THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Trial Court Case Nos.
2011CP-10-7065 and 2015-CP-10-3550

Appellate Case No. 2017-000866

Richard Ralph and Eugenia Ralph, Appellants,

v.

Paul Dennis McLaughlin
and Susan Rode McLaughlin, Respondents.

APPELLANTS' INITIAL BRIEF

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IV. **Did the Trial Court err in allowing the jury to decide the question of whether the SIPOA could abandon the easement, or give legally sufficient permission to build on it, because it was a question of law and not of fact?**

STATEMENT OF THE CASE

On September 30, 2011, the Plaintiffs/Appellants, Richard and Eugenia Ralph, filed a Complaint against their neighbors, Respondents Paul and Susan McLaughlin. In the Complaint, the Appellants alleged that the Respondents destroyed a drainage easement, which caused flooding and poor drainage on the Appellants' adjacent property.[1] The Appellants sought actual and punitive damages. The Respondents answered the Complaint on December 6, 2011, denying its allegations and raising affirmative defenses. The Respondents also brought a Third-Party Complaint against the Seabrook Island Property Owners Association ("SIPOA" or "the POA"), in which they alleged reliance on representations by SIPOA and liability on the part of the SIPOA

[1] On July 17, 2013, the Appellants filed an Amended Complaint against the Respondents, specifying their cause of action as one of trespass and praying for actual and punitive damages against the Respondents.

for the Appellants' claims. SIPOA denied the claims against it and raised affirmative defenses in an Answer filed on January 6, 2011.

On June 24, 2014, the Court entered an Order striking the case from the docket pursuant to Rule 40(j), SCRCP. The case was restored to the docket on June 23, 2015, and a new case number was assigned.

Shortly after the case was restored to the docket, each party filed a motion for summary judgement; the SIPOA, significantly, requested summary judgment as to the Respondents' claims for reliance. In an Order filed June 7, 2016, the Honorable G. Thomas Cooper, Jr., granted SIPOA's Motion for Summary Judgment, dismissing the Respondents' Third-Party Claims against SIPOA "because [Respondents] cannot show any evidence of 'reasonable reliance' on a SIPOA representation."[2] (Order, p. 7)

The remaining claims were tried before a jury, in a trial presided over by the Honorable Roger M. Young, Sr., beginning on January 23, 2017. Judge Young granted the Respondents' Motion for a Directed Verdict as to the issue of punitive damages. Judge Young denied the Appellants' request that Judge Cooper's previous ruling would be considered the law of the case; Judge Young also denied Appellants' Motion for a Directed Verdict as to the issue of Respondents' liability for trespass and as to the issue of the SIPOA's ability to abandon the easements. On January 26, 2017, after hearing closing arguments and instructions, the jury deliberated for five and half hours before announcing that it was deadlocked. After being given an *Allen* charge, the jury returned to deliberations. An hour later, at approximately 5:22pm, the

[2] Judge Cooper filed three orders on that same day in this case; in the first, discussed above, he granted the SIPOA's Motion for Summary Judgement; in the second, he denied the Appellants' Motion for Partial Summary Judgment; and, in the third, he denied Respondents' Motion for Summary Judgment. (See Orders of the Honorable G. Thomas Cooper, Jr., dated May 26, 2016 and filed June 7, 2016)

jury rendered its verdict in favor of the Appellants on their cause of action for trespass and awarded "actual nominal" damages in the amount of $1,000.

On February 2, 2017, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, the Appellants filed a Motion for a New Trial *Nisi Additur*, or, alternatively, a New Trial as to Damages, or, alternatively, a New Trial Absolute. Judge Young denied the Appellants' motions in an Order filed on March 2, 2017.

Appellants filed and served their Notice of Appeal on March 31, 2017.

STATEMENT OF FACTS

This trespass case involves an easement containing a drainage pipe and a "No Build Area," which extends across lots 21 through 28 of Baywood Drive on Seabrook Island, as illustrated on plats prepared by E.M. Seabrook, Jr. ("Seabrook Plats," Plaintiffs' Trial Exhibits 2 & 4)

Appellants are the owners of Lot 23, which they purchased and have lived on since 1997. (Pls.' Ex. 1). Respondents are the owners of Lot 22, which is upstream of Appellants' lot. Respondents purchased their lot in 2002, and they constructed a home on the lot in 2008-2009. (Pls.' Ex. 3). In the course of their construction, the Respondents dug up the portion of the drainage pipe that burdened their lot and then built their home in the No Build Area. The Respondents argued at trial that the drainage easement and No Build Area had been abandoned by the SIPOA, as illustrated by a plat found only in the Respondents' chain of title. ("Forsberg Plat," Pls.' Ex. 5)

