied The Wildewood Decision To Hold That Appellants Failed To State A Claim For Nuisance.**

The trial court cited Wildewood, *supra*, for its determination that Appellants fail to state a claim for nuisance. Wildewood involved 11 property owners who brought suit alleging nuisance against a neighbor manufacturer, Amphenol, alleging that Amphenol released TCE. *Id.* at 501. Unlike Appellants, the Wildewood plaintiffs also alleged that the TCE migrated from Amphenol’s plant into the groundwater beneath their homes. *Id.* Notwithstanding the presence of actual contamination, the district court directed a verdict on the nuisance claim in favor of defendant Amphenol, in part based on evidence that any TCE present did not create health risks for the plaintiffs. *Id.* at 502. On appeal, the Fourth Circuit affirmed and, applying South Carolina law, held that “because the TCE

levels did not rise to the level of toxicological concern, the owners have presented no evidence that the use and enjoyment of their property was unreasonably interfered with by Amphenol.” Id. at 503.

Appellants rely heavily on their argument that the trial court erred because it determined that nuisance claims in South Carolina require allegations of a “physical impact.” (App. Brf. pp. 4-12). However, the trial court did *not* determine that a “physical impact” is required to properly plead a nuisance claim. Rather, the trial court ruled that Appellants’ allegations, when read in their entirety and in the light most favorable to Appellants, failed to state a cause of action for nuisance because those allegations could not be read to allege an unreasonable interference with Appellants’ use and enjoyment of their properties. (R. p. 3.) Though Appellants cite to numerous cases for the contention that they need allege only some conclusory “hurt, inconvenience, or damage” to their properties arising from the proximity to environmental contamination to state a claim for nuisance, they do not direct this Court to a single case from South Carolina or another jurisdiction where a plaintiff has prevailed on a nuisance claim arising from allegations that their property is in close proximity to, but not suffering from, environmental contamination.<sup>7</sup>

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<sup>7</sup> Plaintiffs cite to the following South Carolina private and non-applicable *public* nuisance cases in support of their misplaced assertions regarding physical impacts: Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296 (1993) (plaintiffs alleged chemical contamination of their properties by defendant landfill); Lever v. Wilder Mobile Homes, Inc., 283 S.C. 452, 322 S.E.2d 692, 1984 S.C. App. LEXIS 597 (Ct.App.1984) (plaintiff alleged defendant improperly maintained its sewage treatment lagoon emitting offensive odors and leaking sewage that ran into his fish pond, polluting the pond and killing fish); Ryan v. Copes, 11 Rich. Law (S.C.) 217; 73 Am. Dec. 106 (1858) (court found that plaintiff’s insurance costs had increased due to the threat

Given Appellants' specific allegations that TCE has not contaminated their properties, the trial court's reliance on Wildewood was thus well-placed and this Court should affirm the dismissal of Appellants' nuisance claims.

2. **In The Absence Of Actual Contamination, Appellants Cannot Establish Interference With The Use Of Their Property By Reference To The Requirements Of The South Carolina Residential Property Disclosure Act.**

The Residential Property Disclosure Act ("the Act") requires that the owners of real property make certain disclosures prior to the sale of real property to prospective purchasers. S.C.Code. Ann. § 27-50-10 et seq. (2012). The Act requires the disclosure of the "*presence* of lead-based paint, asbestos, radon gas, methane gas, underground storage tank, hazardous material or toxic material, buried or covered, *and other environmental contamination.*" S.C.Code Ann. § 27-50-20 (2012) (emphasis added). Appellants concede that their property is not contaminated and that contamination allegedly released by Defendant AVX is not "*present*" on or beneath their properties. (R. p. 50, ¶ 22(b).) The trial court recognized correctly that the environmental contamination disclosure requirement of the Residential Property Disclosure Act therefore does not

