THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFICATION FROM UNITED STATES DISTRICT COURT
District of South Carolina

Honorable Joseph F. Anderson, Jr., United States District Court Judge

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Appellate Case No. 2012-212741

Perrin and Debbie Babb, Wayne and Sarah Elstrom, Alan and Kathy Jackson, Plaintiffs

v.

Lee County Landfill SC, LLC Defendant

BRIEF OF DEFENDANT

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STATEMENT OF QUESTIONS CERTIFIED

Pursuant to Rule 244, SCACR, the United States District Court for the District of South Carolina certified the following questions to this Court:

I. UNDER SOUTH CAROLINA LAW, WHEN A PLAINTIFF SEEKS RECOVERY FOR A 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 MENTAL TRANQUILITY AND ABANDONING ALL CLAIMS FOR LOSS OF USE, DIMINUTION OF VALUE, AND PERSONAL INJURY), ARE THE DAMAGES LIMITED TO THE LOST RENTAL VALUE OF THE PROPERTY?

II. DOES SOUTH CAROLINA LAW RECOGNIZE A CAUSE OF ACTION FOR TRESPASS SOLELY FROM INVISIBLE ODORS RATHER THAN A PHYSICAL INVASION SUCH AS DUST OR WATER?

III. 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?

IV. 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?

V. 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

Pursuant to Rule 208(b)(1)(c), SCACR, the defendant provides a brief statement of the case. This statement of the case contains a concise history of the proceedings and does not contain contested matters.

The Lee County Landfill (the "Landfill"), located near the Town of Bishopville in Lee County, is the largest municipal solid waste landfill in South Carolina. Three couples who live near the Landfill filed this lawsuit in state court on June 4, 2010, alleging that odors from the Landfill caused them damage. On July 1, 2010, the defendant removed the case to the United States District Court for the District of South Carolina.

The plaintiffs' theories of liability were trespass, negligence, and temporary private nuisance. The plaintiffs' initial theories of damages were personal injury, property damage, and annoyance/loss of enjoyment. The plaintiffs later abandoned their personal injury and property damage claims, specifically electing not to introduce any evidence supporting those claims. At trial, the plaintiffs limited their prayer for compensatory damages solely to annoyance and loss of enjoyment. The plaintiffs also sought punitive damages.

The case was tried to a jury the weeks of March 19 and 26, 2012. At the close of the evidence, the jury returned a compensatory verdict of $532,500.00 and a punitive verdict of $1.8 million. The defendant filed post-trial motions on April 27, 2012. The District Court requested supplemental briefing on nuisance damages. After the supplemental briefing, the District Court certified five questions to this Court by Order dated August 25, 2012. This Court accepted the certified questions by Order dated

October 17, 2012. The plaintiffs served their initial brief regarding the certified questions on November 19, 2012. This brief analyzes the certified questions and responds to the plaintiffs' initial brief.

ARGUMENT

I. INTRODUCTION.

This case has monumental implications for the Landfill that is the subject of this lawsuit, for the twenty-two other active public and private municipal solid waste landfills in South Carolina, and for other manufacturing and industrial businesses in this State, such as farming operations, animal operations, wastewater treatment plants, paper mills, rail yards, chemical manufacturing facilities and other industries that generate odors, noise, dust, vibrations or smoke as a by-product of their operations. The District Court recognized the far-reaching implications of this lawsuit by certifying five questions to this Court. The plaintiffs also recognized, and touted, the broad reach of this case by asking the jury to send a message to landfills in South Carolina. (Trial Tr. 1801:16-22, Mar. 30, 2012) ("Are you going to let landfills operate in the state of South Carolina the way they operate? I don't think you're going to do it for one second. Yes, you're going to set the standard tonight.").

The plaintiffs now ask this Court to answer the five certified questions in a manner that will give rise to open-ended liability against South Carolina businesses and create a cottage—actually, mansion—industry for lawyers. The tort regime the plaintiffs urge this Court to create would enable landowners to recover damages for purely mental harms associated with the loss of enjoyment of their property that far exceed the full market value of their property. Moreover, unlike in a case for permanent diminution of

value, landowners would claim that they are not limited to a single recovery; instead, they would claim that they are able to sue repeatedly for losses of enjoyment covering different time periods until they hit the jackpot (or bankrupt the defendant). As direct evidence, these same plaintiffs who obtained the $532,500 compensatory verdict and $1,800,000 punitive verdict have threatened to bring new lawsuits for alleged continuing odors from this same Landfill. Additionally, the plaintiffs' counsel have filed six other odor lawsuits against this same Landfill.

Not only would the potential damages be unlimited, so too would be the universe of plaintiffs. Every landowner claiming to be within smelling distance of a landfill, paper mill, farming operation or feed yard, breathing distance of a factory, or hearing distance of a firing range, blast site, or railroad switching yard could have a recurring cause of action for unlimited damages for loss of enjoyment, untethered entirely from any calculable measure of damages based on the rental or market value of the landowner's property. Indeed, under the negligence cause of action that the plaintiffs ask this Court to recognize, the universe of plaintiffs would not be limited to landowners. Anyone who might foreseeably suffer some annoyance or frustration-type injury – family members, guests, renters, passersby – would have a cause of action. If that were not enough, the plaintiffs also attempt to set the bar for proving negligence at ankle height by eliminating the requirement that the standard of care be established through expert testimony.

The ensuing liability risk of the plaintiffs' proposed tort regime would be enormous, and the inevitable consequence is that businesses will move their operations out of state or stop engaging in productive activities that would be easy targets for the next wave of lawyer-enriching litigation. The plaintiffs' demand for annoyance damages

in the absence of any physical harm to their properties is an extreme departure from the long-held maxim that Dean Prosser articulated:

> Life in organized society, and especially in populous communities, involves an unavoidable clash of individual interests. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference, and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or shift the loss in every case where one person's conduct has some detrimental effect on another.

William L. Prosser, *Law of Torts* § 87, at 580 (4th ed. 1978) (quoting *Restatement of Torts* § 822, cmt. j (1939)). By answering the five certified questions and clarifying the state of South Carolina law regarding trespass, nuisance, and negligence in an environmental lawsuit such as this one, this Court has the opportunity to correct a manifest injustice and hold in check these baseless runaway verdicts that could cripple public and private landfills as well as myriad other types of businesses.

The Landfill respectfully requests that this Court hold that (i) damages for temporary trespass and nuisance are limited to the lost rental value of the property; (ii) the maximum amount of damages in *any* trespass or nuisance action (temporary or permanent) is the full market value of the property; (iii) there is no cause of action for an invisible trespass; (iv) there is no independent cause of action for negligence; and (v) if there is an independent cause of action for negligence, the standard of care and any deviation therefrom must be established through expert testimony.

II. STATEMENT OF FACTS.

A. Background.

The Landfill is located off of Interstate 20 near Bishopville in rural Lee County, South Carolina. (Trial Tr. 374:22-375:11, Mar. 20, 2012) It accepts mostly household and business garbage, but also some industrial waste and dried sludge material. (Trial Tr. 1379:2-8, Mar. 28, 2012) No liquid waste is allowed in the Landfill. (Trial Tr. 1527:11-20, Mar. 29, 2012) The Landfill receives waste primarily by truck and by rail. (Trial Tr. 255:12-18, Mar. 20, 2012) The Landfill was built and opened in the early 1990's. (Trial Tr. 1434:2-5, Mar. 28, 2012) Prior to construction, the original owner received the necessary environmental permits to build and operate the Landfill. (Trial Tr. 389:6-390:23, Mar. 20, 2012) Since the Landfill opened, its owners have maintained all environmental permits required for its operation. (*Id.* at 390:20-23) Currently, the Landfill operates under a solid waste permit, an air quality control permit, and a national pollution discharge elimination system ("NPDES") permit, among others. (*Id.* at 390:8-19) The defendant began operating the Landfill in 1997. (*Id.* at 389:3-5) The defendant had no affiliation with the Landfill prior to that time. (*Id.* at 388:18-389:2; 1306:1-4, Mar. 27, 2012)

B. Federal and State regulation of the Landfill.

Landfill odors are generated primarily by two on-site sources – waste that is being deposited in the landfill and landfill gas that is generated over time when waste decomposes within the landfill. (Trial Tr. 511:20-512:1, Mar. 21, 2012) The United States Environmental Protection Agency ("EPA") and the South Carolina Department of

Health and Environmental Control ("DHEC") have adopted regulatory programs to address odors from waste and landfill gas. (Trial Tr. 1009:17-21, Mar. 26, 2012)

Waste and landfill gas management at the Landfill, including odor management, is regulated by state and federal air quality and solid waste statutes and regulations as well as the Landfill's air quality and solid waste environmental permits. (Trial Tr. 238:25-239:14, Mar. 20, 2012)

Landfill gas is regulated by the federal Clean Air Act and its regulations and the South Carolina air quality regulations. (*Id.* at 437:15-438:6); 42 U.S.C. § 7401 *et seq.*; 40 C.F.R. Ch. I, Subch. C, Pt. 60, Subpts. Cc and WWW; S.C. Code Regs. 61-62. In 1997, the Landfill became subject to the federal regulations for landfill gas called New Source Performance Standards ("NSPS"). (Trial Tr. 585:11-14, Mar. 21, 2012); 40 C.F.R. Ch. I, Subch. C, Pt. 60, Subpts. Cc and WWW. The NSPS regulations require landfills to manage landfill gas and associated odors by installing a complex and intricate system of landfill gas collection wells that collect landfill gas through a system of enclosed piping. (Trial Tr. 608:18-609:2, Mar. 21, 2012) The gas is routed to a flare for destruction or is converted into renewable energy. (Trial Tr. 1130:1-7, Mar. 26, 2012) The Landfill has nearly 200 landfill gas collection wells. (*Id.* at 849:9-13) The Landfill also has two flares to destroy the gas, but sells most of its landfill gas to Santee Cooper to be converted into renewable energy. (Trial Tr. 374:4-21, Mar. 20, 2012) The landfill gas generates enough electricity to power most of the homes in Lee County. *Id.* The Landfill's gas collection system is operated by a team of company and outside consultant engineers and technicians. (Trial Tr. 913:5-12, Mar. 26, 2012) These engineers and

technicians monitor, adjust, and repair the well network each day the Landfill operates and report their work to DHEC quarterly and annually. (*Id.* at 913:10-22)

