THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Sr., Circuit Court Judge

Trial Court Case No.
2015-CP-10-3550

Appellate Case No. 2017-00866

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SC Court of Appeals

Richard Ralph and Eugenia Ralph.....Appellants,

v.

Paul Dennis McLaughlin and Susan Rode McLaughlin.....Respondents.

RESPONDENTS' INTIAL BRIEF

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STATEMENT OF THE CASE

On September 30, 2011, the Appellants Richard Ralph and Eugenia Ralph (the "Ralphs") filed their Summons and Complaint against Paul Dennis McLaughlin and Susan Rode McLaughlin. (Summons and Complaint, 9/30/11). In their Complaint, the Ralphs sued over their ownership of Lot 22, Block 32 on Seabrook Island. (the Ralphs' Lot)(*Id.*) The McLaughlins own the neighboring Lot 23, Block 32 on Seabrook Island. (the McLaughlins' Lot) (*Id.*). The Ralphs' Lot is shown on that Plat by E.M. Seabrook, Jr., dated April 29, 1987, and recorded May 8, 1987, in the Charleston County Register of Deeds Office in Plat Book BN at Page 49. (*Id.*; Seabrook Plat, Plat Book BN at 49) The McLaughlins' Lot is shown on an almost identical plat by E.M. Seabrook, Jr., dated September 6, 1984, and recorded in the Charleston County Register of Deeds Office in Plat Book BD at Page 23 . (*Id.;* Seabrook Plat, Plat Book BD at 23) The McLaughlins; Lot was formerly subject to a twenty (20') foot easement for drainage and a ten (10') foot easement for drainage. (*Id.*) The easement was in favor of the Seabrook Island Property Owners Association ("SIPOA"). (Plat, Book BD at Page 23; Order 3/2/2017, Trial Transcript pp. 36-54).

In May of 2002, SIPOA passed a motion to abandon the drainage easement on the McLaughlins' Lot and on other lots on the same portion of Seabrook Island. (Minutes 5/20/02). In October of 2002, the McLaughlins took title to their property by deed which referenced, and incorporated, a Plat by Forsberg Engineering and Surveying, Inc., entitled "Plat Showing Abandonment of an Existing 20' Drainage Easement Lot 22 Block 23 Town of Seabrook Island Charleston South Carolina" dated January 17, 2002 (Forsberg Plat)(McLaughlin Deed). Both the McLaughlins' predecessors in title and SIPOA informed the McLaughlins that the drainage

easement had been abandoned. (Transcript, p. 246, p. 252-253, p. 255) The Forsberg Plat showed that the easement area had been abandoned. (Forsberg Plat).

The McLaughlins ultimately decided to build on their property, and, in the process, removed a drainage pipe on the McLaughlins' Lot in the portion of the abandoned easement and removed a culvert running under their property. (Complaint; Transcript p. 77). The McLaughlins built a portion of their residence on a portion of the former "No Build" area and the drainage easement area with approval from SIPOA. (Complaint; Transcript p. 236, p. 245).

In their Complaint, the Ralphs sued the McLaughlins for actual and punitive damages and for emotional anguish and discomfort for removing the culvert and building on the McLaughlins' Lot claiming that such actions caused flooding on the Ralphs' property. (Complaint). Interestingly, there are no causes of action individually pled in the Ralphs' original Complaint. At trial, the Ralphs admitted their only cause of action against the McLaughlins was for trespass.[1] (Transcript p. 19)

On December 6, 2011, the McLaughlins filed their Answer and Third Party Complaint asserting affirmative defenses and suing SIPOA for indemnification due to SIPOA's approval of the McLaughlins' building plans, the abandonment of the easement, and the attempts by the McLaughlins to provide a new easement on their property, which was rejected by the Ralphs and SIPOA (Answer and Third Party Complaint, 12/6/2011). SIPOA answered the Third Party Complaint on January 6, 2012. (Answer, 1/6/2012). Discovery commenced in the matter.

On January 30, 2013, the Ralphs moved to amend their Complaint to assert a more detailed cause of action, including asserting an alleged action for trespass and for punitive damages. (Motion to Amend 1/30/2013). The Motion was granted and the Amended Complaint

[1] The original Complaint does not specify a cause of action. Counsel for the Ralphs explained to the Court that trespass was the actual cause of action even though there is nothing specific in the pleadings. (Transcript, p. 19)

was filed July 17, 2013. (Amended Complaint 7/17/2013). The McLaughlins filed their Answer to the Plaintiffs' Amended Complaint and Third-Party Complaint on July 22, 2013. (Answer to Amended Complaint, 7/22/2013). On August 23, 2013, SIPOA filed its Answer to the Third-Party Complaint. (SIPOA Answer, 8/23/13).

On February 14, 2014, the Ralphs moved for partial summary judgment seeking to have the Court declare the McLaughlins committed trespass in removing the drainage pipe on their own McLaughlins' Lot and causing damages. (Motion, 2/14/2014). The Motion was based upon an Affidavit of J. Howard Yates, Jr., Esq., as to his opinion regarding the easement. (*Id.*)

On February 19, 2014, the McLaughlins filed their motion for summary judgment based upon the Ralphs' responses to Requests for Admission, the statute of limitations, and the filing of a prior lawsuit captioned *Seabrook Island Property Owners Association v. McLaughlin*, Case No. 2008-CP-10-6975 (the "SIPOA case")(Motion 2/19/2014).