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of fire and explosion from defendant's steam cotton-press ); Emory v. Hazard Powder Co., 22 S.C. 476, 1885 S.C. LEXIS 44 (1885) (plaintiff alleged injury to the plaintiff's health due to the proximity of explosives stored by the defendant); Neal v. Darby, 282 S.C. 277, 318 S.E.2d 18 (Ct.App.1984) (court determined that a landfill constitutes a *public* nuisance due to the emission of odors and resulting impact to the public); Young v. Brown, 212 S.C. 156, 46 S.E.2d 673 (1948) (proposed cemetery may constitute a *public* nuisance); Gray v. Southern Facilities Inc., 256 S.C. 558, 183 S.E.2d 438 (1971) (the Court noted injury to reputation of property has been held not to be proper element of damages and did not allow recovery in negligence without injury or damage to property) LeFurgy v. Long Cove Club Owners, Association, 443 S.E.2d 577 (Ct.App.1994) (*public* nuisance case concerning loud conversation and noise from golf carts associated with proposed tee box construction).

apply to Appellants and cannot serve as the basis for a claim that the use and enjoyment of appellants' property has been actually and unreasonably interfered with. (R. p. 3.)

**C. The Trial Court's Dismissal Of Appellants' Claims For Failing To Allege Actual Contamination Of Their Properties Is Also Consistent With The Law Of Other Jurisdictions.**

In addition to citing Wildewood, the trial court also noted correctly that many other jurisdictions concur with its ruling that actual contamination must be alleged in order for a landowner to sustain property damage claims related to environmental contamination.<sup>8</sup> The cases of Stancill v. E.I. DuPont de Nemours and Company, Inc., 91 F.3d 133 (Table), 1996 WL 267327 (4<sup>th</sup> Cir. 1996) and Brooks v. E.I. Du Pont de Nemours & Company, 944 F. Supp. 448, 449 (E.D.N.C. 1996) – applying North Carolina law – are particularly instructive. In Stancill, the Fourth Circuit applied North Carolina law to affirm the district court's grant of summary judgment in favor of

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<sup>8</sup> The trial court cited the following cases by footnote: Stancill v. E.I. DuPont de Nemours and Co. Inc., No. 95-2560, 91 F.3d 133 (Table), 1996 WL 267327, at \*1 (4th Cir. May 21, 1996) (holding that “without physical damage to [plaintiffs’] properties as opposed to mere diminution of property value or emotional distress, none of the causes of action - trespass, nuisance per accidens, or negligence - can be sustained under North Carolina law”); Adams-Arapahoe School District No. 28-J v. GAF Corp., 959 F.2d 868, 872 (10<sup>th</sup> Cir. 1992) (“Tort actions can be maintained only where plaintiffs explicitly allege and subsequent evidence demonstrates contamination of the building or other property [involved] ....”); Dusoe v. Mobil Oil Corp., 167 F. Supp. 2d 155, 163-64 (D. Mass. 2001) (granting summary judgment for defendant because Massachusetts nuisance law requires proof of actual contamination); Maddy v. Vulcan Materials Co., 737 F. Supp. 1528, 1540 (D. Kan. 1990) (plaintiffs' claim for trespass dismissed because plaintiffs could present no evidence that airborne pollution had reached their property and caused actual and substantial damage to their property); Leaf River Forest Prods., Inc. v. Ferguson, 662 So.2d 648, 664 (Miss. 1995) (“We find as to nuisance that there is little evidence and scarce testimony of any invasion by substance or odor by the defendants as to the [plaintiffs’] specific property. Without such there can be no nuisance.”); Kemner v. Monsanto Co., 576 N.E.2d 1146, 1154-44 (Ill. App. Ct. 1991) (dioxin contamination in a nearby creek was insufficient to establish a compensable injury because contamination had not reached the plaintiffs' property). (R. p. 4.)

defendant, DuPont, for plaintiffs' claims of trespass, nuisance, negligence and strict liability arising from alleged contamination and resulting diminution in property values. Id. Unlike Appellants, the Stancill plaintiffs alleged that their properties had been contaminated by DuPont. The district court ordered all plaintiffs to have an expert analyze their property for contaminants. Id. The analysis demonstrated that several of the plaintiffs' properties were not contaminated. Id. The district court then granted summary judgment to DuPont as to the claims of all plaintiffs whose properties, like Appellants', were not contaminated. Id. The Fourth Circuit found no error. Id.