In addition to the federal NSPS regulations, the Landfill is regulated by numerous other environmental laws and regulations including state and federal solid waste and NPDES water quality regulations. (Trial Tr. 391:8-392:23, Mar. 20, 2012)

C. Off-site Landfill odors.

From the time the defendant began operating the Landfill in 1997 to the end of 2008, the Landfill was not a source of off-site odors. (Trial Tr. 397:15-18, Mar. 20, 2012) The plaintiffs' own expert testified that the Landfill was not the subject of odor complaints prior to late 2008. (Trial Tr. 613:4-6, Mar. 21, 2012) Additionally, DHEC inspections of the Landfill did not identify off-site odors prior to late 2008. (Def. Tr. Exs. 1-3)

From December 2008 to January 2010, the Landfill generated some odors that traveled off-site. (Trial Tr. 399:16-21, Mar. 20, 2012) DHEC, the state agency that regulates odor management at the Landfill, inspected the Landfill at least once per week from 2001 to 2011 and identified off-site odors only during the time period of December 2008 to January 2010. (Def. Tr. Exs. 1-3) DHEC characterizes off-site odors as "minor," "moderate," or "serious." (Trial Tr. 1385:8-17, Mar. 28, 2012) In DHEC's nearly 400 inspections of the Landfill from 2001 to 2011, DHEC has *never* categorized off-site odors from the Landfill as "serious." (Def. Tr. Exs. 1-3) Since January 2010, DHEC has not detected even minor off-site odors from the Landfill. (*Id.*) In fact, in the middle part of 2011, DHEC reduced its inspections from weekly to twice per month because it was not

detecting off-site odors or identifying any other environmental concerns that warranted the more frequent inspections. (Trial Tr. 1379:19-1380:21, Mar. 28, 2012)

D. The Landfill's efforts to control odors since 2008.

The Landfill already was pursuing enhanced odor control measures when odors were first identified off-site in December 2008. (Trial Tr. 251:5-12, Mar. 20, 2012) At that time, the Landfill already had ordered a new flare to destroy landfill gas, installed an innovative permanent cover over 14 acres of the Landfill, and designed a set of new gas collection wells to collect the landfill gas. (Trial Tr. 866:9-11; 874:3-23, Mar. 26, 2012) After odors were identified, the Landfill took a series of additional actions including, among numerous other improvements, the installation of over 40 new gas collection wells, purchase and installation of another new flare with double the capacity of the existing flare, and installation of a permanent cover on 23 additional acres of the Landfill, all at a cost in excess of $7 million. (Trial Tr. 278:2-8, Mar. 20, 2012; 407:13-18, 496:15-497:1, Mar. 21, 2012; 890:23-891:1, Mar. 26, 2012) Additional odor management improvements continue today. *See* Def.'s Reply in Supp. of Mot. to Preserve Ct.'s Apr. 6, 2012 Order Staying Inj. Phase of Trial, Ex. A.

E. Testimony of the plaintiffs' only expert.

The plaintiffs called only one expert, a tenured professor from the University of Florida, Dr. Timothy Townsend. (*Id.* at 501:13-502:14, Mar. 21, 2012) Dr. Townsend's area of expertise is environmental engineering with specialties in solid waste and landfill engineering. (*Id.* at 508:18-21) Dr. Townsend provided some important testimony in the case. First, Dr. Townsend visited the plaintiffs' properties and surrounding neighborhoods on a total of three separate occasions during three different seasons in

2011. (*Id.* at 586:19-587:8) During those visits, *Dr. Townsend never smelled a single landfill odor at any of the plaintiffs' properties.* (*Id.* at 567:6-8) He smelled only a faint, passing odor in one location far from any of the plaintiffs' properties during one of his three visits. (*Id.* at 567:19-568:4) Put another way, two out of the three times he visited the area around the Landfill, Dr. Townsend never smelled a single off-site odor, and he has never smelled a single odor at any of the plaintiffs' properties. (*Id.* at 567:11-577:10) Interestingly, Dr. Townsend travelled from Florida to South Carolina for trial. During trial, he did not visit the Landfill or the plaintiffs' properties to determine whether there were any odors at the time of trial. (Trial Tr. 566:13-19, Mar. 21, 2012) (Q. "How was your trip 45 minutes from here to Bishopville yesterday?" A. "I didn't go to Bishopville yesterday." Q. "You flew up here from Gainesville to testify in federal court about odors at the Plaintiffs' properties and you didn't go to Bishopville?" A. "That's correct.") That obviously was a strategic decision to avoid the jury hearing that Dr. Townsend traveled to the plaintiffs' properties a fourth time during trial and again smelled no odors.

Second, the plaintiffs' expert provided a checklist of steps a landfill can take to control odors. (*Id.* at 627:18-629:16) He then admitted that the Landfill had taken every one of those steps and *acted reasonably in controlling odors.* (*Id.* at 629:17-20).

Third, Dr. Townsend testified that the Landfill had never had a single violation of the NSPS landfill gas control regulations. (*Id.* at 585:4-14).

Fourth, after reviewing tens of thousands of pages of documents, analyzing odors at the Landfill, and studying the Landfill's environmental and regulatory compliance history (*Id.* at 509:3-510:11; 549:9-17), Dr. Townsend testified unequivocally that (1) the Landfill's actions in taking odor control measures were reasonable (*Id.* at 629:17-20); (2)

he did not see any activity on the part of the Landfill that was egregious, reckless, malicious, or grossly mismanaged (*Id.* at 606:10-14; 636:3-11; 649:15-16); and (3) he did not see any extraordinary misconduct on the part of the Landfill (*Id.* at 649:15-21).

F. Testimony by the regulating agency, DHEC.

A DHEC representative testified that in the nearly 400 weekly inspections of the Landfill from 2001 to 2011, the agency had never identified a serious off-site odor from the Landfill. (Trial Tr. 1388:2-1390:16, Mar. 28, 2012) He further testified that DHEC has been pleased with the Landfill's efforts to control odors and believes that the Landfill has acted reasonably in controlling odors. (*Id.* at 1399:1-19) Finally, he testified that the agency had not seen any intentional, reckless, egregious, or malicious behavior on the part of the Landfill. (*Id.* at. 1399:16-24)

G. Damages evidence.

The plaintiffs specifically abandoned their personal injury and property damages claims and introduced no evidence of personal injury or property damage. (Pls.' Br. 10 n.8; Trial Tr. 900:3-901:3, Mar. 26, 2012) They limited their evidence to annoyance and loss of enjoyment. (Trial Tr. 108:2-8, Mar. 19, 2012 (D. Babb) (not able to enjoy a rainbow); Trial Tr. 446:2-11, Mar. 20, 2012 (W. Elstrom) (not able to grill outside); Trial Tr. 685:23-686:7, Mar. 21, 2012 (A. Jackson) (not able to play baseball outdoors)). The plaintiffs similarly introduced no evidence of special, out-of-pocket, damages. (Trial Tr. 698:19-24, Mar. 21, 2012 (A. Jackson); Trial Tr. 160:15-24, Mar. 19, 2012 (P. Babb); Trial Tr. 453:21-454:7, Mar. 20, 2012 (W. Elstrom))

In an effort to provide the jury some yardstick by which to measure the alleged damages, *the defendant* introduced evidence of the monthly rental value of the three

plaintiffs' properties (Elstrom plaintiffs: $535 per month; Jackson plaintiffs: $900 per month; Babb plaintiffs: $1,300 per month) (Trial Tr. 1465:25-1466:14, Mar. 28, 2012) The lost rental value of all the plaintiffs' properties combined during the period of the odors totaled $35,555. (*Id.*) The jury disregarded the rental-value evidence and returned a compensatory verdict of $532,500, *fifteen times the fair rental value of the plaintiffs' properties during that period.*

The defendant also developed undisputed evidence that the total market value of all the plaintiffs' properties combined is $426,000. *See* Def. Tr. Ex. 777 at 17.[1] The compensatory verdict exceeded the full market value of all the plaintiffs' properties combined by $106,500.

III. UNDER SOUTH CAROLINA LAW, WHEN A PLAINTIFF SEEKS RECOVERY FOR A TEMPORARY TRESPASS OR NUISANCE, THE DAMAGES MAY NOT EXCEED THE LOST RENTAL VALUE OF THE AFFECTED PROPERTY, AND IN NO CIRCUMSTANCE MAY DAMAGES FOR A TRESPASS OR NUISANCE EXCEED THE TOTAL MARKET VALUE OF THE PROPERTY.