On February 20, 2014, SIPOA filed its motion for summary judgment as to the third-party causes of action and as to the Ralphs' underlying claims. (Motion 2/2/2014)

While the motions for summary judgment were pending, the parties agreed to dismiss the case pursuant to Rule 40(j) SCRCP. (Consent Order, 6/2/2014).

On May 11, 2015, the Ralphs moved to restore the case to the active docket for Charleston County. (Motion to Restore 5/11/2015). The case was restored by Consent Order filed June 23, 2015. (Consent Order 6/23/2105)

The parties to the case re-filed their motions for summary judgment. (Motions 3/17/16; 3/25/16; and 3/28/2016).

On May 11, 2016, the Honorable G. Thomas Cooper, Jr., heard all three motions for summary judgment. (Orders 6/7/2016) Judge Cooper denied both the Ralphs' and the

McLaughlins' respective motion for summary judgment. (Orders 6/7/2016). Judge Cooper granted SIPOA's motions for summary judgment as to the McLaughlins' claims that they should be indemnified by SIPOA. (Order Granting Third-Party Defendant's Motion for Summary Judgment 6/7/2016)

This case was called for trial the week of January 23, 2017. The Honorable Roger M Young, Sr., tried this case before a jury in Charleston County from January 23 to January 26, 2017. (Order Denying Plaintiffs Motion for New Trial)(Transcript, p. 1).

At trial, the Ralphs each testified. (Order 3/2/17)(Transcript pp. 55-138). They also called Howard Yates, G. Robert George, and C.O. "Nick" Thompson, III. (*Id.*)(Transcript pp. 36-54; 142-214; 217-235) The McLaughlins each testified, as did John Wells. (Order 3/2/17)(Transcript pp. 236-377).

At trial, the Ralphs presented evidence that the abandonment of the easement by SIPOA would not have extinguished the easement. (Transcript pp. 43-45; Order 3/2/17) That evidence came in the form of the expert testimony of Howard Yates. (Transcript, *id*; Order 3/2/17). Mr. Yates testified that plats do become part of the deed to property and the plat showing an abandonment of the easement was recorded. (Transcript p. 42; Order 3/2/17). Mr. Yates also testified that recorded plats become part of a deed, including the Forsberg plat, which became part of the McLaughlins' deed. (Transcript p. 47; Order 3/2/17). Mr. Yates testified that plat unilaterally terminated the easement in question. (Transcript, *id.*)

The Ralphs testified as to alleged damages to their property as did Robert George, their expert in civil engineering. (Transcript pp 55-214). Mr. George testified that the removal of the drainage pipe caused poor drainage and flooding on the Ralphs' property. (*Id.* at 152) He also testified that this portion of Seabrook Island consists of dunes and troughs, which is typical

landscape for that type of island. (Transcript pp. 150-151). The Ralphs' front yard is in a trough, according to Mr. George. (Transcript, p. 178). Mrs. Ralph testified that after a rain there was always standing water on her property before any pipe was removed. (Transcript p. 98; Transcript p. Order, 3/2/17).

The Ralphs' appraiser expert C.O. "Nick" Thompson, III, testified that the Ralphs' property had been devalued between ten and fifty or sixty per cent based upon problems with surface water. (Transcript p. 229; Order 3/2/17). Mr. Thompson was not able to offer any report in evidence. (Transcript p. 223). Mrs. Ralph testified that she thought the value of her property was Seven Hundred Seventy-five Thousand ($775,000.00) Dollars. (Transcript, p. 101). Mr. Ralph agreed. (Transcript, p. 128). Their appraiser, Mr. Thompson, had done no updates in valuation since 2011. (Transcript, p. 234).

At the close of the Ralphs' case, they moved for a direct verdict as to their cause of action for trespass, which the Court denied. (Order 3/2/17). The McLaughlins moved for a directed verdict on the Ralphs' causes of action for trespass, intentional infliction of emotional distress, and punitive damages. (Order 3/2/17, Transcript, pp. 264-268) Judge Young granted the McLaughlins' motion for a directed verdict as to their claims for punitive damages and intentional infliction of emotional distress. (Transcript p. 286-287; Transcript p. 294; Order 3/2/17). At the close of all evidence, Judge Young determined there was evidence to present the issue of trespass to the jury, denying the McLaughlins' renewed motion for a directed verdict. (Transcript p. 381)(Order 3/2/17). The Court also denied the Ralphs' directed verdict motion at the same time. (*Id.*)

The only cause of action submitted to the Jury was for trespass. (Jury Charges)(Order 3/2/17)(Transcript p. 293)

Judge Young charged the jury as to the duty of the Court, the jurors being the judge of the facts, the credibility of witnesses, the burden of proof, direct and circumstantial evidence, expert witnesses, easements, trespass, nominal damages, actual damages, mitigation of damages, and the verdict form. (Transcript; pp. 406- 416)