At trial, the Appellants presented evidence, including the above-referenced deeds and plats, demonstrating that the Appellants had a special property interest in the drainage pipe easement and No Build Area that ran under and through lots 21 through 28 of Baywood Drive

("the easements").[3] Howard Yates, qualified as an expert in the law of real property, testified that he personally examined the chain of title on the properties belonging to the Appellants and the Respondents, and that he found that all deeds in their chains of title were subject to the easements. (Trial Transcript pp. 40-42; 45-48; Complaint Ex. A and B). Mr. Yates testified that the SIPOA could not have unilaterally extinguished the easements, although it had attempted to do so around the time the Respondents purchased their lot. Rather, successful abandonment of the easements would require at least the agreement of all the owners of properties depicted on the Seabrook Plats, including the Appellants. (Id. p. 44.) Additionally, Mr. Yates testified that the recording of the Forsberg Plat, which indicated the easements as "to be abandoned," did not result in the abandonment of the easements. (Id. p. 46, lines 6-24).

It was not disputed at trial that the Respondents purchased Lot 22 (upstream of Appellants' house on lot 23) and ultimately proceeded to dig up the portion of the drainage pipe located on that lot and to construct part of their home in the No Build Area. Appellants presented evidence that damage was caused to their property by Respondents' destruction of the pipe and No Build Area. The testimony demonstrated that the removal of the drainage pipe increased the volume of surface water on the Appellants' property after rainfall and also increased the length of time required for that surface water to dissipate. Foremost was the testimony of storm-water drainage engineer Robert George, P.L.S., P.E., who was qualified as an expert in civil

[3] The original developer of the lots on Baywood Drive conveyed the lots subject to the Plat of E.M. Seabrook dated September 6, 1984 and recorded in the Charleston County RMC/ROD Office in Plat Book BD, page 23 and the revised plat dated May 8, 1987 and recorded in the Charleston County RMC/ROD Office in Plat Book BN, page 49 (Pl. Ex. 2, 4, 5). Those plats established a plan for a 20' drainage easement and No Build Area. The plats are referenced in the subsequent deeds in the Appellants' chain of title, as evidenced by the deed to the Appellants recorded in the Charleston County RMC/ROD Office on April 10, 1997 and indexed in Book K282, Page 846 (Pl. Ex. 1) (Their complete chain of title is charted in Exhibits A and B to the Plaintiffs' Complaint). The drainage easements are an appurtenant easement benefitting the Appellants as of the date on which they acquired ownership of Lot 23.

engineering, registered land surveying, and storm-water drainage. He stated, in accordance with his scientific analysis and to a reasonable degree of engineering certainty, that poor drainage and flooding on the Appellants' property was a direct result of the Respondents' act of digging up the drainage pipe and building their house on the No Build Area. (Trial Transcript pp. 172-183; pp. 207-209). Further, the Appellants themselves testified that there was a marked and noticeable difference in the drainage of storm-water from their property before, as opposed to after, the Respondents' construction. (Trial Transcript, pp. 81-83; pp. 127-128)

Mr. George's analysis that the Respondents' trespass caused the flooding and poor drainage on the Appellants' property was largely unrefuted by the Respondents;[4] they focused their defense instead on whether or not the Respondents had permission to build from the SIPOA, and on whether the SIPOA had previously abandoned the drainage easement.

The Appellants also offered the testimony of Nick Thompson, who was qualified as an expert in residential real property appraisal; Mr. Thompson testified that the Appellants' property could be diminished in value by between 40 and 60 percent (40-60%) because of the surface water problem. (Trial Transcript p. 226, line 14-p. 230). Additionally, the Appellants themselves testified that they believed that their property was worth $775,000 without the drainage problem. They further testified that they thought their property value had been diminished by $200,000 because of the Respondents' act of destroying the easements, which caused the poor drainage and flooding on their lot. (Trial Transcript pp. 85-88; p. 128). Finally, the Appellants testified that they had paid $17,000 to Mr. George in a fruitless attempt to mitigate the drainage problems

[4] The Respondents did claim that they had seen water on the Appellants' property after heavy rains, before the construction of their home. (Trial transcript, p. 376). However, this assertion was undermined by their own admission that they lived in Winston-Salem prior to their construction on lot 22, and so were only on Seabrook Island for brief weekend visits. Respondent Mrs. McLaughlin admitted that they did not have the opportunity to witness whether and how quickly the water that they saw on the Appellants' lot drained. (Id. p. 377)

caused by the Respondents' destruction of the easements. (Id. p. 89)