The distinction between temporary and permanent harm in environmental cases is critically important because it drives the measure of damages, among other things. This case concerns only temporary harm. The plaintiffs specifically abandoned their allegations of permanent harm. (Pls.' Br. 10 n.8; Trial Tr. 900:3-901:3, Mar. 26, 2012) While this case is limited to temporary harm, the issue of what damages are permissible for such temporary harm to property cannot be analyzed in a vacuum. Virtually every one of the reported environmental decisions in South Carolina discusses both temporary and permanent harms, though each ultimately turns on the type of harm involved in the

[1] Over the defendant's objection, the full market value of the plaintiffs' properties was excluded from evidence at the motion *in limine* hearing.

case. Similarly, the certified questions before this Court touch both temporary (Questions 1 and 3) and permanent harms (Question 3). Because temporary and permanent harms are inextricably linked in the reported decisions and in the certified questions before this Court, this brief analyzes the types of harm to property together and addresses Certified Questions 1 and 3 in sequence.

A. South Carolina Courts have established lost rental value as the proper measure of damages for temporary harm and diminution in property value as the measure of damages for permanent harm in environmental cases where there is no physical damage to property.

Over thirty years ago, this Court established what remains controlling precedent today regarding the proper measure of damages in the environmental tort context where no physical damage to property is alleged. *See Gray v. S. Facilities, Inc.*, 256 S.C. 558, 561, 183 S.E.2d 438, 439 (1971). The *Gray* decision also became the backdrop for a series of later environmental decisions from this Court and the Court of Appeals, discussed below, that further developed the case law in this area. *Gray* established two fundamental points regarding damages in the environmental tort context where no physical injury to property is alleged: (1) the proper measure of damages available to a plaintiff for *temporary harm* is lost rental value and for *permanent harm* is diminution in property value; and (2) the existence, causation, and amount of damages must be proven to a reasonable degree of certainty and may not be left to the jury's speculation, guess, or conjecture. *Id.* at 570-71, 183 S.E.2d at 443-44.

In *Gray*, a property owner brought an action against a nearby petroleum facility seeking recovery for odors resulting from a fire that was ignited after gasoline spilled into a creek adjacent to his property. The gasoline spill did not cause any physical damage to the plaintiff's property. The plaintiff argued that odors and general stigma associated

with the gasoline in the river and resulting fire near the plaintiff's property caused him injury. 256 S.C. at 563-66, 183 S.E.2d at 439-42. The trial court directed a verdict in favor of the defendants on the ground that the plaintiff "had sustained no actual or physical damages resulting [from the defendant's conduct] and consequently he was not entitled to a recovery therefor." *Id.* at 561-62, 183 S.E.2d at 439.

This Court examined the damages issue closely and established the measure of damages for environmental torts in South Carolina, which continues to be the law today:

> The general rule is that in case of an injury of a permanent nature to real property . . . the proper measure of damages is the diminution of the market value by reason of that injury, or in other words, the difference between the value of the land before the injury and its value after the injury. *Where the pollution . . . results in a temporary or nonpermanent injury to real property, the injured landowner can recover the depreciation in the rental or usable value of the property caused by the pollution.*

Id. at 569, 183 S.E.2d at 443 (emphasis added). Upon establishing the measure of damages in the environmental context, this Court concluded that the plaintiff had introduced no probative evidence of actual damage and affirmed the trial court's directed verdict in favor of the defendant.[2] *Id.* at 571, 183 S.E.2d at 444. Importantly, the Court refused to allow the negligence claim to go forward and refused to allow any non-real-property-based measure of damages, such as the stigma damages sought by the *Gray* plaintiffs.

Twenty years after *Gray*, this Court again addressed the measure of damages for environmental torts (though indirectly) in *Clark v. Greenville County*, 313 S.C. 205, 437

[2]*Gray* was a negligence case. *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 568, 183 S.E.2d 438, 443 (1971). On appeal, the plaintiff argued that the trial court erred in not treating the case as a nuisance case. This Court held that the pleadings and evidence raised no issue as to the creation or maintenance of a nuisance. *Id.*

S.E.2d 117 (1993). In *Clark*, property owners near a county landfill sued the landfill for inverse condemnation and sued the customers of the landfill for negligence, strict liability, trespass, and nuisance. *Id.* at 207, 437 S.E.2d at 118. The trial court entered summary judgment in favor of the defendants, and this Court affirmed. Presupposing that the measure of damages for permanent injury to property is the diminution in property value, this Court held that "[b]ald allegations of diminution in property value [were] insufficient to create a genuine issue of fact regarding damages absent any competent evidence showing the existence, amount, or causation of damages." *Id.* at 208, 437 S.E.2d at 118.

Since *Gray* and *Clark*, South Carolina Court of Appeals decisions have reaffirmed the measure of damages for permanent and temporary injuries in the environmental context. For example, in *Yadkin Brick Co. v. Materials Recovery Co.*, 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000), a former owner of a brickyard sued a chemical company and others after contaminated materials were shipped to the brickyard for disposal. *Id.* at 643, 529 S.E.2d at 765. The Court of Appeals recited the rule established in *Gray* as to permanent and temporary injury to real property and affirmed the trial court's grant of the defendant's motion for directed verdict because the plaintiff had "failed to show a permanent injury to the property." *Id.* at 645-48, 529 S.E.2d at 766-68.

The Court of Appeals also cited *Gray* in *Ravan v. Greenville County*, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993), for the proposition that "[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." *Id.* at 465, 434 S.E.2d at 307. *Ravan* did not concern temporary nuisance damages but did affirm the trial court's refusal to send the nuisance claim to the jury. *Id.*

AVX Corp. v. Horry Land Co., 686 F. Supp. 2d 621 (D.S.C. 2010), briefly considered the issue of temporary injury in the environmental context. *AVX* was an environmental action for negligence, nuisance, trespass, and strict liability involving groundwater contamination that allegedly had migrated from the defendant's manufacturing facility to the plaintiff's property. The District Court cited to *Gray* for the proposition that the appropriate measure of damages for a temporary injury to property is loss of use measured by lost rental value. *Id.* at 624-25.

The import of these cases is that in the environmental context, the law in South Carolina unquestionably is that the proper measure of damages for a temporary nuisance or trespass is *lost rental value* and that the measure of damages for a permanent nuisance or trespass is *diminution in property value*.

B. This Court has not allowed damages other than lost rental value for temporary environmental torts when there is no physical damage to property.

It being clear under existing South Carolina precedent that the measure of damages for a temporary harm is lost rental value, the ultimate question becomes whether lost rental value is the *only* category of compensatory damages available to a plaintiff in a temporary nuisance action like this one. This Court has decided that point as well, holding in *Gray* that the proper measure of damages for a temporary injury in the environmental context where no physical damage to property is alleged is lost rental value. 256 S.C. at 569, 183 S.E.2d at 443. Importantly, this Court concluded that the trial court had committed no error in granting the involuntary nonsuit on the ground that

"*the appellant had sustained no actual or physical damages* resulting [from the defendants' conduct] and consequently, the appellant was not entitled to a recovery therefor." *Id.* at 561-62, 183 S.E.2d at 439 (emphasis added). In *Gray*, after the Court established the measure of damages for temporary harm – lost rental value – the Court specifically noted that another category of damages – stigma – was not permitted. *Id.* at 571, 183 S.E.2d at 444. Nowhere in *Gray*, *Clark*, or other later environmental cases from this Court or the Court of Appeals has any court concluded that any damages other than lost rental value are proper for a temporary injury caused by environmental torts where there is no physical damage to property.

It bears mentioning that this Court has discussed a second category of damages – restoration or cleanup costs – that could be available to a plaintiff, but only where there is *physical damage* to property, which is not at issue in the present case because the plaintiffs abandoned their physical property damage claim. *See Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 484, 623 S.E.2d 373, 377-78 (2005). *See also* Pls.' Br. 11 n.9. In *Vaught*, this Court held that in the case of physical damage to property, a plaintiff could be entitled to the cost of restoring the land to its original condition, so long as the restoration costs do not exceed the full value of the property. 366 S.C. at 484, 623 S.E.2d at 377-78; *see Yadkin*, 339 S.C. at 648, 529 S.E.2d at 768 (affirming in an environmental physical property damage case the trial court's decision to submit *only* the issue of cleanup costs to the jury).[3]

[3] Importantly, this Court in *Vaught* established an outer limit for the amount of damages a plaintiff can recover in this context, holding that "the landowner may not recover restoration costs which exceed the market value of the entire parcel prior to the loss." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 484, 623 S.E.2d 373, 378 (2005).

Gray was not a physical property damage case. The plaintiff in *Gray* alleged only injury from odors and general stigma of being near a contaminated stream. 256 S.C. at 561, 183 S.E.2d at 439. Thus, restoration/cleanup costs were not sought by the *Gray* plaintiff. Similarly, the case at bar does not concern physical damage to the plaintiffs' properties. The plaintiffs allege only annoyance and loss of enjoyment injury resulting from odors allegedly caused by the Landfill. *See* Pls.' Br. 11 n.9. Thus, restoration/cleanup costs of the type allowed in *Vaught* are not at issue in this case.

C. The South Carolina Court of Appeals also has not allowed damages other than lost rental value for a temporary nuisance where there is no physical damage to property.

There are no reported environmental decisions in South Carolina in which the Court of Appeals held that any damages other than lost rental value for a temporary nuisance were proper where there was no physical damage to property. In *Yadkin*, the plaintiffs alleged that their property *was physically damaged* by the defendant depositing contaminated materials on their property. 339 S.C. at 643-44, 529 S.E.2d at 765-66. The plaintiffs brought several claims, including negligence, breach of contract, and nuisance and sought damages for cleanup costs, lost profits, and diminution in property value. *Id.* at 644, 529 S.E.2d at 766. The plaintiffs conceded that the claim for lost profits was not proper and consented to a directed verdict on that category of damages. *Id.* at 644 n.1, 529 S.E.2d at 766 n.1. The trial court directed a verdict in favor of the defendant on the diminution-in-value claim. *Id.* at 643, 529 S.E.2d at 765. The only category of damages the trial court sent to the jury was cleanup costs. The Court of Appeals affirmed the trial court's decision to send only cleanup costs to the jury. *Id.* Like in *Vaught*, the plaintiffs

in *Yadkin* alleged physical property damage and therefore, according to the Court of Appeals, cleanup costs were the only proper measure of damages in that case.