As part of the jury charges, Judge Young charged the jury that it could award nominal damages for trespass. His specific charge read as follows:

Nominal Damages

- *The plaintiff is entitled to a least nominal damages if you find the Defendant committed a trespass. Nominal damages may be a token sum such as one cent or one dollar.*

(Transcript, p. 412; Request to Charge)

There were no objections from the Ralphs as to the charges presented by Judge Young. (Transcript p. 416)

During their deliberations, the jury requested to re-hear the testimony of Howard Yates. (Order 3/2/17). The jury deliberated for over five hours. (Transcript p. 417; Order 3/2/17). At one point, the jury advised the Court that it was deadlocked. (Transcript p. 417; Order 3/2/17). The Court provided an *Allen* charge. (Transcript p. 417; Order 3/2/17). *See Allen v. United States*, 164 U.S. 492 (1896). There were no objections to the *Allen* charge. (*Id.*;Order 3/2/17). The jury continued its deliberations for another hour before returning its unanimous verdict. (Transcript, pp. 419-420).

Ultimately, the jury returned their verdict in favor of the Ralphs for trespass in the amount of One Thousand and No/100 ($1,000.00) Dollars (Transcript pp. 419-420; Verdict Form).

On the Verdict Form, the foreman wrote the following:

X We, the Jury find for the Plaintiff against the Defendant in the amount of
$ 1,000 actual damages
nominal

(Verdict Form). The jury foreman specifically wrote the word "nominal" on the verdict form. (*Id.*)

Judge Young asked the members of the jury to raise their right hands if that indeed was their verdict; all raised their right hand. (Transcript p. 420).

No motions were made before the jury was dismissed by the Court. (*Id.* pp. 420-423).

Judge Young allowed for five days to make post-trial motions (*Id.* at 423).

On February 3, 2017, the Ralphs moved for a new trial *additur*, a new trial as to damages, and a new trial absolute pursuant to Rule 59 SCRCP. (Motion, 2/3/2017).

By his Order filed March 2, 2017, Judge Young denied all of the Ralphs' post-trial motions of and found no compelling reason to invade the jury's province. (Order, 3/2/2017)

The Ralphs filed their Notice of Appeal of Judge Young's Order on March 31, 2017. (Notice of Appeal).

FACTS OF THE CASE

The McLaughlins are the owners of Lot 22, Block 32, 3016 Baywood Drive on Seabrook Island. (Title to Real Estate, Ex. C to Answer and Third Party Complaint). The McLaughlins purchased this property on October 1, 2002, from Carroll M. Gantz and Lorraine Gantz. *Id.* The Ralphs are the McLaughlins' next door neighbors and own Lot 23, Block 32 3055 Baywood Drive. (Ralph Deposition, p. 5, ll. 19-23). The Ralphs have owned their property since 1997. *Id.* The Seabrook Island Property Owners Association ("SIPOA") is the property owners association for Seabrook Island and the former owner of a 20' Drainage Easement across the north end of the McLaughlins' property. (Forsberg Engineering Plat, Ex. B to Answer and Third Party Complaint). That drainage easement contained a "NO BUILD" area as identified on Plats by E.M. Seabrook (Plaintiffs' Trial Exs. 2 & 4).

On May 20, 2002, the SIPOA Board of Directors took a vote, recorded in their minutes, to abandon the easement on Lot 22, Block 32. SIPOA's Directors

> made a motion to give the easement back to the property owner with the understanding that the property owner pay all cost necessary to remove the easement. Mr. Giardino seconded. The motion passed by unanimous vote.

(Minutes, Ex. D to Answer and Third Party Complaint). Part of the easement was a drainage pipe that ran under Lots 21 to 28 on Baywood Drive. (John Thompson Depo).

On September 22, 2002, a new plat was recorded in the Office of the Register of Deeds for Charleston County in Book EF at Page 883 of that January 17, 2001, plat from Forsberg Engineering and Surveying entitled "PLAT SHOWING ABANDONMENT OF AN EXISTING 20' DRAINAGE EASEMENT." (Ex. B to Answer and Third Party Complaint)(Plaintiff's Trial Ex. 5). The plat was approved by Mr. Randy Pierce, the Town Administrator for Seabrook Island. *Id.* Using the reference to this new plat, the Plaintiffs purchased Lot 22, Block 32 from

Carroll M. and Lorraine D. Gantz. (Title to Real Estate, Ex. C to Answer and Third Party Complaint) The deed from Mr. and Mrs. Gantz to the McLaughlins references the property description in the new plat by Forsberg. (*Id.*) The deed from the Gantzes was recorded on October 9, 2002, in Book L421 at Page 820. (*Id.*) Both the plat and the deed were recorded as of October, 2002. The McLaughlins have always contended that the easement was abandoned. *Id.*

The Plaintiffs' predecessor in title obtained approval from the Executive Vice President of SIPOA as well as from the Town Administrator to record a new plat showing the abandonment of the easement and the "no build area" in that easement. (Signed Letter, Ex. A. to Answer and Third Party Complaint). There was no objection from the Plaintiffs or anyone else on Seabrook Island as to the abandonment of the easement in 2002.