The Appellants and the Respondents both testified that, prior to the Respondents' construction of their home, the SIPOA had held several meetings of the owners of lots 21 through 28, and that the purpose of those meetings was to discuss the impact that the Respondents' desired construction would have on their neighbors' drainage. The Respondent Paul McLaughlin testified that he attended those meetings. (Trial Transcript p. 241). The SIPOA had hired Mr. George (the storm water drainage expert), who presented at one of those meetings a study he had conducted on the functionality of the drainage pipe. Mr. George specifically warned that the Respondents' proposed construction plans would cause surface water drainage problems on the neighboring downstream lots (including that belonging to the Appellants). (Trial transcript pp. 149-156). Respondent Mr. McLaughlin testified that he was aware of the study and that he had heard Mr. George's warnings. (Id. p. 241). Appellants introduced into evidence emails from neighboring lot owners, including the Appellants, asking the Respondents not to construct their home as planned, unless a solution could be found for the drainage issues that would be caused. (Pls.' Ex. 6-10; 18, 19). Appellants and Respondent Mr. McLaughlin testified that the SIPOA was attempting to work with the Respondents to find a resolution for the potential drainage problem. (Trial Transcript pp. 244-246)

Both parties testified at trial that the dialogue between the Respondents, the Appellants, and the SIPOA escalated in the autumn of 2008. On October 7, 2008, a SIPOA agent who was working to try to mediate the issues between the Appellants and the Respondents told the Respondents that he was no longer mediating the issue because it was "an impossible situation." (Order of Judge Cooper, p.5). Respondents grew frustrated by the time it was taking to come up with a solution, and so they announced their intention to proceed with construction as planned.

(Trial transcript pp. 74-75; p. 245, lines 10-11; Pls.' Ex. 11). On December 9, 2008, the SIPOA filed a lawsuit against the Respondents, seeking an injunction to halt their construction and alleging that Respondents' "unilateral action will result in irreparable damage by diminishing the drainage capacity of the drainage easement as it affects the downstream lots." (Trial transcript, p. 239, Pls.' Ex. 17). On the same day that SIPOA filed the lawsuit, the Respondents ordered their construction crew to commence work. (Id. pp. 123-124; p. 237, lines 7-10; p. 256, lines 14-19). A backhoe dug up the drainage pipe and began construction, even though neither the SIPOA nor the Appellants had authorized Respondents' actions. A portion of the Respondents' residence now sits in the No Build Area. (Id. p. 236, lines 20-22)

ARGUMENT

I. The Trial Court erred in failing to submit the issue of punitive damages to the jury because more than one reasonable inference could be drawn from the evidence as to whether the Respondents acted with reckless disregard for the property rights of the Appellants when they destroyed the Appellants' drainage easement.

The Trial Court improperly granted the Respondents' motion for a directed verdict as to the issue of punitive damages. When it rules "on a directed verdict motion as to punitive damages, 'the circuit court must view the evidence and the inferences that can reasonably be drawn therefrom in the light most favorable to the nonmoving party.'" *Hollis v. Stonington Dev. Llc*, 394 S.C. 383 at 393-394, 714 S.E.2d 904 at 909-910 (Ct. App. 2011), *quoting Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 621 S.E.2d 363 (Ct. App. 2005). This Court should apply the same standard as the circuit court when it reviews a grant of a motion for directed verdict. *Id.* "The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." *Id.*

At trial, the Appellants presented evidence that when the Respondents dug up the drainage pipe and built their house in the designated No Build Area, they were acting with reckless disregard for the property rights of the Appellants. The Respondents countered that they were acting with permission from the SIPOA and were therefore not willful in their act of destroying the drainage easement. (Trial transcript p. 266). However, the record is clear that this was not the case, and much evidence exists to the contrary: the Respondents acted in deliberate contravention of the SIPOA's and the Appellants' attempts to halt their construction, and with knowledge that their acts would cause harm to the Appellants' property.

The Respondents asserted a third-party claim against the SIPOA, in which they alleged that they had acted in reliance on representations from the SIPOA when they destroyed the pipe and constructed their home in the No Build Area. The SIPOA moved for summary judgement several months before the case went to trial, and the parties were heard on the issue by the Honorable G. Thomas Cooper, Jr. When he issued an Order dismissing the Respondents' reliance claims against the SIPOA, Judge Cooper specifically held:

> As a practical matter, there is no evidence to show that SIPOA has ever made any promises to the [Respondents]. Accordingly, as a matter of law, there is simply no genuine issue of material fact that the [Respondents] reasonably relied on the unambiguous acts, representations, and writings of SIPOA or otherwise reasonably based their decision to remove the pipe in 2008, which is what prompted the lawsuit brought by [Appellants].
>
> In fact, the record is completely clear that there was absolutely no "unambiguous representation" from SIPOA that the [Respondents]' only responsibility regarding the pipe was that it had to pay to remove the pipe. **Rather, the entire history of the interactions between SIPOA indicate the opposite**—that the [Respondents] had to assume all responsibility for the disposition of the pipe. **Indeed, by their own admission, (1) the [Respondents] blamed SIPOA for leaving them in "limbo" in 2008 prior to their removal of the pipe, (2) rejected SIPOA's proposals to resolve the matter prior to the [Respondents] unilateral decision to remove the pipe, and (3) were defendants in a lawsuit filed by the SIPOA to stop them from removing the pipe.** For these reasons,

> the [Respondents] simply cannot prevail on their third-party claim against SIPOA as a matter of law.