In *Ravan*, the plaintiffs alleged that their property *was physically damaged* by hazardous substances migrating from a nearby property. 315 S.C. at 452, 434 S.E.2d at 300. The plaintiffs brought claims of negligence, nuisance, trespass, and inverse condemnation and sought diminution-in-value and consequential damages. *Id.* The trial court directed a verdict in favor of the defendants on the trespass and nuisance claims and allowed only the negligence and inverse condemnation claims to go to the jury. *Id.* at 452-53, 434 S.E.2d at 300. The trial court instructed the jury that diminution in property value was the measure of damages for inverse condemnation against the County and consequential out-of-pocket damages (for example, moving expenses, cost of bottled water, etc.) was the measure of damages for negligence. *Id.* at 466, 434 S.E.2d at 308.

Thus, no South Carolina Court of Appeals environmental decision has allowed any damages other than lost rental value for temporary trespass or nuisance claims where there is no physical injury to property. The only categories of damages the courts have allowed other than diminution in property value (for permanent injuries) and lost rental value (for temporary injuries) are in the context of *physical damage to property* where restoration/cleanup costs are incurred (*Yadkin*) or, under a negligence theory, where consequential damages are suffered (*Ravan*). The evidence is undisputed in the present case that there is no physical damage to the plaintiffs' property, so restoration/cleanup costs are not a proper category of damages. Similarly, the plaintiffs admitted that they have not suffered any out-of-pocket/consequential damages in this case. *See, e.g.*, Trial Tr. 698:19-24, Mar. 21, 2012 (A. Jackson) (no out-of-pocket expenses or medical

treatment because of odors); Trial Tr. 160:15-24, Mar. 19, 2012 (P. Babb) (same); Trial Tr. 453:21-454:7, Mar. 20, 2012 (W. Elstrom) (same). Therefore, under South Carolina precedent for a temporary trespass and nuisance lawsuit where there is no physical injury to property and the plaintiffs have incurred no out-of-pocket expenses, the only measure of damages available to the plaintiffs is lost rental value.

D. Allowing annoyance/loss of enjoyment damages that are untethered to lost rental value or diminution in property value also would violate the mandate in *Gray* that damages must be proven to a reasonable degree of certainty and not left to the jury's conjecture and speculation.

In addition to establishing the measure of damages for environmental torts in South Carolina, *Gray* and the decisions that followed also reiterate long-established precedent that even in environmental cases, plaintiffs must meet their burden of proving damages to a reasonable degree of certainty. To allow annoyance and loss-of-enjoyment damages in this context with no way to quantify the damages and with no connection to lost rental value or diminution in property value would violate that long-held precedent. In *Gray*, the Court concluded:

> While proof, with mathematical certainty, of the amount of loss or damage is not required, in order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.

256 S.C. at 570-71, 183 S.E.2d at 444 (citation omitted); *see Clark*, 313 S.C. at 208, 437 S.E.2d at 118 ("Bald allegations of diminution in property value are insufficient to create a genuine issue of fact regarding damages absent any competent evidence showing the existence, amount, or causation of damages."); *Yadkin*, 339 S.C. at 646, 529 S.E.2d at 767 ("The amount of damages need not be proved with mathematical certainty. The

evidence, however, should be such that a court or jury can reasonably determine an appropriate amount."); *see also Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991) ("There is a total absence of any competent evidence showing either the existence or the amount of damage to property, or that any such damage was proximately caused by the acts of [the defendant].").

Gray, *Clark*, *Yadkin*, and *Baughman* make it clear that plaintiffs in environmental actions do not receive a free pass on their burden of proving actual, quantifiable damages. Quite to the contrary. South Carolina courts have *adhered strictly* to the requirement that plaintiffs cannot recover if the existence, causation, or amount of damages is left to conjecture, guess, or speculation. *In fact, nearly all the reported environmental decisions in South Carolina have rejected the plaintiffs' damages claims as being too speculative.*

More specifically, in *Gray*, *Clark*, *Baughman*, and *Yadkin*, this Court and the South Carolina Court of Appeals did not hesitate to reject plaintiffs' damages claims when the plaintiffs failed to meet their evidentiary burden as to damages. In *Gray*, this Court affirmed a directed verdict in favor of the defendant on the plaintiff's negligence and nuisance claims because there was no evidence of physical damage to the plaintiff's property and the evidence of diminution in market value was speculative, not only as to the amount but as to the portion proximately and directly resulting from the actions of the defendants. 256 S.C. at 570-71, 183 S.E.2d at 444. This Court in *Clark* affirmed the trial court's grant of summary judgment in favor of the defendant landfill because the record was "devoid of any evidence of damages caused by contamination from the landfill." 313 S.C. at 209, 437 S.E.2d at 119. In *Baughman*, this Court also affirmed the trial court's grant of summary judgment in favor of the defendant refinery because the

plaintiffs' "bald allegations" that the defendant's refinery caused diminution in the value of the plaintiffs' properties were insufficient to create a genuine issue of fact. 306 S.C. at 117, 410 S.E.2d at 546.

The Court of Appeals has followed this Court's lead in requiring adequate proof of damages in environmental cases. In *Yadkin*, for example, the Court of Appeals affirmed the trial court's directed verdict in favor of the defendant because the plaintiff failed to present sufficient evidence of permanent injury to its property to warrant submission to the jury of a claim for diminution in property value. 339 S.C. at 646-48, 529 S.E.2d at 767-68.

Claims of annoyance and loss of enjoyment that are unquantifiable and bear no relation to lost rental value (in a case of temporary nuisance or trespass) or diminution in property value (in the case of a permanent nuisance or trespass) would violate this strict rule in environmental cases that requires the plaintiffs to prove their claims to a reasonable degree of certainty without leaving the existence, causation, or amount of such damages to the jury's speculation, guess, or conjecture. In a series of pleadings before trial and during argument at trial, the plaintiffs abandoned all claims for diminution in property value, personal injury, and loss of use, leaving as their sole remaining damages claim that of annoyance and loss of enjoyment allegedly resulting from alleged landfill odors. (Def. Tr. Ex. 854 at 1; Def. Tr. Ex. 857 at 2-3) This was a tactical decision by the plaintiffs to avoid being limited to a recovery of lost rental value. The plaintiffs could not prove the typically more lucrative personal-injury or diminution-in-value claims but did not want to be limited to lost rental value, so they attempted to fashion a hybrid damages claim solely for "annoyance, frustration and loss of enjoyment." This hybrid

damages claim, however, is contrary to South Carolina law.[4] As set forth above, South Carolina precedent is clear that the only measure of damages available to the plaintiffs in this environmental tort context is lost rental value. Allowing amorphous, unquantifiable "annoyance and loss of enjoyment" claims in the absence of any other damage claims such as lost rental value or diminution in property value violates this Court's mandate in *Gray* that damages must be proven by a preponderance of the evidence and to a reasonable degree of certainty. *See Gray*, 256 S.C. at 570-71, 183 S.E.2d at 444.

The plaintiffs argue that their annoyance and loss of enjoyment claim is analogous to pain and suffering in the personal injury context. (Pls.' Br. 22) Yet, by plaintiffs' own admission, this is not a personal injury action. The plaintiffs cannot have it both ways. They cannot abandon their personal injury cause of action on the one hand and argue that they are entitled to pain and suffering-like damages on the other. The two simply do not equate. Furthermore, in South Carolina, underlying physical injury is required before pain and suffering damages can be awarded in the personal injury context. *Bray v. Marathon Corp.*, 347 S.C. 189, 198-99, 553 S.E.2d 477, 481-82 (Ct. App. 2001), *aff'd in*

[4] The plaintiffs cite some authority from outside South Carolina regarding the issue of whether damages in a temporary nuisance case are limited to lost rental value. *See* Pls.' Br. 17-21. The defendant respectfully submits that South Carolina law speaks to this issue and controls. In any event, authorities from other jurisdictions support the defendant's position. *See, e.g.*, Ky. Rev. Stat. Ann. § 411.560(3) (2012) (limiting damages for temporary nuisance to lost rent and prohibiting any award for "annoyance, discomfort, sickness, emotional distress, or similar claims."); *Kobs v. Zehnder*, 40 N.W.2d. 120, 122 (Mich. 1949) (in an odor case, refusing to award damages where claim was based solely on annoyance and no damage to property was alleged); *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 276 (Tex. 2004) ("[I]f a nuisance is temporary, the landowner may recover only lost use and enjoyment (measured in terms of rental value) that has already accrued."); *Junction City Lumber Co. v. Sharp*, 123 S.W. 370, 372 (Ark. 1909) (reversing an award of annoyance and discomfort damages, holding that "the depreciation in the rental or usable value of the property would give a just and full compensation for the injury").

part, rev'd in part, 356 S.C. 111, 588 S.E.2d 93 (2003) (*citing Mack v. South-Bound R.R. Co.*, 52 S.C. 323, 335, 29 S.E. 905, 908 (1898)). Even if the plaintiffs' "annoyance and loss of enjoyment" claims in the case at bar were similar to pain-and-suffering damages in the personal injury context (which they are not), under the plaintiffs' own analogy there could be no annoyance and loss-of-enjoyment damages here because there is no underlying physical damage to the plaintiffs' properties to support an annoyance and loss-of-enjoyment claim.