In the spring of 2006, the McLaughlins submitted a plan to the SIPOA Architectural Review Board to build their home on Lot 22 at 3061 Baywood Drive. Nothing is built on Seabrook Island without approval of the SIPOA Architectural Review Board. (Transcript, p. 191) The McLaughlins understood from SIPOA that they had the obligation to pay for the removal of any pipe in the No Build Area. (McLaughlin Depo, p. 14) The McLaughlins submitted house plans through their architect Whitney Powers and were told by Coy Foster, SIPOA's ARB administrator, that the McLaughlins were financially responsible for removing the pipe from the drainage area. (Ex. F to Answer and Third Party Complaint). The SIPOA Architectural Review Board approved the plans for the McLaughlins on August 18, 2006, through Coy Foster's letter. (Letter, 8/18/2006),

In June 2007, SIPOA contacted the McLaughlins about creating a plan to address the abandoned easement and pipe. (Letter, June 19, 2007). The Ralphs also received this letter. (Ralph Depo, p. 54, p. 55, p. 59). Richard Ralph testified that the pipe was working and did not

want the McLaughlins to "tear the thing apart or filling it in or whatever they wanted to do on the property. And that is when I argued against it." (Ralph Depo. P. 60).

The McLaughlins sought financing for their construction in 2008. (McLaughlin Depo, p. 334). During that time, Mr. McLaughlin contacted Ron Ciancio of the SIPOA legal committee who gave him verbal approval to continue the process in order to obtain a loan and begin construction. *Id.* at 65. The Ralphs continued to express concerns during this time.

On September 22, 2008, SIPOA's director, John Thompson sent an email to the McLaughlins and the Ralphs regarding the easement. In that email, Mr. Thompson wrote

> The Owner of Lot 22 is interested in building a new home, and wishes to remove the drain pipe from the old easement. The Owners of Lots 21 and 23 [the Ralphs] are concerned about potential adverse impacts this may have on the drainage characteristics of their lots.
>
> ...
>
> The SIPOA would like to discuss the possibility of re-establishing the easement and providing for the long term care of the pipe, which is presently still in very good condition, but doing so will require the cooperation of all parties.

(Email, 9/22/2008, Ralph Depo. Ex. 9)

On September 29, 2008, the President of SIPOA, Sam Reed, convened a meeting with the McLaughlins and their neighbors. The McLaughlins brought their then attorney, their architect, and representatives of their contracting company, too, to discuss a plan from Robert George, a professional engineer, regarding the removal of the pipe and a remedy. (McLaughlin Depo., p. 48, p. 49) At that meeting, the McLaughlins agreed to give SIPOA a new easement in the setback area between their property and the Ralphs to install Mr. George's plan and remedy. (*Id.;* Transcript p. 246). Mr. McLaughlin allowed a tour of the property and a proposed solution. The Ralphs withdrew any support for that plan. From September through December, 2008, the

McLaughlins attempted to resolve the issue. (Transcript p. 246). Ultimately, on December 9, 2008, the McLaughlins removed the pipe in the "NO BUILD" area. (Transcript p. 77)

On that same day, SIPOA filed a complaint and motion for a temporary restraining order in that case captioned *Seabrook Island Property Owners Assoc. v. Paul Dennis McLaughlin and Susan Rhode McLaughlin*, Case Number 2008-CP-10-6975, in the Court of Common Pleas for Charleston County (the "2008 suit"). In that lawsuit, SIPOA requested relief for all property owners on Seabrook Island, including the Ralphs, in order to stop the McLaughlins from building their home unless the McLaughlins installed another drainage system. The Plaintiff dismissed its lawsuit two (2) days after it was filed on December 11, 2008. (Defendants' Ex. 5)(Defendant's Ex. 6)

In allowing the abandonment of the easement in 2002, approving plans in 2008, the McLaughlins relied upon SIPOA in constructing their house. (Transcript pp. 246). The Ralphs knew that SIPOA ultimately approved plans for the McLaughlins to build on their property. (Transcript p. 99)

STANDARD OF REVIEW

When ruling on a motion for directed verdict, the court must view the evidence in the light most favorable to the non-moving party. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2001). The reviewing court will apply the same standard. *Id.*

Compelling reasons must be given to justify invading a jury's province in granting a new trial. *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995). Substantial deference must be afforded to a jury's determination of damages when considering whether or not to grant a new trial nisi additur. *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003). The thirteenth juror doctrine entitles a trial court to act as a thirteenth juror when it finds the evidence does not justify the verdict and it may then grant a new trial based solely on the facts. *Curtis v. Blake*, 392 S.C. 494, 709 S.E.2d 79 (2011). Motions for a new trial on the grounds of inadequacy of a verdict are addressed to the sound discretion of the trial judge and are subject to review on appeal only as to whether or not there has been an abuse of discretion. *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973). The grant or denial of new trial motions rests within discretion of trial judge, and his decision will not be disturbed on appeal unless his findings are wholly unsupported by evidence. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E. 2d 715 (Ct. App. 1996); *Morris v. Jensen*, 309 S.C. 153, 420 S.E.2d 710 (Ct. App. 1992); *Umhoefer v. Bollinger*, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989)[2].