(Order of Judge Cooper, May 26, 2016, p.8, emphasis added.) It is clear from Judge Cooper's Order, and is in fact the law of the case, that the Respondents were not acting on mistake or misunderstanding when they dug up the drainage pipe. The issue of punitive damages should therefore have been submitted to the jury by the trial judge. *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984).

When it erroneously granted the Respondents' directed verdict motion, dismissing the Appellants' claim for punitive damages, the Trial Court's logic was notably conflicted. Its own words indicate that more than one reasonable inference could have been drawn from the evidence as to whether the Respondents acted willfully:

> And, you know, that's where I come in with the problem of whether or not this is a punitive damages case. Again, [the Respondent] was acting on—clearly he was acting willfully. I don't think he was acting recklessly, but he was obviously acting—he knew what he was doing, but, again, he was acting under the mistaken belief he had the right to do that, but if the jury agrees that he wasn't trespassing, then he did have the right to do it. He still maintains that he has the right to do it. I don't think you can be punished for doing something that you had the right to do, and he believes he had the right to do it and he still believes he has the right to do it. I just think there's a genuine issue as to whether or not he had the right to do it, but I don't think he was acting malevolently, certainly not to the level of clear and convincing, so I'll grant their motion for punitive damages.

(Trial transcript, pp. 287-288.)

As demonstrated by the Trial Court's own divergent holding, the Appellants had indeed entered evidence tending to show that the Respondents acted willfully and that they could not have reasonably believed that they had the right to dig up the drainage pipe and build in the easement. Specifically, the Respondent Mr. McLaughlin testified that, prior to destroying the

easement, he was served with a lawsuit, filed by the SIPOA, the sole purpose of which was to stop the Respondents' construction. (Trial transcript p. 256; Plaintiffs' Ex. 17). The Respondent's own testimony on the matter may be found in the trial transcript on pages 236-260. In the course of that testimony, the Respondent admitted that he dug up the drainage pipe even after the SIPOA filed a lawsuit seeking an injunction to halt his construction; the lawsuit alleged that "the [Respondents'] unilateral action [of digging up the drainage pipe and constructing in the No Build Area] will result in irreparable damage by diminishing the drainage capacity of the drainage easement as it affects the [Appellants'] lot[]." (Trial transcript p. 238, Pls. Ex. 17, ¶17). The SIPOA's lawsuit to halt construction additionally asserted: "[Respondents'] continued actions and destruction of the subject drainage pipe without some alternative plan will seriously and adversely and irreparably impact the...drainage system for lots 21, 23 [belonging to the Appellants], 25, 26, 27, and 28." (Trial transcript pp. 239-240, Pls. Ex. 17).

Respondent Mr. McLaughlin also testified that he was aware that the Appellants and other lot owners (who owned a property interest in the easements) objected to his construction plans. (Trial transcript p. 249; Pls. Ex. 18 and 19). Finally, he testified that he attended the meeting organized by the SIPOA, at which storm water drainage expert Robert George presented his study which demonstrated the anticipated adverse impact of Respondents' plan to destroy the drainage easements. (Trial transcript p. 241, lines 7-19; Pls. Ex. 12)

The evidence put forth at trial by the Appellants—especially the lawsuit against the Respondents by the SIPOA, the history of opposition from neighboring lot owners, and the many meetings called and attempts made to ascertain and resolve the drainage problems that would be caused by their construction—clearly gives rise to the reasonable inference that the Respondents were acting with reckless disregard for the property rights of the Appellants when they destroyed

the easements. When it ruled on the Respondents' directed verdict motion, the Trial Court should have construed that evidence in the light most favorable to the Appellants, the nonmoving party. *Hollis*, 394 S.C. at 383-94, 714 S.E.2d at 909.

Furthermore, the issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. *Id.* (finding that the issue of punitive damages was properly submitted to the jury in a trespass case where Plaintiff submitted "ample evidence from which to find [defendant] acted in reckless disregard of the rights of others"); *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says that person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

The evidence put forth by the Appellants at trial—particularly when paired with Judge Cooper's prior ruling that Respondents could not reasonably have relied on any representation by the SIPOA—unquestionably raised the inference that the Respondents acted in reckless disregard for the rights of the Appellants when they dug up the drainage pipe and constructed their home in the designated No Build Area. Because more than one inference could be drawn as to the nature of the acts of the Respondents, it should have been for the jury to decide whether a reasonable person would have been aware that the Respondents' trespass would injure the Appellants. The Trial Court's grant of directed verdict on the issue was therefore improper, and a new trial is warranted.