The district court expanded the holding of the Stancill case in Brooks v. E.I. Du Pont de Nemours & Company, 944 F. Supp. 448 (E.D.N.C. 1996). Brooks followed Stancill and arose from the same allegations. Though contaminants were present in the groundwater beneath the Brooks plaintiffs' properties, the concentrations of those contaminants were below maximum allowable concentrations established by the North Carolina groundwater quality regulations. Id. at 449. The district court granted summary judgment for DuPont, holding that "since the levels of contaminants estimated by plaintiffs' experts fall below the maximum allowable concentration for all contaminants at issue, the plaintiffs have failed to demonstrate even a prima facie showing that they have been damaged..." Id. Likewise, Appellants, by pleading that their properties *are not contaminated whatsoever* have failed to allege facts sufficient to state a claim for negligence, strict liability or nuisance.<sup>9</sup>

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<sup>9</sup> See also, Cereghino v. Boeing Co., 873 F. Supp. 398, 403 (D. Or. 1994) (plaintiffs were not injured where trichloroethane concentrations were below the regulatory levels; rejected plaintiffs' claim that such a holding constitutes a "pollution easement" in favor of the defendants); Gleason

II. **APPELLANTS FAILED TO ALLEGE FACTS SUFFICIENT TO ESTABLISH PRESENT ACTUAL INJURIES AND THEREFORE LACK STANDING.**

The Amended Complaint fails to allege facts sufficient to establish that any Appellant has sustained an actual economic injury in fact; instead Appellants' claims are premised and rely upon the conclusory allegation that their properties and homes have been devalued due to their proximity to TCE contamination. (R. p. 50, ¶ 22(b).) Absent specific and concrete allegations regarding present economic injuries in fact, Appellants do not have standing to maintain this lawsuit, and their claims must be dismissed. See, e.g., Sea Pines Ass'n for the Protection of Wildlife, Inc., v. South Carolina Dept. of Nat. Resources and Comm. Services Assocs., Inc., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)); Beaufort Realty Co. v. South Carolina Coastal Conservation League, 346 S.C. 298, 302-03, 551 S.E.2d 588, 589-90 (Ct.App.2001).

To establish standing, Appellants must have alleged a "concrete and particularized" injury that is not "conjectural or hypothetical." Sea Pines Ass'n, 345 S.C. at 601 (citing Lujan) (internal citations omitted). Appellants fail to meet this burden, as their alleged "injuries" are wholly hypothetical and speculative. (R. pp. 51-52, ¶¶ 28, 31.) Appellants plead only that they "are unable to sell their homes," that "their property is worthless," and that "their property is damaged and devalued" because they must now

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v. Town of Bolton, 14 Mass. L. Rep. 678, 2002 WL 1555320, 2002 Mass. Super. LEXIS 208 (Mass. Super. 2002) (MTBE contamination below the regulatory levels does not constitute an injury); Rose v. Union Oil Co., 1999 U.S. Dist. LEXIS 967, 1999 WL 51819 (N.D. Cal. Jan. 29, 1999) (petroleum constituent contamination below the regulatory levels does not present a risk to health or unreasonable interference with the plaintiffs' use of the land).

disclose to prospective purchasers that their properties are contaminated (which, as noted above, is inaccurate as a matter of law). (R. pp. 51-52, ¶¶ 28, 31.) However, Appellants did not plead that they have actually tried and been unable to sell any of their properties. Appellants' lawsuit is based only upon the speculative allegation and belief that they will be unable to sell their properties should they ever decide to do so at some hypothetical future point in time. (R. p. 51, ¶ 28.) (“... Plaintiffs are required *if* their property is sold to advise the prospective purchaser that ... there is contamination from TCE which makes the aforementioned property ‘a distressed property’ and accordingly unable to be sold with disclosure.”) (emphasis added).