[2] The Appellants provide no reference to the appropriate Standard of Review before this Court; Appellants must know their appeal cannot be sustained were they to reference the appropriate standards for granting a new trial or overturning Judge Young's Order.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED A DIRECTED VERDICT AS TO PUNITIVE DAMAGES WHERE THERE WAS NO SHOWING BY ANY EVIDENCE, LET ALONE CLEAR AND CONVINCING EVIDENCE, EVEN IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS, THAT THERE WAS ANY WILLFUL, WANTON, OR RECKLESS BEHAVIOR ON THE PART OF THE MCLAUGHLINS TO WARRANT AN AWARD OF PUNITIVE DAMAGES AND, ADDITIONALLY, THIS ISSUE WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW

The trial court property directed a verdict as to punitive damages. Judge Young properly directed a verdict where there was no issue as to punitive damages to be submitted to the jury. Further, this matter was not properly preserved for appellate review by this court. When ruling on a motion for directed verdict, the court must view the evidence in the light most favorable to the non-moving party. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 20010. The reviewing court will apply the same standard. *Id.* The appellate court will reverse a ruling on a directed verdict motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Zinn v. CFI Sales & Marketing, Ltd.*, 415 S.C 93, 780 S.E.2d 611 (Ct. App. 2015). Judge Young property directed a verdict supported by the evidence: there were no actions rising to the level needed for the imposition of punitive damages and where he found evidence to support his ruling that the McLaughlins' actions did not rise to a level requiring punishment. There was no error of law in the striking of the punitive damages demand.

There was no clear and convincing evidence of conscious wrongdoing by the McLaughlins in this case. Mr. McLaughlin consistently testified that he was relying on SIPOA in having his plans approved, in representing that the easement had been abandoned, and in having the authority to proceed with construction from SIPOA. (Transcript pp. 237; 246, 250, 251, 252-253; 255-256, 258, 260). Even the Ralphs testified that they knew that the

McLaughlins' plans were approved and the easement had been purportedly abandoned: Mrs. Ralph testified that she knew the SIPOA approved the plans to build.[3] (Transcript, p. 99). In their own Exhibit 11 presented at trial, Mrs. Ralph confirmed receipt of an email correspondence regarding the abandonment of the easement, representations by the prior owner, and that SIPOA had agreed to an abandonment of the easement. (*Id*). Mr. Ralph also acknowledged receiving correspondence from SIPOA that the easement had been abandoned. (Transcript p. 130). Mr. George, the Plaintiffs' engineering expert, also testified that SIPOA had abandoned the easement, and that the McLaughlins could not have built without SIPOA's approval. (Transcript p. 205; p. 214). The McLaughlins proceeded to build their house based upon what they perceived to be correct, approved plans from the SIPOA. Their actions were not those rising to the level of conscious wrongdoing. *See* contra *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011)(Defendant showed reckless disregard of landowners' rights as required due to consistent and repeated misconduct and violations of regulations regarding flooding, stormwater runoff and intrusion onto neighbors property). The McLaughlins demonstrated no consistent disregard for anyone else's rights. Instead, they built on their property in compliance with the procedures required of them by SIPOA.

There was no evidence presented of malicious behavior justifying any award of punitive damages. Judge Young agreed:

> He [Mr. McLaughlin] 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 activing malevolently, certainly not to the level of clear and convincing, so I'll grant their motion for punitive damages.

[3] Mrs. Ralph testified that neither she nor her husband took any action to prohibit the McLaughlins from building on their property. (Transcript pp. 99-100)

(Transcript, pp. 287-288). Judge Young based his decision on the uncontroverted lack of evidence showing any acts on the part of the McLaughlins warranting any punishment, certainly not to the level of clear and convincing evidence. (Transcript pp. 287-288) There was no consciousness of wrongdoing proven by clear and convincing evidence demonstrated by the Defendants at any time where the McLaughlins testified consistently that they relied on SIPOA and on the documents presented to them stating that the easement had been abandoned.

Judge Young further stated:

> And punitive damages are out. I, again, don't think this is a case in which there has been a rise to clear and convincing evidence that he [Mr. McLaughlin] acted intentionally, knowing that he did not have the right to do that.
>
> He knew it was disputed. He had been arguing about it for, apparently, a couple of years, but it didn't get resolved to his satisfaction, to anybody's satisfaction, so he moved forward with what he thought was his rights. I don't think that rises to the level of punitive damages, so you won't be able to argue punitive damages.

(Transcript, pp. 294-295). Nowhere in their Brief do the Appellants address the clear and convincing standard required for punitive damages; they cannot.