E. The treatises and cases cited by the plaintiffs are distinguishable.

1. Plaintiffs' reliance on a South Carolina environmental treatise is misplaced because the commentators themselves do not rely on South Carolina law.

The plaintiffs base their argument largely on various South Carolina and non-South Carolina articles and publications on general nuisance law. *See* Pls.' Br. 7-10, 12, 22-23, 27-30. The issue before the Court is not what academicians *think* the law of nuisance is in South Carolina and around the country. The issue is what the law *actually is* in South Carolina, which is this Court's exclusive purview. A closer look at the academic commentary on nuisance law that the plaintiffs cite in their brief also reveals that the commentators' statements of nuisance law in South Carolina *are not based on South Carolina law.* For example, the plaintiffs quote a publication entitled *Environmental Law in South Carolina* a half dozen times in their brief for the general proposition that plaintiffs in a nuisance action are entitled not only to damage to property interest but also to special damages.[5] *See, e.g.,* Pls.' Br. 12. The authorities cited by the

[5] Even if "special damages" were recoverable (which they are not), the plaintiffs failed to plead special damages specifically or prove special damages.

commentators in support of this general proposition, however, are not South Carolina case law at all, but rather decisions from Washington and New Jersey and a general non-South Carolina treatise on environmental law. *See* Bradford W. Wyche & Samuel L. Finklea, III, *Envtl. Law in South Carolina* 75 n.442 (3d ed. 2011) (*citing Birchler v. Castello Land Co.*, 942 P.2d 968 (Wash. 1997), *Ayers v. Twp. of Jackson*, 525 A.2d 287 (N.J. 1987) and Rodgers, *Envtl. Law*, Vol. 1 (1986)).

2. The cases relied upon by the plaintiffs are distinguishable.

The cases on which the plaintiffs rely only discuss nuisance generally. They do not address whether a plaintiff may recover for annoyance and loss of use in an environmental temporary nuisance/trespass action where no physical damage to property is alleged. It is telling that the plaintiffs do not even attempt to analyze the seminal case in South Carolina establishing the measure of damages for temporary and permanent environmental torts, *Gray v. Southern Facilities, Inc.* *See* Pls.' Br. 11. It is equally telling that the plaintiffs make only passing references to (or do not even mention) the South Carolina environmental cases, including *Ravan*, *Clark*, *Yadkin*, *Vaught*, and *Baughman*.

The cases that the plaintiffs do cite are distinguishable. In *Lever v. Wilder Mobile Homes, Inc.*, a property owner's fish pond was damaged by a lagoon maintained by a nearby business. 283 S.C. 452, 453, 322 S.E.2d 692, 693 (Ct. App. 1984). The court in *Lever* did not analyze the proper measure of compensatory damages for a temporary or permanent nuisance. Rather, it held that whether the defendant's maintenance of its lagoon constituted a nuisance was a question for a jury. *Id.* at 453-54, 322 S.E.2d at 693-94. *Woods v. Rock Hill Fertilizer Co.* – decided 56 years before *Gray* – concerned the

operation of a fertilizer plant near the plaintiff's house. 102 S.C. 442, 442, 86 S.E. 817, 818 (1915). The issue in *Woods* was whether the plaintiff's cause of action stated a claim for public or private nuisance. *Id.* at 442, 86 S.E. at 819. The court did not reach the issue of damages.

The plaintiffs assert that the 1948 case of *Davis v. Palmetto Quarries Co.*, 212 S.C. 496, 498, 48 S.E.2d 329, 330 (1948), represents the "modern trend." (Pls.' Br. 8-9) In that case, which was decided 23 years before *Gray* set forth the damages regime for permanent and temporary injury to property, the plaintiff sued for damages and to abate an alleged nuisance arising out of the defendant's quarry operation. The issue in *Davis* was not the proper measure of compensatory damages for a temporary or permanent nuisance, but rather the trial court's refusal to strike from the complaint the plaintiff's allegation that the plaintiff could recover damages for alleged harm to the plaintiff's family. *Id.* at 499, 48 S.E.2d at 330-31.

The question in *Wiggins v. Moskins Credit Clothing Store, Inc.*, which was decided 15 years before *Gray*, was whether allegations of frequent and abusive telephone calls over a three-month period using inappropriate language were "tantamount" to a nuisance. 137 F. Supp. 764, 767 (D.S.C. 1956). *Johnson v. Phillips* was a dispute between adjacent property owners over the diversion of surface water. 315 S.C. 407, 410, 433 S.E.2d 895, 897 (Ct. App. 1993), *aff'd in part, rev'd in part by Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995). The Court of Appeals remanded the case for a new trial on the ground that the jury's verdict for actual damages of "no dollars" on a nuisance claim was either an inconsistent or an incomplete verdict. *Id.* at 415-16, 433 S.E.2d at

900-01. The court in *Johnson* did not discuss the proper measure of compensatory damages in a temporary or permanent nuisance.

In *Home Sales, Inc. v. City of North Myrtle Beach*, the plaintiff sought injunctive relief to prevent the public from using a street for beach access. 299 S.C. 70, 81-82, 382 S.E.2d 463, 469-70 (Ct. App. 1989). Notably, in *Home Sales*, the Court of Appeals reversed the lower court and held that no nuisance existed. *Id.* at 84, 382 S.E.2d at 470. The court reasoned, "[p]eople who live in organized communities must of necessity suffer some inconvenience and annoyance from their neighbors and must submit to annoyances consequent with the reasonable use of property and streets by others." *Id.* at 82, 382 S.E.2d at 470.

The issue in *Fraser v. Fred Parker Funeral Home* – decided 29 years before *Gray* – was whether the operation of a funeral home in a residential area of town would constitute a nuisance and should be enjoined. 201 S.C. 88, 88, 21 S.E.2d 577, 584-85 (1942). *Emory v. Hazard Powder Co.* – decided 86 years before *Gray* – concerned the trial court's instructions to the jury regarding nuisance in a case involving the construction of a powder magazine near the plaintiff's residence, but did not turn on the proper measure of damages for a temporary or permanent nuisance. 22 S.C. 476, 482-83 (1885).

Blanks v. Rawson was an action for injunctive relief between neighbors over the construction of a dog pen, basketball goal, and privacy fence. 296 S.C. 110, 111, 370 S.E.2d 890, 891 (Ct. App. 1988). It too had nothing to do with the measure of damages for a temporary or permanent nuisance or trespass. *Green v. Blanton* concerned the trial court's instructions to the jury regarding nuisance and the court's directed verdict

regarding the defendant's liability for nuisance, but did not discuss the measure of damages for a temporary nuisance. 294 S.C. 14, 17-18, 362 S.E.2d 179, 180-81 (Ct. App. 1987).

Young v. Brown, decided 23 years before *Gray*, involved the construction of a cemetery near a residential development. This Court determined that a demurrer as to the defendant's nuisance liability was not appropriate. 212 S.C. 156, 172, 46 S.E.2d 673, 680 (1948). The measure of damages was not at issue. The sole issue in *Strong v. Winn-Dixie Stores, Inc.* – decided nine years before *Gray* – was whether the proposed construction and operation of a retail grocery store would constitute a nuisance and should be enjoined. 240 S.C. 244, 247, 125 S.E.2d 628, 629 (1962).

In *Hollis v. Stonington Development, LLC*, a property owner's pond was damaged by a nearby development and the owner sought restoration costs. 394 S.C. 383, 391-94, 714 S.E.2d 904, 908-10 (Ct. App. 2011). *Hollis* did not concern the measure of compensatory damages for a temporary or permanent nuisance. Rather, the only damages issue before the court was the propriety of the punitive award. The court concluded that remittitur was appropriate and reduced the punitive award. *Id.* at 407, 714 S.E.2d at 971. *O'Cain v. O'Cain* involved whether hog operations should be enjoined as a nuisance but did not involve the measure of damages for a temporary or permanent nuisance. 322 S.C. 551, 562-63, 473 S.E.2d 460, 467 (Ct. App. 1996).

In short, none of the South Carolina decisions cited by the plaintiffs hold that plaintiffs can recover in excess of lost rental value in an environmental tort case

involving temporary nuisance or more than the total value of the property in a case involving permanent nuisance where there was no physical damage to property.[6]

F. The plaintiffs' attempt to recover unlimited annoyance and loss of enjoyment damage ignores the real property underpinnings of their temporary nuisance and trespass claims.

The plaintiffs argue that the amount of their damages should in no way be tied to the value of their properties because they were seeking damages only for loss of *enjoyment*, not for loss of *use*. This argument ignores the fact that the theories of recovery under which the plaintiffs chose to sue the defendant have fundamental real property underpinnings. This argument also ignores the resulting paradox that allows a plaintiff in a temporary trespass and nuisance case where there admittedly is no physical property damage to obtain a verdict that far exceeds the full rental value (and the full market value) of the property simply by claiming annoyance and loss of enjoyment rather than property damage.

Dean Prosser wrote that "[t]he word [nuisance] first emerges in English law to describe interferences with servitudes or other rights to the free use of land." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 86, at 617 (5th ed. 1984 and Supp. 1988); *see Adams v. Star Enter.*, 851 F. Supp. 770, 772 (E.D. Va. 1994) (nuisance "evolved in the United States from a property law concept"); *Restatement (Second) of*

[6] The plaintiffs spend much of their brief discussing cases from outside South Carolina. Decisions from other states have no bearing on the present case, particularly when South Carolina law speaks to these certified questions before the Court. In any event, the out-of-state cases are not controlling and not good law. To take just one example, after the Missouri Court of Appeals held in *Owens v. Contigroup Cos.*, 344 S.W.3d 717 (Mo. App. 2011), that temporary nuisance damages can exceed the fair market value of the property, the Missouri legislature quickly recognized the untoward consequences of the decision and passed a statute severely limiting that type of odor claim. *See* Mo. Rev. Stat. § 537.296.