LaBauve v. Olin Corp., 231 F.R.D. 632 (S.D.Ala.2005) offers an instructive example of how the absence of actual contamination deprives property owners of standing. In LaBauve, five plaintiffs brought a putative class action against Olin Corporation seeking damages for alleged diminution in property values caused by mercury contamination emanating from an Olin manufacturing plant. Id. At the certification stage, the district court ruled that three of the five named plaintiffs had not demonstrated their properties were contaminated with mercury as alleged. LaBauve, 231 F.R.D. at 647. Accordingly, the court determined that these plaintiffs had not sustained an injury in fact and therefore lacked standing to bring claims on behalf of themselves and the class related to alleged property damage. LaBauve, 231 F.R.D. at 650.

Simply stated, the mere possibility of an injury, *if* Appellants ever decide to sell their property, is not sufficiently “concrete and particularized” to establish standing. See, e.g., Beaufort Realty Co. 346 S.C. at 302-03 (holding a plaintiff must suffer actual injury,

not merely a concern of possible future harm, in order to establish standing). Accordingly, the trial court properly dismissed all of Appellants' claims against AVX in their entirety.

**III. APPELLANTS DO NOT ALLEGE THAT AVX ENGAGED IN ACTIVITIES GIVING RISE TO STRICT LIABILITY UNDER SOUTH CAROLINA LAW.**

Appellants' claims for strict liability fail as a matter of law because Appellants have not pled facts which, if true, would establish that AVX engaged in an activity giving rise to a strict liability claim under South Carolina law. Appellants offer no basis for their strict liability claim beyond their contention that AVX engaged in an ultrahazardous activity merely by using the chemical TCE for its manufacturing operations. (R. p. 54, ¶ 46.) This claim fails as a matter of law because neither the use nor disposal of hazardous chemicals is an ultrahazardous activity subject to strict liability under South Carolina law. See, e.g., Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296 (1993).

Strict liability and activities considered ultrahazardous are narrowly construed in South Carolina. See Snow v. Columbia, 305 S.C. 544, 547-550, 409 S.E.2d 797, 799-801 (Ct.App.1991). In fact, there are only two reported cases in which strict liability has been imposed for an ultrahazardous activity: Frost v. Berkeley Phosphate Co., 42 S.C. 402, 20 S.E. 280 (1894) (imposing liability on a fertilizer company for *manufacturing* sulfuric acid) and Wallace v. A.H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960) (“[b]lasting is ultrahazardous because high explosives are used and it is impossible to predict with certainty the extent or severity of consequences”). The mere use and storage of a commonly-used hazardous substance has never been held to constitute an

ultrahazardous activity giving rise to a claim for strict liability under South Carolina law.<sup>10</sup>

Appellants suggest that this Court should apply the Restatement (2d) of Torts, §§ 519-520 to find that the use of TCE is an “abnormally dangerous” activity that can give rise to strict liability. (App. Brf. pp. 18-20). However, they cannot direct this Court to any South Carolina decision adopting the Restatement standard or applying the Restatement to find that the use and storage of a substance defined as hazardous under environmental regulations is a sufficient basis, by itself, for strict liability. To the contrary, South Carolina appellate courts have continuously refused to extend the list of activities subject to strict liability.<sup>11</sup>

Neither the South Carolina legislature nor the South Carolina Supreme Court has held that a company engaged in handling chemicals is strictly liable for damages caused thereby; therefore, as a matter of law Appellants have failed to state a claim for strict liability. This Court should affirm dismissal of Appellants’ claims for strict liability

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<sup>10</sup> It should be noted that during most of the period that AVX used TCE, it was not even classified as a hazardous substance.