The Appellants mistakenly rely on cases clearly distinguishable from their own. In some five (5) pages of their Brief, the Appellants make reference to only three cases: *Hollis*, *supra*, at 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011), *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984)(the holding of which was declined to be followed in *Youmans v. S.C. Dep't of Transportation*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2009)), and *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607 (2011). None of these cases are on point. In *Hollis*, the Defendants repeatedly and continuously caused harm to the Plaintiffs by misconduct for which the Defendants were fined by regulatory agencies and which caused major damage to the Plaintiff's downstream properties. *Hollis*, *supra*, at 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011). In *Graham*, punitive damages were warranted due to differing accounts of the underlying facts

arising from a slip and fall in an ophthalmologist's office by a patient, susceptible to more than one inference. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). In *Berberich*, a contractor slipped on a wet ladder after the homeowner failed and refused to turn off a sprinkler while the contractor was working even after being asked to quit the conduct complained of by the injured party. *Berberich v. Jack,* 392 S.C. 278, 287, 709 S.E.2d 607 (2011). The holding in *Berberich* related to all forms of negligence being allowed to be considered as to a jury's determination of comparative negligence, not punitive damages arising from an alleged trespass. *Id.* All of the authorities referenced by the Appellants are clearly not on point. In the case before this Court, there is only one inference to be had: the McLaughlins believed they had the right to proceed with approvals from SIPOA. There was no clear and convincing evidence of an intentional act rising to the level of misconduct to warrant the imposition of punitive damages. Without such evidence, Judge Young had no choice but to grant the directed verdict as to punitive damages.

In addition to the grant of directed verdict being proper, this issue has not been properly preserved for review. The Ralphs' motion for a new trial pursuant to Rule 59 SCRCP was for a new trial absolute, a new trial nisi additur, and a new trial as to damages. (Motion, Feb. 3, 2017) The Ralphs did not raise the issue of punitive damages in the post trial motion before the trial court and did not object at the time the directed verdict was granted; accordingly, the issue is not preserved. (Transcript pp. 268-287, 294, 381) It is well settled that an issue must have been raise to and ruled upon by the trial court to be preserved for appellate review. *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000). The initial ruling as to the directed verdict as to punitive damages must stand as the Plaintiffs did not raise this issue in their post-trial motions. Without a ruling by the trial court, the reviewing court would not be able to determine whether

the trial court committed error. *Id.* The issue as to the directed verdict as to punitive damages was not raised by the Plaintiffs in their post-trial motions, and, it is not preserved. Further, there was no objection made at the time of the trial as to this issue. (Transcript, p. 424) Accordingly, the issue has not been preserved for appellate review, being another grounds for sustaining Judge Young's ruling as to punitive damages.

II. THE TRIAL COURT PROPERLY DENIED THE PLAINITFFS' MOTION FOR A NEW TRIAL, A NEW TRIAL ABSOLUTE, NEW TRIAL NISI ADDITUR, AND A NEW TRIAL AS TO DAMAGES WHERE IT THOROUGLY CONSIDERED THE ARGUMENTS AND COULD NOT FIND COMPELLING REASONS TO INVADE THE JURY'S PROVINCE, AS IT WOULD HAVE BEEN REQURIED TO DO

The trial court properly denied the Plaintiffs' motion for a new trial, a new trial absolute, new trial nisi additur and a new trial as to damages where it thoroughly considered the arguments and could not find compelling reasons to invade the jury's province, as it would have been required to do. Compelling reasons must be given to justify invading a jury's province in granting a new trial. *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995). Substantial deference must be afforded to a jury's determination of damages when considering whether or not to grant a new trial nisi additur. *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003). The thirteenth juror doctrine entitles a trial court to act as a thirteenth juror when it finds the evidence does not justify the verdict and it may then grant a new trial based solely on the facts. *Curtis v. Blake*, 392 S.C. 494, 709 S.E.2d 79 (2011). Motions for a new trial on the grounds of inadequacy of a verdict are addressed to the sound discretion of the trial judge and are subject to review on appeal only as to whether or not there has been an abuse of discretion. *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973). The grant or denial of new trial motions rests within discretion of trial judge, and his decision will not be disturbed on appeal unless his findings are

wholly unsupported by evidence. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E. 2d 715 (Ct. App. 1996); *Morris v. Jensen*, 309 S.C. 153, 420 S.E.2d 710 (Ct. App. 1992); *Umhoefer v. Bollinger*, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989). Judge Young's well-written and thorough twelve (12) page Order demonstrates his dedicated review of the case prior to denying the motion from the Ralphs. (Order, March 2, 2017). His decision is wholly supported by the evidence presented at trial as referenced in the Statement of Facts of the Order. (*Id.*) His decision is wholly supported by his recitation of the relevant law as referenced in the Discussion section of the Order. (*Id.*) His decision showed no abuse of discretion. (*Id.*)

The Ralphs cannot accurately state that the Order is "wholly unsupported" by the evidence presented, which is the standard required to overturn it. In fact, Judge Young's Order is wholly supported by the evidence presented, and he thoroughly and carefully made reference to the evidence at trial. In the Statement of Facts alone, Judge Young made reference to the following evidence to support his ruling:

1. The "E.M. Seabrook, Jr." Plats (Plaintiffs' Exhibits 2 and 4)
2. The Ralphs' deed (Plaintiffs' Exhibit 1);
3. The McLaughlins' deed (Plaintiff's Exhibit 3);
4. The Forsberg Plat (Plaintiffs' Exhibit 5);
5. The testimony of Mr. Yates;
6. The testimony of Mrs. Ralph;
7. The testimony of Mr. George;
8. The testimony of Mr. McLaughlin; and
9. The testimony of Nick Thompson;

(Order, 3/2/2017). To say that the Order is "wholly unsupported" by the evidence is to either to mischaracterize it, at best, or to ignore the words on the page, at worst. Based upon the thorough references in over three pages of the Order to the evidence presented at trial, Judge Young's Order should be affirmed.