Torts § 821D cmt. a (1979) ("The action for private nuisance originated in the assize of nuisance, which dates back to as early as the twelfth century. . . . [T]he assize of nuisance provided redress when . . . there was no entry on the plaintiff's land, but was an indirect damage to the land or an interference with its use and enjoyment."); John S. Palmore, *Kentucky's New Nuisance Statute*, 7 J. Min. L. & Pol'y 1, 5 (1991) ("[T]he gravamen of a nuisance is damage to property rather than persons."). Further, to assert a claim for trespass and nuisance, plaintiffs must have a possessory interest in the properties at issue. *See* Keeton, *supra*, § 87, at 621. *In fact, the lead plaintiff's trespass claim in the present case was dismissed because he was not an owner of the property at issue.* (Trial Tr. 805:3-8, Mar. 23, 2012).

Because an interest in property is essential to and inseparable from the environmental claims asserted by the plaintiffs, they cannot simply ignore the essence of these claims and argue that their recovery need not be tied to lost rental value. Presumably, any plaintiff in an environmental case such as this would be annoyed and frustrated, but this Court has not allowed this hybrid category of damages in a case where there admittedly is no physical damage to property. For example, in *Gray*, the plaintiffs clearly were annoyed and frustrated by the alleged nuisance but did not seek (nor did the Court allow) a hybrid recovery for annoyance and frustration (and the Court specifically prohibited a hybrid claim for stigma damages).

The plaintiffs also argue that it would be unfair to limit damages to the rental value of property because an owner of a modest home allegedly suffers the same loss of enjoyment as an owner of an expensive home and both, therefore, should be compensated equally and without regard to the value of their properties. Commentators and courts,

however, have recognized that the *diminished value award itself* captures lost use and enjoyment such that additional damages for annoyance or discomfort would be duplicative. *See* Dan B. Dobbs, *Dobbs Law of Remedies*, § 5.6(2), at 758 (2d ed. 1993) ("In many cases plaintiffs claim both discomfort damages and diminished value damages. But since the diminished value award is itself a reflection of the discount that potential buyers would require to be willing to live with the discomforts of the nuisance in question, it may be quite inappropriate to award both a sum for diminished value and an additional sum for discomfort the plaintiff will suffer from a continuance of the nuisance in the future."); *Gay v. Perry*, 265 S.W. 437, 438 (Ky. App. 1924) ("Annoyance and discomfort are not separate elements of damage, for which a recovery may be had, in addition to the diminution in the value of the use of the property. Such elements may be shown in evidence only for the purpose of showing the diminution in the value of the use. When it comes to measuring the damages, the diminution in the value of the use of the property necessarily includes annoyance and discomfort, which directly affect the value of the use.").

Put another way, it is a matter of basic economics that the value of real property already accounts for its proximity (or distance) from sources of odor, noise, vibration, etc. Those who live near such sources pay less for their property, and those who live farther pay more; to allow those who live near sources of odor, noise, and vibration to pay less for their property and then recover the same as those who live farther and may pay more for their property would turn the market for real estate on its head.

G. Plaintiffs' awards violate South Carolina law because the awards exceed not only the loss of rental value, but even the full market value of the plaintiffs' properties.

At the end of the day, the claims the plaintiffs chose to assert – trespass and nuisance – are real property born and real property based. The plaintiffs cannot simply ignore these real property underpinnings and create their own hybrid claim out of whole cloth when they admit that they have suffered absolutely no damage to their properties. If this type of recovery is allowed to go unchecked, the result in future cases will be exactly what happened in this case – a verdict for temporary harm where there is absolutely no physical injury to property that greatly exceeds not only the lost rental value of the property but also the full market value of the entire property.

Real property rights historically have been viewed by courts as a bundle of sticks, with the full market value of the property represented by the full bundle of sticks. *See Hansen v. United States*, 65 Fed. Cl. 76, 100 (2005) (courts often define the scope of an owner's property rights as a bundle of sticks). Rental value is a property right that accounts for one of the sticks in the bundle. Here, the plaintiffs admit that there is no physical damage to their properties, but they seek (and were awarded) damages that *far exceed not only the single stick in the bundle of lost rental value, but also exceed the value of their full bundle of sticks*. The plaintiffs were awarded $532,500, fifteen times the lost rental value of their properties and $106,500 over the full market value of their properties. Because the plaintiffs limited their claims to a temporary nuisance *but* the corresponding measure of damages was not limited to rental value, they obtained a windfall of $532,500. This is the very jackpot that will have litigants lined up to claim at the doors of industry in this State.

In short, the proper measure of damages for a temporary nuisance that causes no physical injury to property is limited to lost rental value, while the full market value of property is the absolute maximum a plaintiff can recover in *any* environmental case such as this. *Vaught,* 366 S.C. at 484, 623 S.E.2d at 377-78. *See Smith v. Carbide & Chem. Corp.*, 507 F.3d 372, 379 (6th Cir. 2007) (citing Ky. Rev. Stat. Ann. § 411.560(1) (2012)) ("The measure of compensatory damages for a permanent nuisance is 'the reduction in the fair market value of the claimant's property caused by the nuisance, *but not to exceed the fair market value of the property.*'") (emphasis added).

Here, the full market value of the plaintiffs' combined properties was $426,000. *See* Def. Tr. Ex. 777 at 17. The compensatory verdict of $532,500 exceeds this outer limit of any recoverable damages by $106,500. In addition to being violative of *Vaught*, as discussed above, it simply is illogical for the compensatory verdict in this case to exceed the full market value of all the plaintiffs' properties combined because market value is the measure of damages for a *permanent nuisance*, which admittedly was neither alleged nor proven here.

IV. SOUTH CAROLINA LAW DOES NOT RECOGNIZE A CAUSE OF ACTION FOR TRESPASS SOLELY FROM INVISIBLE ODORS RATHER THAN A PHYSICAL INVASION SUCH AS DUST OR WATER. THIS COURT SHOULD CONTINUE TO FOLLOW THAT RULE.

Trespass is an intentional "interference with one's right to the exclusive, peaceable possession of his property." *See Ravan*, 315 S.C. at 463, 434 S.E.2d at 306; *Snow v. City of Columbia*, 305 S.C. 544, 552-53, 409 S.E.2d 797, 801-02 (Ct. App. 1991). South Carolina courts have not recognized the migration of odors (such as landfill odors) as supporting a cause of action for trespass. This is consistent with the rule in most jurisdictions, requiring that "the defendant's act must result in an invasion of

tangible matter." Keeton, *supra*, § 13, at 71 (emphasis added) ("[i]t is, however, reasonably clear that the mere intentional introduction onto the land of another of smoke, gas, noise and the like. . . is not actionable as a trespass").

The defendant respectfully submits that this Court should continue to follow the rule that the alleged migration of odors onto the land of another is not sufficient to support a cause of action in trespass. To hold otherwise would unnecessarily and improperly blur the line between trespass and private nuisance. *See Silvester v. Spring Valley Country Club*, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001) ("The distinction between trespass and nuisance is that trespass is any intentional invasion of the plaintiff's interest in the *exclusive possession* of his property, whereas nuisance is a substantial and unreasonable interference with the plaintiff's *use and enjoyment* of his property.") (emphasis added).

The majority of courts refuse to recognize odors or other invisible and intangible intrusions as grounds for recovery in trespass. For example, applying the law of Kentucky, the U.S. District Court for the Western District of Kentucky recently distinguished between alleged intrusions of odors "which are visibly undetectable and transient" and dust, which may settle on the land. *Brockman v. Barton Brands, Ltd.*, No. 3:06-cv-332-H, 2009 WL 4252914, at *5 (W.D. Ky. Nov. 25, 2009). The plaintiffs in *Brockman* lived within two miles of a distillery. They complained that odors and dust from the facility constituted a trespass. *Id.* at *1. The court found that the odors could not support the trespass claim "because a trespass only occurs *when an object or thing enters a person's property* and interferes with his or her possession or control." *Id.* at *5 (emphasis added) (citing *Bartman v. Shobe*, 353 S.W.2d 550, 555 (Ky. 1962)).

Similarly, the Michigan Court of Appeals has taken a definitive stand in favor of the majority rule. *See Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 219-20 (Mich. Ct. App. 1999). In *Adams*, landowners near an ore mine brought an action against the mine operator alleging that dust, noise and vibrations constituted a trespass. *Id.* at 216-17. The *Adams* court evaluated the majority rule limiting trespass to tangible, physical invasions and the minority rule allowing intangible trespasses only in cases of actual, substantial harm to property. *Id.* at 219-20. The court then categorically rejected the minority rule in favor of the majority rule:

> Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession. . . We prefer to retain the traditional elements . . . because they serve as gatekeepers-safeguarding genuine claims of trespass and keeping the line between the torts of trespass and nuisance from fading into a "wavering and uncertain" ambiguity. Further, retaining the distinction between the two theories of recovery limits the possibilities for dual liability stemming from the same conduct and results.

Id. at 222-23. Ultimately, the court held that dust, noise, and vibrations do not constitute an actionable trespass. *Id.* at 225.