<sup>11</sup> See Allison v. Ideal Laundry & Cleaners, 215 S.C. 344, 55 S.E.2d 281 (1949) (concluding that property owner’s use of propane gas was not an inherently dangerous activity); Snow, 305 S.C. 544, 549-550, 409 S.E.2d 797, 800 (1991) (refusing to impose strict liability against city for leaking water pipe that caused property damage); Ravan, 315 S.C. 447, 434 S.E.2d 296 (1993) (refusing to hold that dumping of hazardous chemicals into county landfill constitutes an abnormally dangerous activity as a matter of law); Hatfield v. Atlas Enterprises, Inc., 274 S.C. 247, 249, 262 S.E.2d 900, 901 (1980) (no error in trial court’s refusal to charge handling of fireworks was an abnormally dangerous activity when strict liability had not been extended to encompass that activity by the South Carolina Supreme Court); Shockley v. Hoechst Celanese Corp., 996 F.2d 1212 (4<sup>th</sup> Cir. 1993) (applying South Carolina law and stating that South Carolina does not recognize strict liability for damages caused by hazardous waste disposal or reclamation).

accordingly.

**IV. THE TRIAL COURT DID NOT ERR BY DECLINING TO CONSIDER INFORMATION BEYOND THE PLEADINGS.**

The trial court did not err in twice rejecting Appellants' attempts to reach beyond the pleadings to demonstrate that they have adequately stated claims for relief for negligence, strict liability, and nuisance. (R. pp. 178-80, 245, lines 5-11, pp. 1-4.) The trial court noted appropriately that the issue before it on AVX's Motion to Dismiss was the sufficiency of the pleadings and that when considering a motion to dismiss a complaint pursuant to Rule 12(b)(6), SCRPC, it must base its ruling solely on allegations set forth in the complaint. See Doe v. Marion, 373 S.C. 390, 395 (2007). (R. p. 2.) Accordingly, the Court's Order is based *only* on the Court's review of the *pleadings* and its *interpretation of South Carolina law*. (R. pp. 118, 2-4.)<sup>12</sup>

This Court should reject Appellants' attempts to include information proffered as Exhibits 1-12 in the Record before it and should not consider such extraneous materials when determining whether or not Appellants' allegations state any claim for relief. State Bd. of Medical Examiners v. Fenwick Hall, Inc., 300 S.C. 274, 387 S.E.2d 458 (1990). Appellants seek to have the Court review hundreds of pages of materials beyond the

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<sup>12</sup> Appellants have not ever sought leave to amend the pleadings to include allegations based on the extrinsic evidence proffered in conjunction with their Motion for Reconsideration, though nearly a year and a half passed between the hearing on AVX's Motion to Dismiss and the trial court's entry of the Order now on appeal. Similarly, at no point have Appellants suggested that their claims should have been dismissed without prejudice with leave to amend their Complaint, either in their Rule 59(e) Motion or in their initial brief before this Court. They have therefore waived any request to amend or argument in favor of amending the pleadings now. See In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004); Dunbar, *supra*; Barnes, *supra*.

pleadings, including deposition testimony, documents produced in discovery between the parties, documents obtained via third party discovery, as well as expert affidavits. The vast majority of the information proffered by Appellants as Exhibits 1-12 was obtained during discovery *after* the trial court issued its letter ruling indicating its intent to dismiss Appellants' claims. Much of the extraneous information proffered by Appellants as Exhibits 1-12 was discovered or developed by counsel with respect to issues arising out of the Contaminated Property Plaintiffs' claims and with the understanding between counsel that Appellants' claims had been dismissed. (R. pp. 1-4.) Appellants do not cite a single case for their assertion that the trial court erred by not considering the extraneous information proffered by Appellants as Exhibits 1-12 or supporting their contention that this information should be considered by this Court.