Judge Young's Order is further supported by the application of the cases referenced as applied to the evidence in the Discussion section of the Order. Judge Young carefully distinguished a case which the Ralphs' made reference to in reliance that they should be granted a new trial, *Hinson v. A.T. Sistare Const. Co.*, 236 S.C. 125, 113 S.E.2d 341 (1960). (Order, 3/2/2017). For unknown reasons, the Ralphs make no reference to this case in their Brief before this Court. Judge Young dissected *Hinson* as being distinguishable from this matter. (Order, 3/2/2017). Judge Young described in detail the difference between *Hinson* and this case: the damages issues were not the same. *Id.* Judge Young carefully calculated that the jury's award of One Thousand and No/100 ($1,000.00) Dollars as being a truly nominal sum representing one half of one percent (0.5%) of the claim of damages by the Plaintiff. *Id.* Judge Young ruled that it was indeed the jury's intention to award only nominal damages. *Id.* Obviously, the jury paid close attention to the charges given to them, none of which were objected to by the Plaintiffs, one of which was as follows:

Nominal Damages

- *The plaintiff is entitled to at least nominal damages if you find the Defendant committed a trespass. Nominal damages may be a token sum such as one cent or one dollar.*

(Jury Charges, Jan. 26, 2017).

Judge Young then properly analyzed each of aspect of the motion for new trial, new trial absolute, new trial nisi additur, new trial as to damages, only.

As for a new trial, Judge Young relied upon *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000) and *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996) to support his ruling, both of which are still good law. Making reference to *Vinson*, Judge Young quoted "the jury does not have to believe uncontradicted testimony" as it is the jury's province to

determine such issues and if there is any evidence to sustain factual findings in the jury's verdict, the reviewing court must affirm. *Vinson, id.* That is exactly what happened in this case. The jury believed that the McLaughlins thought they were acting lawfully, but they did commit a trespass requiring nominal damages.

Judge Young could not act as the thirteenth juror and award a new trial. In the case before him, Judge Young let stand the jury's award as

> [t]he award of nominal damages in the amount of one thousand dollars ($1,000.00) indicates that the jury did not find that the defendants' trespass caused the damage alleged by the plaintiffs but understood that the law requires at least nominal damages to vindicate the plaintiffs' rights

(Order, 3/2/2017).

The jury's verdict was supported by more than just "any evidence" so that Judge Young had no choice but to sustain their verdict. The jury deliberated most of the day on January 26, 2017, after closing arguments and the jury charge, over five hours (Transcript, p. 412, pp. 416-423). The deliberations followed two full days of detailed testimony by the Plaintiffs, the Defendants, Howard Yates, Robert George, "Nick" Thompson, and John Wells. During their deliberations, the jury asked to re-hear the testimony of Howard Yates. After that testimony was re-heard, the jury advised the Court that it could not reach a decision. Around 4:30 p.m. on the last day of trial, the jury received an *Allen* charge. *Allen v. United States*, 164 U.S. 492 (1896); *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015), *reh'g denied, cert. denied.* (Transcript pp. 417-419) There were no objections given by the Plaintiffs to the jury receiving an *Allen* charge or to any of the jury charges. The length of deliberation alone and the careful consideration given over hours of deliberation must be allowed to stand as set forth in Young's Order. Judge Young properly held the amount awarded was consistent and denied the motion for a new trial absolute.

Judge Young further properly denied the motion for a new trial nisi additur. The motion requires the court to consider the adequacy of the verdict in light of the evidence presented. *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 200). There must be compelling reasons offered to invade the jury's province in granting a new trial nisi additur. *Luchok v. Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010). Judge Young could not find any compelling reason as, ultimately, the jury returned its verdict scratching out "actual" by damages and inserting "nominal." (Verdict Form)(Order 3/2/2017). For the same reasons Judge Young could not grant a new trial, he could not grant a new trial nisi additur. There was ample evidence supported the jury's award.

Lastly, Judge Young properly denied the motion for a new trial as to damages only. A new trial on damages alone is not warranted unless the evidence indicated that a directed verdict as to liability would have been proper. *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993). The Court denied both the Plaintiffs' and Defendants' motions for a directed verdict, finding that there were issues of fact regarding the trespass cause of action. (Order 3/2/2017). The one cause of action for trespass was ruled to be a question of fact, which fact question the jury answered, finding trespass but awarding only nominal damages after much deliberation. (Order, 3/2/2017). That the Plaintiffs' are upset with the amount of the jury's nominal damage award does not justify a new trial nisi additur, a new trial on damages, or a new trial absolute. Because the Plaintiffs are upset with the lack of an award of damages does not constitute compelling reasons for invading the jury's province. *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003). The amount of the verdict is not grossly inadequate or shocking where the jury specifically named the damages to be nominal. *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000). Judge Young carefully

considered that the jury ruled upon the facts and the damages. The naming of the damages award as nominal after great deliberations by the jury indicated that there was no passion, caprice, prejudice or gross inadequacy to warrant a new trial, and Judge Young found accordingly. The jury committed no abuse of discretion amounting to an error of law. *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993). The jury's verdict shows great discretion and consideration of the facts and evidence presented and the manner in which they viewed the case. There may have been a trespass, but there were no damages the jury could award beyond the nominal sum awarded. There was no error of law where the Plaintiffs are upset about the jury's award and their perceived inadequacy of the nominal damages awarded, and Judge Young's Order should be upheld.