II. The trial judge committed reversible error in failing to apply a previous grant of summary judgment as the law of the case.

From the very inception of the trial, the Respondents employed as their theory of the case the argument that the Respondents were acting in justified reliance on representations by the SIPOA when they dug up the pipe and built their home in the No Build Area.[5] This argument was prejudicial to the Appellants and was precluded by an earlier, binding ruling in the case, which held that the Respondents had no right to rely on any representations by the SIPOA. The Trial Court's refusal to acknowledge and apply the previous Order as the law of the case was clearly erroneous; its rulings on the issue must be reversed by this Court and a new trial ordered.

A. The jury should have been bound by the rulings in Judge Cooper's Order.

Shortly before resting, the Appellants reminded the trial judge of Judge Cooper's previous Order of May 26, 2016, which Order had not been appealed by the Respondents. Appellants argued that the jury should be bound by Judge Cooper's decision that the Respondents could not have reasonably relied on any representations by the SIPOA. (Trial Transcript pp. 261-262). The Trial Court responded:

> Well, there's no third-party claim being made. This is a lawsuit between the plaintiffs and the defendants. I don't know what the—I haven't read the order, so I don't know what would bind anybody else who wasn't a party to the lawsuit.

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[5] See, e.g., the opening argument for the Respondents: "nothing gets built on Seabrook Island or Kiawah Island and certain places like that unless you have the approval of your property owner's association...and eventually...their plans were approved to build their home where it's currently situated in the former no-build area...and I think that's important for the testimony to bear out, that my clients went through a lot of time and effort with the property owners association to build in this no-build area with the abandoned easement." (Trial transcript, pp. 33-35)

Again, in their closing statement, the Respondents reiterated: "[Respondents], of course, relied on the representation of their sellers and the representation of the Seabrook Island Property Owners Association that they could build." (Trial transcript p. 393, lines 21-24) "...those letters confirm what the [Respondents] relied on, that the easement had been abandoned, they could remove the pipe they could build in the no-build area." (Id. at p. 395) "[Respondents] relied exclusively on the POA to get their house built." (Id. at 398, lines 10-11)

Trial Transcript, p. 262, lines 10-14.

The Court's basis for this holding was erroneous. In fact, the ruling by Judge Cooper was within this same case, to which both the Appellants and the Respondents were parties. It is a fundamental rule of law that an un-appealed order is ordinarily the law of the case. *Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000). Respondents did not appeal the findings of fact and law that Judge Cooper made in his Order dismissing their claims against the SIPOA. As such, those findings should have been deemed by the trial judge as the law of the case, and the jury should have been bound by them.

Again, at the close of their case, Appellants made the same argument, maintaining that the previous order should be the law of the case, and they read aloud Judge Cooper's Order to the Trial Court. (Trial transcript, pp. 289-292). The Trial Court mistakenly responded, "a summary judgement order, unless it's granting summary judgment, doesn't do anything except say it's going on to trial. There's a genuine issue of disputed fact." (Id. p. 291, lines 12-15). This was error on the part of the trial judge because the previous Order **did indeed grant summary judgment**; the previous Order found that there was no question of fact as to lack of reliance and thus granted the SIPOA's motion. Respondents did not appeal that Order. When Appellants brought this to the Trial Court's attention, it reiterated, in error:

> Well, Judge Cooper's order between...the defendants and the property owners association is not binding on this jury's finding. I don't know how to put it any other way. We're having this argument, but I don't understand why we're having it, necessarily. There's a genuine issue in my mind whether or not he was acting lawfully.

(Id. at p.292)

The Trial Court's decision to discount Judge Cooper's Order—holding that there was no genuine issue as to the fact that the Respondents could not have relied on the SIPOA—was

erroneous, and it imparted credence to the Respondents' frequent testimony before the jury that they were merely acting in reliance on the SIPOA when they destroyed the pipe. Because the Trial Court's failure to apply the previous Order was error as a matter of law, this case should be remanded for a new trial.

B. The Trial Court itself was bound by Judge Cooper's Order.

In arguing for a directed verdict as to the issue of punitive damages, counsel for Respondents stated:

> Your Honor, we also don't think the standard for punitive damages has been reached. You heard Mr. McLaughlin testify that he was relying on the POA when they built their house. There was no wrongdoing of which he was conscious that has been proven by clear and convincing evidence as required for punitive damages, so we would ask Your Honor to strike the punitive damages for the lack of proof and the lack of ability to comply with the case law regarding punitive damages.