Should this Court consider the information proffered by Appellants as Exhibits 1-12, Respondent requests that the Court note the following information regarding each Exhibit<sup>13</sup> proffered by Appellants:

Exhibit	Title	Date	Significance
1	Deposition of Carol Minsk	August 10, 2010	Appellants highlight Ms. Minsk's testimony regarding the extent of and expected duration of TCE contamination. Her testimony has no bearing on Appellants' properties which are not contaminated.
2	Deposition of Janice Camp	August 11, 2010	Ms. Camp is not an Appellant and has elected not to exercise her right to sue Respondent individually for

<sup>13</sup> Excluding Exhibits 6, 7, and 11 proffered by Appellants, as they are decisions of this Court and of the United States District Court, which speak for themselves.

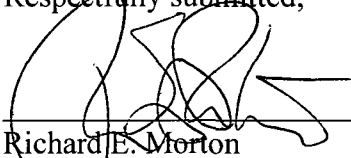
			any damages she may have incurred. Appellants have not alleged that they have been denied loans secured by their properties as claimed by Ms. Camp.
3	Letter from Carolina Trust Federal Credit Union	August 27, 2010	Refers to a “business decision” by the Credit Union to delay lending until the “ <i>legal issues regarding the contamination are resolved.</i> ” These “legal issues” remain in progress for Appellants only because they sought reconsideration of their dismissal and have now appealed that decision to this Court.
4	Affidavit of Henry Beckham	October 1, 2010	Plaintiffs attempted to introduce this Affidavit at the first hearing on the Motion to Dismiss, and it was properly rejected by the trial court as beyond the scope of Rule 12(b)(6), SCRCF motion.
5	Affidavit of John Kilpatrick	January 27, 2012	Filed by remaining Plaintiffs in opposition to AVX’s motion to exclude certain properties from the certified class of <i>contaminated</i> properties.
8	Order Granting Plaintiffs’ Motion to Certify Class	August 30, 2010	This Order concerns the Contaminated Property Plaintiffs and certifies a class of contaminated properties. Appellants’ claims were not considered and are not within the contemplation of the Order.
9	Consent Order	December 19, 1996	Appellants do not refer to Exhibit 9 in their Brief.
10	Various expert, third party, and Plaintiffs depositions.	Various	All such depositions are immaterial to and beyond the scope of a Rule 12(b)(6), SCRCF dismissal.

12	"Plume" Map drawn by Plaintiffs' Expert Dr. Fetter		This map purports to display an alleged area of TCE contamination, but does not attribute the contamination to Respondent. The South Carolina Dept. of Health and Env. Control has determined that the area impacted by TCE attributable to AVX is significantly smaller than the area depicted in this exhibit.
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### CONCLUSION

For the reasons stated, this Court should affirm the dismissal of Appellants' claims.

Respectfully submitted,



Richard E. Morton  
S.C. Bar No. 15182

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October 23, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

---

Case No. 2007-CP-26-7459

---

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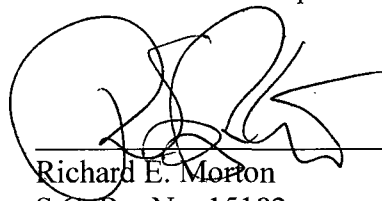
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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief complies with Rule 211(b),  
SCACR.

October 23, 2012



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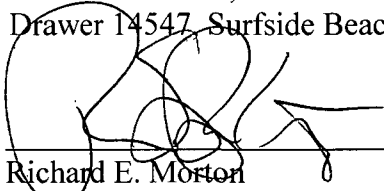
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**PROOF OF SERVICE**

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I certify that I have served the **Final Brief of Respondent** on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on October 23, 2012, addressed to their attorneys of record Gene M. Connell, Jr. and L. Sidney Connor, IV of Kelaher Connell & Connor PC, P. O. Drawer 14547, Surfside Beach, SC 29587-4547.

October 23, 2012



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