Other courts are in accord. *See, e.g.*, *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 554 (Minn. Ct. App. 2003) ("Because odors do not interfere with the exclusive possession of land, an allegation that a confined-animal feeding operation emits invasive odors does not state a claim for trespass."); *Fentress Families Trust v. Va. Elec. & Power Co.*, 81 Va. Cir. 67, at *12-13 (2010) (holding that fly ash that allegedly leached into plaintiff's land and drinking water was not a trespass, and explaining that "any [prior] cases finding trespass by invisible gases or non-visible particles were in

actuality cases involving nuisance or negligence"); *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 695 (Cal. 1996) (denying action for damages from electromagnetic fields and noting "[a]ll tangible intrusions, such as noise, odor or light alone, are dealt with as nuisance cases, not trespass").

Some courts have recognized a trespass claim for intangible intrusions onto property such as odors, smoke, and vibrations, *but only if the intangible intrusions cause actual and substantial physical harm to property. Darney v. Dragon Prod. Co.*, 771 F. Supp. 2d 91, 107 (D. Me. 2011) (citing *John Larkin, Inc. v. Marceau*, 959 A.2d 551, 554 (Vt. 2008) ("invasions of intangible matter are actionable in trespass *only* if they cause substantial damage to the plaintiff's property") (emphasis in original)). Alabama is one such state that applies this rule, requiring both an intangible trespass *and* resulting *physical and substantial damage to property.* In *Born v. Exxon Corp.*, 388 So.2d 933 (Ala. 1980), the court found that the alleged intrusion of light and odors onto the plaintiff's land from an oil treatment facility was not an actionable trespass because "there was not a scintilla of evidence of an intentional entry of any substance onto the land...." *Id.* at 933-34. Those courts that follow this minority rule rarely find an actual trespass because intangible intrusions typically do not cause harm to property. *See, e.g., Pestey v. Cushman*, No. 530238, 1994 WL 720359, at *3-4 (Conn. Super. Ct. Dec. 15, 1994) (finding that noxious odors from an upwind dairy were not an actionable trespass because there was no "direct or indirect physical invasion or deposit of some substance onto the [plaintiffs'] land"); *Brown v. Scioto Cty. Bd. of Comm'rs*, 622 N.E.2d 1153, 1162 (Ohio Ct. App. 1993) (finding that odors from a sewage treatment plant were not a

trespass because the plaintiff "failed to adduce summary judgment evidence of physical damage to her real property").

South Carolina has not recognized the invasion of invisible odors onto the land of another as giving rise to an actionable trespass, and it should not do so now. To do so would unnecessarily and improperly blur the line between causes of action in trespass, private nuisance, and negligence. *See id.* at 71-72 (*citing* Keeton, *supra*, § 13, at 72) ("[T]he historical requirement of an intrusion by a person or some tangible thing seems the sounder way to go about protecting the exclusive right to the use of property."). Nuisance provides a sufficient cause of action for intangible intrusions such that there is no need for this Court to expand trespass into that area. Even if this Court decides to adopt the minority rule (and the defendant submits that it should not), that rule would not help the plaintiffs in this case because the plaintiffs specifically abandoned any and all property damage claims and conceded that the odors caused no physical harm to their properties.

V. WHEN A PLAINTIFF CONTENDS THAT ODORS HAVE MIGRATED FROM A NEIGHBOR'S PROPERTY ONTO THE PLAINTIFF'S PROPERTY, NO INDEPENDENT CAUSE OF ACTION FOR NEGLIGENCE SHOULD EXIST. IN ANY EVENT, THE PLAINTIFF CANNOT RECOVER FOR BOTH NEGLIGENCE AND NUISANCE BECAUSE DOING SO WOULD BE AN IMPERMISSIBLE DOUBLE RECOVERY.

The Court should not expand the law to permit a cause of action for negligent migration of odors (or other similar non-physical invasions). To begin with, nuisance actions already adequately protect landowners from substantial and unreasonable interference with the use and enjoyment of their property. Those causes of action are

property-based and therefore strike an appropriate balance between compensating landowners and preventing crippling liability.

In contrast, the negligence cause of action is limited not by ownership, but rather by the notion of foreseeability. *See Bishop v. S.C. Dept. of Mental Health*, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998) (foreseeability is determined by looking to the natural and probable consequences of the complained of act). Consequently, the universe of potential plaintiffs would not be limited to landowners. *Anyone* claiming to be within smelling distance of a landfill, paper mill, farming operation or feed yard, breathing distance of a factory, or hearing distance of a firing range, blast site, or railroad switching yard who might foreseeably suffer some annoyance or frustration-type injury – family members, guests, renters, customers, passersby – potentially could have a cause of action. The inevitable consequence of allowing such an open-ended cause of action for injuries allegedly caused by the escape of odors and noises is that businesses will move their operations out of state or cease productive activities that could be subject to this expanded tort regime. Because such a massive expansion of potential tort liability is not necessary to protect the legitimate interests of South Carolina residents, this Court should refuse to endorse it.

In any event, even if a negligence claim exists independent of a nuisance claim in the odor context (and the defendant believes that it should not), a plaintiff cannot recover for both negligence and nuisance (or trespass). *See Save Charleston Found. v. Murray*, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct. App. 1985) (a plaintiff may not recover for separate claims if pled on an identical set of facts). The plaintiffs agree that to allow a recovery under both theories of negligence and nuisance on the same facts would be an

improper double recovery. *See* Pls.' Br. 28-29 ("The only prohibition is that a party is not entitled to a double recovery when the same damages were alleged under each remedy.").

Thus, this Court should not recognize an independent negligence claim in an odor lawsuit where a nuisance cause of action has been alleged. If the Court does recognize an independent negligence claim, however, it should also recognize that a plaintiff cannot recover on multiple claims (in this case negligence, nuisance, and trespass) under the same facts, as this would amount to a double recovery, specifically prohibited under South Carolina law.

VI. IF AN INDEPENDENT CAUSE OF ACTION FOR NEGLIGENCE EXISTS WHEN A PLAINTIFF CONTENDS THAT OFFENSIVE ODORS HAVE MIGRATED FROM A NEIGHBOR'S PROPERTY ONTO THE PLAINTIFF'S PROPERTY, THE STANDARD OF CARE FOR A LANDFILL OPERATOR AND BREACH THEREOF MUST BE ESTABLISHED THROUGH EXPERT TESTIMONY.

The plaintiffs asserted a negligence claim against the defendant Landfill alleging that the Landfill had a duty to maintain odors on-site and that the Landfill breached that duty. Landfill odors are generated from on-site sources, including landfill gas from decomposing solid waste and solid waste in the landfill. Landfill gas collection system operation and landfill construction and management are occupations decidedly not within the common understanding of a jury.

It is well-established in South Carolina that expert testimony is required to establish the standard of care and a breach thereof if the subject matter that forms the relevant standard of care for a negligence claim is not within the common understanding of a jury. *See, e.g.,* 18 S.C. Jur. Negligence §15 (2012); *City of York v. Turner-Murphy Co.,* 317 S.C. 194, 200, 452 S.E.2d 615, 618 (Ct. App. 1994) (dismissing negligence

claim against engineer where no expert testimony was presented as to the alleged breach of the standard of care). In *City of York*, the plaintiffs filed a negligence suit against an engineering firm that had contracted to design and oversee the construction of a wastewater treatment plant. 317 S.C. at 195, 452 S.E.2d at 616. When a concrete wall of the plant failed a year after construction, the city discovered that the wall had extensive voids and needed replacement. *Id.* at 196, 452 S.E.2d at 616. The plaintiff failed to establish by expert testimony that the defendant breached the relevant standard of care. *Id.* at 196-97, 452 S.E.2d at 617. The Court of Appeals held that the plaintiff's claim failed as a matter of law because establishing a breach of the duty of care required technical inferences that were outside the common knowledge of the jury. *Id.* at 199-200, 452 S.E.2d at 618.

Similarly, in *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, the plaintiff alleged that an engineering firm was negligent in the supervision, design, and administration of a contract to build a water main for the City of Charleston. 351 S.C. 459, 463-64, 570 S.E.2d 197, 199 (Ct. App. 2002). The plaintiff's claim failed as a matter of law because the plaintiff did not present expert testimony to establish the standard of care and "there [was] no way for a jury to compare [the engineering firm's] actions with the actions other similarly situated engineering firms would have taken when confronted with the situation . . . ." *Id.* at 474, 570 S.E.2d at 204. The plaintiff further alleged that the engineering firm negligently required the plaintiff to stop construction for 34 days because of non-compliance with Occupational Safety and Health Administration (OSHA) safety regulations. *Id.* at 475, 570 S.E.2d at 205. The Court also rejected this claim, *finding that safety regulations were not matters of common*

knowledge. Id.; *see also Gilliland v. Elmwood Prop.*, 301 S.C. 295, 300-01, 391 S.E.2d 577, 580 (1990) (requiring expert testimony to establish the standard of care and deviation therefrom for an architect); *Folkens v. Hunt*, 290 S.C. 194, 200, 348 S.E.2d 839, 843 (Ct. App. 1986) (requiring expert testimony to establish the standard of care and the departure therefrom for an accountant); *Kemmerlin v. Wingate*, 274 S.C. 62, 65, 261 S.E.2d 50, 51 (1979) (same); *Shelton v. LS & K, Inc.*, 374 S.C. 294, 297-99, 648 S.E.2d 307, 309-11 (Ct. App. 2007) (*abrogated on other grounds by Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)) (requiring expert testimony to establish the standard of care for the design and construction of a parking lot).

Under the above precedent, expert testimony is required to establish the standard of care for a landfill operator and any deviation from that standard because landfill operation unquestionably is a technical occupation that is beyond the common knowledge and experience of the average layperson. More specifically, expert testimony is required to establish the standard of care in the industry for a landfill operator to build and manage an engineered sanitary landfill and landfill gas collection system, and any alleged breach thereof. Furthermore, expert testimony is required to establish alleged violations of the environmental health and safety regulations the plaintiffs put at issue in this case.