(Trial transcript, p. 266, line 23-p. 267, line 6)

However, as counsel for the Appellants repeatedly pointed out to the Trial Court, the previous ruling by Judge Cooper specifically held that Respondents had no right to rely on any representations by the SIPOA purportedly authorizing the Respondents to destroy the easements in the construction of their home. (See Trial transcript, pp. 269-274; 287-295). In response to the Appellants' argument that Judge Cooper's ruling should be applied to his decision, the trial judge replied, "Well, Judge Cooper's order between them...Between the defendants and the property owner's association is not binding on this jury's finding." (Trial transcript, p. 292, lines 13-18). In this instance, however, Judge Cooper's Order established the fact that Respondents could not have reasonably relied on the SIPOA, and thereby rendered erroneous the Trial Court's determination to remove the decision about punitive damages from the province of the jury.

An un-appealed order is the law of the case. *Charleston Lumber Co.*, 338 S.C. 171, 525 S.E.2d 869 (2000). Respondents did not appeal the findings of fact and law that Judge Cooper made in his Order dismissing their claims against the SIPOA. As such, those findings should have been deemed by the trial judge, in the subsequent trial of the same case, as the controlling facts and law of the case. Moreover, the previous findings went directly to the heart of the question of whether the Respondents acted willfully, and they should absolutely have steered the Trial Court's consideration of the Respondents' motion for directed verdict as to punitive damages. It was prejudicial error for the Trial Court to disregard Judge Cooper's Order, as well as an error of law under the doctrine of the law of the case. Therefore, the Appellants respectfully request that this Court would grant them a new trial.

III. The Trial Court's denial of Appellants' Motion for a New Trial was manifestly characterized by error of law *and* wholly unsupported by the evidence.

Although the determination of whether to deny a new trial is within the discretion of the Trial Court, this Court should reverse where such a decision is controlled by error of law or is wholly unsupported by the evidence; in this case, the Trial Court's decision was both. In denying the Appellants' Motion for a New Trial, the Trial Court held, "there was sufficient evidence for the jury to determine issues of trespass and abandonment regarding the easement." (Order of February 28, 2017, pp. 11-12). However, both the law of trespass and the evidence itself reveal that the Respondents had trespassed as a matter of law. The issue should not have been submitted to the jury—especially when Respondents' argument before the jury was that the elements of intent and possession were lacking because the easements had been abandoned by the previous lot owner and the SIPOA, which (they claimed) had given them permission to build.

At the close of evidence, the Appellants moved for a directed verdict as to liability

because—even when it was viewed in the light most favorable to Respondents—the evidence raised no other reasonable inference but that the Respondents had trespassed on the easements. The elements of a cause of action for trespass are: (1) that the plaintiff was in legal possession of the property; (2) that the defendant or his agent voluntarily entered upon the plaintiff's property; and (3) that such entry was made without the plaintiff's permission. *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991).

a. As a matter of law, the Appellants had a special property interest in the easements that the Respondents destroyed.

The question of whether the Appellants had an ownership interest in the easements (which was the first element in their cause of action for trespass) was ultimately one of law, and it was clear error for the trial judge to submit it to the jury.

At trial, the Appellants presented evidence that the deed by which they acquired their lot referenced the Seabrook Plat. (See Trial Transcript pp. 40-41; Pl.'s Ex. 1.) The law is clear that where a deed describes land as shown on a specified plat, that plat becomes a part of the deed, and purchasers of lots with reference to such plats acquire every easement, privilege and advantage depicted thereon. *Blue Ridge Company v. Williamson*, 247 S.C. 112 (1965). The Seabrook Plat referenced in the Appellants' deed depicted a drainage easement containing a pipe, and a No Build Area, which extended across every lot on their block on Baywood Drive. (Trial transcript p. 41-44; Pl.'s Ex. 2). By virtue of the conveyance of each lot subject to the 20' easement and No Build Area for the common use or benefit of each lot owner, as a matter of law a servitude was created as to each lot, which restricted the use of the land to that purpose. *Restatement of Law- Property Restatement (Third) of Property, Chapter 2. Creation of Servitudes.*

Thus, the first element of their cause of action, that the Appellants were in legal possession of a property interest in the drainage pipe and No Build Area (which was located in part on the Respondents' lot), was satisfied without question and as a matter of law, by the evidence that the Plaintiffs' title referenced a plat depicting those easements.

b. When viewed in the light most favorable to the Respondents, the evidence gave rise to only one inference: that the Respondents voluntarily entered (and destroyed) the Appellants' drainage easements.

In a cause of action for trespass, intent is proven by showing the defendant acted voluntarily, and that he knew or should have known the result would follow from his act. Although neither deliberation, purpose, motive, nor malice are necessary elements of intent, the defendant must intend the act which in law constitutes the invasion of the plaintiff's right. Trespass is an intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land. *Snow v. City of Columbia*, 305 S.C. at 553.

The Respondents were aware of the drainage easements burdening their property. The law imputes to a purchaser who proposes to acquire title to real estate notice of the recitals contained in any properly recorded instrument of writing which forms a link in a chain of title to the property proposed to be acquired. *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (S.C., 1975), *citing Moyle v. Campbell*, 126 S.C. 180, 119 S.E. 186 (1923), and *National Bank of Newberry v. Livingston*, 155 S.C. 264, 152 S.E. 410 (1930). The Seabrook Plat depicting the easements could be found within the Respondents' chain of title. (Trial transcript, testimony of Howard Yates, pp. 45-49; Pls. trial Exs. 2, 3, 4).

The Respondents admitted that they authorized their construction crew to dig up the pipe;

they admitted that a portion of their house now rests in the No Build Area; and they admitted that they intended for their construction crew to place it there. At trial, Respondent Mr. McLaughlin testified:

MS. TILLMAN:	Is your house currently situated in what was once the no-build zone, or no-build area on your property?
RESPONDENT:	A portion of it is, yes.
MS. TILLMAN:	And did you authorize your construction company to dig up the pipe that was once running through the drainage easement in your back yard?
RESPONDENT:	Yes.

(Trial Transcript pp. 236-241).

Thus, element two—that the Respondents voluntarily entered the Appellants' property and committed an intentional physical interference with the Appellants' present right to possess it—was satisfied without any other possible inference, by the Respondent's own admissions.

c. When viewed in the light most favorable to the Respondents, the evidence gave rise to no other inference but that the Respondents did not have permission to destroy the Appellants' easements.

Finally, there was no question of fact presented as to the third element of trespass: that the Appellants did not grant the Respondents permission to enter or interfere with the property. The Respondents admitted in their testimony that they were aware that the Appellants opposed their construction and that they proceeded without permission to dig up the easements:

MS. TILLMAN:	The neighbors, on the day that you authorized your construction crew to dig up the pipe, had they changed their mind and given you permission?
RESPONDENT:	I didn't ask for permission.

(Trial transcript, p. 357; see also, pp. 241-244)

Because the Appellants had a special property interest in the drainage easements, their

permission was required—as a matter of law—before those easements could ever have been lawfully destroyed.

Contrary to the Trial Court's holding in its Order denying a new trial, the Appellants should have prevailed on their motion for a Directed Verdict as to the issue of Respondents' liability for trespass. The Respondents had trespassed as a matter of law because the following facts, constituting the elements of trespass, were utterly uncontroverted: (1) that the Appellants had an ownership interest in the drainage pipe and No Build Area; (2) that the Respondents authorized their construction crews to dig up the pipe and to build a portion of their house in the No Build Area; and (3) that the Appellants did not grant them permission to do so. There could have been no other inference drawn from the evidence, even when viewed in the light most favorable to the Respondents, but that the Respondents were liable to the Appellants.

Because the Trial Court's decision to deny the Appellants' Motion for a New Trial was corrupted by mistake of law and unsupported by the evidence, this Court should reverse its decision and remand to the Circuit Court for a new trial.

IV. The question of whether the SIPOA could entirely abandon the easement, or give legally sufficient permission to build on it, was a question of law and should not have been presented to the jury.

At the close of evidence, Appellants moved for a directed verdict, asking for a ruling from the Trial Court that the SIPOA's purported abandonment of the easement did not affect the property rights of the Appellants, because extinguishment of the easements would have required the agreement of all the lot owners. (Trial transcript p. 379, p. 382.) The Trial Court's denial of this motion and its decision to submit the issue to the jury (which it reiterated in its Order of February 28, 2017) was clear and prejudicial error, because it was a question of law, and not of

fact.

In the course of his testimony, Mr. Howard Yates explained that when they purchased their lot with reference to the Seabrook Plat, the Appellants acquired a property interest in the drainage easements running through all of the lots on that portion of Baywood Drive, as depicted on the plats, which easements could not have been abandoned without their consent:

MR. YATES:	[Appellants] have an interest in those easements as well as their lot.
MR. SINKLER:	Is that a legal interest?
MR. YATES:	Yes. According to the cases, this interest is referred to as a special property interest, and it is an interest that must be addressed. It's a legal or equitable interest. It is an interest, whatever you call it.
MR. SINKLER:	All right. And how could that interest—how could that interest be abandoned?
MR. YATES:	Well, the only way it could be abandoned is for everyone, at the minimum, everyone who has a special property interest in that easement to join in an instrument stating that they're all in agreement and they want to close the easement. In addition, because so many people have mortgages on properties, the mortgage holders who hold equitable interest in real property that they may divulge, they have to join in it, too, so it is a very cumbersome process. And, least of all, you've got to have all of the people, at least on that area that are benefitting from the easement, to all join in. One person cannot unilaterally close off an easement.
MR. SINKLER:	Did the property owner's association have the right to abandon anything?
MR. YATES:	**No. Categorically no.**

(Trial transcript, pp. 42-44, emphasis added).