That expert testimony is required for landfill operators was well demonstrated in the trial of the present case. Over the course of a two-week trial, the plaintiffs and the defendant presented hundreds of exhibits concerning the design and operation of an engineered sanitary landfill and the associated gas collection system, the analysis of landfill gas, and the applicability and requirements of numerous State and Federal

regulations. Highly trained professionals presented testimony regarding landfill construction and management and landfill gas collection.

The defendant's witnesses, Hank Ludwig and Steve Lamb, are responsible for the landfill design and landfill gas collection system at the Landfill and are both licensed professional engineers. (Trial Tr. 234:17-24, Mar. 20, 2012; Trial Tr. 833:1-834:15, Mar. 26, 2012) The plaintiffs' own landfill construction, management, and gas collection system expert witness, Dr. Timothy Townsend, is a professional engineer with a doctorate in environmental and solid waste engineering. (Trial Tr. 501:13-502:8, Mar. 21, 2012) The defendant's landfill gas collection system expert witness, Dr. Morton Barlaz, is a licensed professional engineer. (Trial Tr. 1008:4-5, Mar. 26, 2012) The defendant's odor control expert witness, Ken Skipka, is a certified meteorologist. (Trial Tr. 1143:11-15, Mar. 27, 2012) *In fact, the plaintiffs objected to this expert witness because he was not a licensed professional engineer.* (Trial Tr. 1162:8-12, Mar. 27, 2012) Because landfill gas collection requires such specialized technical knowledge, the defendant engaged a professional consulting firm to manage that aspect of landfill operations. (Trial Tr. 366:21-367:1, Mar. 20, 2012) Furthermore, the defendant engages other engineering firms to build new landfill cells for the waste and to engineer permanent caps over the waste. (Trial Tr. 935:19-936:2, Mar. 26, 2012)

Questions that were important in the trial but were beyond the common understanding of a jury included how landfill gas collection wells are installed, operated and maintained (including requirements for monitoring negative pressure, oxygen content and landfill gas temperature at each wellhead), *see* Def. Tr. Ex. 467 at 1-9 (describing gas well monitoring requirements), how permanent landfill caps are designed and built, the

operation of landfill gas flares, the application of federal landfill gas NSPS standards at the Landfill (*see* NSPS regulations at 40 C.F.R. Ch. I, Subch. C, Pt. 60, Subpt. Cc and WWW), how landfill gas is generated, the number of landfill gas collection wells that typically are required at a landfill, how landfill surface emissions are monitored, collected, and analyzed to correct excess emissions, additional odor control and management options and costs of those options. *See Nat'l Tel. Coop. Ass'n v. Exxon Corp.*, 38 F. Supp. 2d 1, 10 (D.D.C. 1998) (*citing District of Columbia v. Peters*, 527 A.2d 1269, 1273 (App. D.C. 1987)) (holding that the standard of care regarding installation and removal of underground storage tanks ("USTs") required expert testimony and listing questions regarding USTs that were "so distinctly related to some science, profession or occupation" as to be beyond the common understanding of the average layperson).

The plaintiffs argue that the defendant's alleged admissions at trial regarding the existence of odors supersede the requirement to provide expert testimony to establish the standard of care and breach thereof. In making this argument, the plaintiffs confuse negligence and strict liability. *See id.* at 10 (plaintiff's reliance on defendant's admission that material from a leaking UST contaminated neighboring property "essentially transforms its negligence claim into one for strict liability"). In *National Telephone,* an owner of commercial property brought negligence, trespass, nuisance, and strict liability claims against the owner of a neighboring gasoline service station after USTs on the property leaked and a "black waste-oil like substance" migrated through the below-grade basement wall of the plaintiff's building. *Id.* at 4. The plaintiff did not present expert testimony to establish the standard of care, but argued that the defendant's negligence

was a "matter of common sense or every day knowledge" and was "evidenced by its *admitted failure* to remove the old tanks and by its *admitted contamination* of [the plaintiff's] property." *Id.* at 10 (emphasis added) (internal quotations omitted). The court granted the defendant's motion for summary judgment on the negligence claim because it had "little difficulty concluding that expert testimony [was] essential to establish the standard of care." *Id.* Just as the defendant's "admitted contamination" of neighboring property in *National Telephone* was insufficient to establish the standard of care for the UST owner and operator, so too here, the defendant's admission that off-site odors occurred at one time is not enough to satisfy the plaintiffs' burden of establishing the standard of care of a landfill operator and a breach thereof; instead, expert testimony is required.[7]

Courts outside of South Carolina also require expert testimony to establish the standard of care when the subject matter of a negligence claim involves technical knowledge outside the common knowledge and understanding of the jury. The North Carolina Court of Appeals, for example, has rejected a negligence claim against an engineering firm that was retained by a county to *design a new cell in an existing landfill. Handex of the Carolinas, Inc. v. County of Haywood,* 607 S.E.2d 25 (N.C. Ct. App. 2005). The court held that the plaintiff failed to state a *prima facie* claim of negligence

[7] The plaintiffs spend a significant portion of their brief attempting to convince this Court that they did, in fact, put on evidence of the standard of care for a landfill operator and a breach thereof (which the defendant vehemently denies). The sufficiency of the evidence, however, is not before this Court. The only question before this Court is whether the law in South Carolina requires the standard of care for a landfill operator and breach thereof to be established by expert testimony. If this Court answers that question in the affirmative, the District Court will resolve the evidentiary issues at the post-trial motion stage.

against the engineering firm because the plaintiff failed to make the required showing of "what an engineer practicing under the relevant standard of care actually does nor any specific instances of breach of that relevant standard." *Id.* at 32. Further, the common knowledge exception did not apply because "the localized expectations and terms of art relating to excavation and landfill construction" did not fall within the realm of a layperson's common knowledge and experience. *Id.* (citing *Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 510 S.E.2d 690, 695-96 (N.C. Ct. App. 1999)).

Handex is particularly instructive because it involved landfill construction. The plaintiffs in the case at bar alleged that the landfill operator was negligent in building and operating a landfill and landfill gas collection system in such a way as to fail to eliminate the escape of odors. As the court held in *Handex*, understanding these terms of art relating to landfill and landfill gas collection construction and operation do not fall within the realm of a layperson's common knowledge.

In *Delta*, the owner of a manufacturing facility with soil and groundwater contamination claimed that an environmental and engineering firm it had retained to formulate and implement a cleanup plan had negligently failed to meet the relevant standard of care. 510 S.E.2d at 692-93. The North Carolina Court of Appeals affirmed the trial court's directed verdict in favor of the engineering firm because no expert testimony had been offered to establish the standard of care. *Id.* at 696 ("Our review of volumes of transcripts and exhibits leads us to conclude that this case certainly required expert testimony to explain and prove the standard of care required . . . ."); *see also Design & Prod., Inc. v. Am. Exhibitions, Inc.*, 820 F. Supp. 2d 727, 738 (E.D. Va. 2011) (requiring expert testimony to establish the standard of care for designers and fabricators

of museum exhibits); *Owen v. United States*, No. 10–01540(BAH), 2012 WL 5199192, at *6 (D.D.C. Oct. 22, 2012) (same with respect to standard of care for maintenance and operation of a wheelchair lift); *FFE Transp. Serv., Inc. v. Fulgham*, 154 S.W.3d 84, 91 (Tex. 2004) (same with respect to standard of care for maintenance of a coupler assembly, kingpin and base rail of a refrigerated tractor trailer, which "involves the use of specialized equipment and techniques unfamiliar to the ordinary person").

Without question, under existing precedent in South Carolina and other jurisdictions, landfill operation (and specifically the construction and operation of the landfill and landfill gas collection system as it relates to odors) requires specialized technical knowledge not within the common knowledge of the average juror such that expert testimony is required to establish the standard of care for landfill operation and a breach thereof. Similarly, the regulations for landfill construction and operation also require expert testimony. Thus, this Court should hold that South Carolina law requires that (1) the standard of care for landfill operators (specifically, design and management of the landfill itself and landfill gas collection system) and any breach thereof must be established by expert testimony; and (2) regulations that serve as the standard of care and an alleged breach of that standard must be established through expert testimony.

CONCLUSION

For the reasons set forth above, the defendant respectfully requests that the Court answer the District Court's certified questions as follows:

1. Under South Carolina law, when a plaintiff seeks recovery for temporary trespass or nuisance, the plaintiff's damages are limited to the lost rental value of the property.

2. The maximum amount of compensatory damages a plaintiff can receive in any trespass or nuisance action is the full market value of the plaintiff's property.

3. South Carolina law does not recognize a cause of action for trespass solely from invisible odors.

4. When a plaintiff contends that odors have migrated from a neighbor's property onto the plaintiff's property, no independent cause of action exists. Additionally, when a plaintiff pleads multiple claims on the same facts, the plaintiff may not recover on multiple claims.

5. The standard of care for a landfill operator and breach thereof must be established through expert testimony. Additionally, regulations that serve as the standard of care and an alleged breach of that standard must be established through expert testimony.

This 19th day of December, 2012.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFICATION FROM UNITED STATES DISTRICT COURT
District of South Carolina

Honorable Joseph F. Anderson, Jr., United States District Court Judge

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Appellate Case No. 2012-212741

Perrin and Debbie Babb, Wayne and Sarah Elstrom, Alan and Kathy Jackson,..... Plaintiffs,

v.

Lee County Landfill SC, LLC,..... Defendant.

PROOF OF SERVICE

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