The case law is in accord with Mr. Yates' testimony at trial. It is an established principle of South Carolina law that:

> The Florenza Company by subdividing and platting this property into lots and streets and selling and conveying lots with reference to the plat, thereby manifested an intent to dedicate said streets to the use of the public, and is estopped to deny the rights of such purchasers and those claiming under them, to an easement in all the streets represented and as represented on the plat. ***Such purchasers acquired every easement, privilege and advantage which the plat represented as belonging to them.***

Corbin v. Cherokee Realty Co., 229 S.C. 16, 24, 91 S.E.2d 542, 546 (1956); see also *Blue Ridge Realty Co. v. Williamson*, 27 S.C. 112 at 121, 145 S.E.2d 922 (1965) ("Where lots in a subdivision are sold by reference to a map or plat upon which roads are shown which are or become public highways, the *private easement which arises upon such a sale survives the vacation, abandonment, or closing* of the road or highway by the public") (emphasis added).

The Respondents argued at trial that the SIPOA abandoned the easements in 2001,[6] which was four years after the Appellants acquired Lot 23 and the appurtenant drainage and No Build Area easements running with title to that lot. However, this contention is legally unfounded. A third party can no more abandon an easement belonging to another than it could effectively sell real estate owned by another. SIPOA's purported abandonment did not in any way impact the enforceability of Appellants' drainage and No Build Area easements, and no reasonable inference could have existed that this was somehow possible. Furthermore, Judge Cooper's previous Order in the case foreclosed the argument that the Respondents' reliance on representations by the SIPOA was proper.

It was error of law on the part of the Trial Court to allow the jury to consider the issue of

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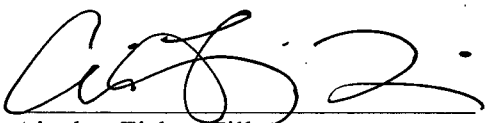
[6] "[Respondents] purchased this property...according to a plat. It's the plat you'll take back into the jury room, the plat from Forsberg Engineering. It's the plat that shows the abandonment of the easement by the Seabrook Island Property Owner's Association and the abandonment of the no-build area on their lot. And that's important, because you didn't hear the plaintiffs' counsel mention the permission that my clients had to build because they know it's fatal to their case." (Trial transcript, p. 393)

whether the Respondents had trespassed, or whether they had permission to build (steeped as that issue was in repeated testimony by the Respondents that the SIPOA had abandoned the easements and given permission to destroy them), because, as a matter of law, the SIPOA could not have abandoned the property rights of the Appellants. This Court should reverse that holding and remand the case for a new trial.

CONCLUSION

Because the Trial Court's denial of the Appellants' directed verdict motions—as to the SIPOA's ineffective abandonment of the easement, as to the SIPOA's legal inability to permit the destruction of the easements, as to the previous Order's applicability as the law of the case, and as to the Respondents' liability for trespass—was error of law, this Court should reverse those holdings and remand this case for a new trial. Furthermore, because the Trial Court improperly issued a directed verdict as to the issue of punitive damages when more than one reasonable inference could have been drawn from the evidence, this Court should reverse the decision and remand the case to the Circuit Court.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Trial Court Case Nos.
2011CP-10-7065 and 2015-CP-10-3550

Appellate Case No. 2017-000866

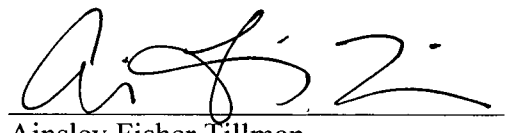
Richard Ralph and Eugenia Ralph, Appellants,

v.

Paul Dennis McLaughlin
and Susan Rode McLaughlin, Respondents.

PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter to Be Included in the Record on Appeal upon Respondents by depositing a copy of those items in the United States Mail, postage prepaid, on November 6th, 2017, addressed to their attorney of record, G. Hamlin O'Kelley, III, 652 Coleman Boulevard, Suite 200, Mount Pleasant, South Carolina, 29464.



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November 6, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Ralph v. McLaughlin*
Appellate Case No. 2017-000866

Dear Ms. Kitchings,

Enclosed, please find the original and one copy of the Appellants' Initial Brief and Appellants' Designation of Matter to Be Included in the Record on Appeal, along with proof of service thereof, in the above-referenced matter.

I would appreciate your filing the originals and returning the copies to me in the enclosed envelope. Thank you for your assistance in this matter, and please do not hesitate to contact me if you should have any questions.

Yours very truly,

Ainsley F. Tillman
Attorney for Appellants

Enclosures
cc: G. Hamlin O'Kelley, III, Esquire
Attorney for Respondents

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