III. THE PRIOR ORDER GRANTING THE FORMER THIRD PARTY DEFENDANT SUMMARY JUDGMENT WAS NOT BINDING ON THE PLAINTIFFS AND THE DEFENDANT AS TO LIABILITY AND WAS NOT BINDING ON ANY DELIBERATIONS OR DETERMINATIONS OF THE JURY

The trial court properly ruled that the prior order granting summary judgment to the former third party defendant, the Seabrook Island Property Owners Association, did not constitute a final ruling by and between the remaining parties as being conclusive. On June 7, 2016, the Honorable G. Thomas Cooper, Jr., entered his order granting the third party defendant SIPOA judgment as a matter of law as to the cause of action pending against it for indemnity by the McLaughlins. (Order, 6/7/16). The Judge based his ruling on the lack of evidence showing an unambiguous promise from SIPOA on which the McLaughlins would be entitled to rely so that their third-party complaint cause of action could proceed. (*Id.*) The Order did not relate to the only issue in the case by and between the Ralphs and the McLaughlins: the alleged trespass. There is not one ruling in that order regarding trespass or the lawful or unlawful acts of the

McLaughlins in relation to the Ralphs' property. It is simply inapplicable to the Ralphs' causes of action against the McLaughlins. It is not the law of the case as to these parties as it makes no ruling as to the matters brought by the Ralphs. In fact, at the same time, Judge Cooper denied both the Ralphs' and the McLaughlins' motions for summary judgment as to the issues between them. (Orders, 6/7/2016). Judge Cooper noted in those orders "there are disputed issues of fact regarding Plaintiffs' claims" and "there are disputed issues of fact regarding Defendants' claims." (*Id.*) It was these very same disputed issues of fact were tried before Judge Young and which were ultimately determined by the jury.

As Judge Young noted

> Well, Judge Cooper's order between them....[b]etween 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. I'm letting you go forward and argue to the jury that he was not acting lawfully....

(Transcript p. 292).

The Ralphs have provided no authority to support their argument that Judge Cooper's prior orders have some preclusive effect on the issues presented to the jury. The Ralphs make reference to *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000). In that case, in a counterclaim, a buyer asserted claims against its supplier for negligence, fraud and violations of the Unfair Trade Practices Act. *Id.* Judge A. Victor Rawl granted summary judgment as to the fraud and negligence claims but allowed the Unfair Trade Practices Act claim to go to the jury. *Id.* The Court of Appeals reversed the grant of summary judgment on fraud. On remand, the case came back to Judge Rawl. *Id.* Judge Rawl granted summary judgment again on the grounds of *res judicata* as to the fraud claim. That was appealed. The Supreme Court held that the unappealed decision from the Court of Appeals was

the law of the case. Unlike in *Charleston Lumber*, there was not a complete adjudication of the matters by Judge Cooper to make his ruling the law of the case where he also found there to be issues for trial by and between the Ralphs and the McLaughlins. (Orders, 6/7/2016). Judge Cooper made no ruling as to the Ralphs cause of action for trespass, and Judge Young properly allowed to consider the McLaughlins' belief that they had the right to rely on SIPOA in building their house.

Judge Cooper's ruling about reliance on SIPOA by the McLaughlins related only to the McLaughlins' claim for indemnity from SIPOA and did not relate to the alleged trespass by the McLaughlins as complained of by the Ralphs. (Order, 6/7/2016; Third Party Complaint). Judge Cooper ruled there were no issues of material fact regarding the McLaughlins right to rely on SIPOA in order to bring their third party action. (Order, *id.*) His Orders of that same date stated there were issues for trial by and between the Ralphs and the McLaughlins. Judge Young agreed and submitted the case to the jury. Accordingly, there are no grounds to overturn the jury's verdict based upon Judge Cooper's Order granting SIPOA judgment as a matter of law.

CONCLUSION

For the foregoing reasons, this Court should uphold the trial court's denial of the Plaintiffs' directed verdict motions and the trial court's ruling granting the Defendant's motions for a directed verdict as to punitive damages. Further, this Court should uphold the trial court's order denying the Plaintiffs' Motion for New Trial as there are were no compelling reasons to grant a new trial and the trial court was well within its discretion in denying a new trial.

Respectfully submitted,

Mt. Pleasant, South Carolina
Feb. 5, 2018

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Sr., Circuit Court Judge

RECEIVED
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SC Court of Appeals

Trial Court Case No.
2015-CP-10-3550

Appellate Case No. 2017-00866

Richard Ralph and Eugenia Ralph.....Appellants,

v.

Paul Dennis McLaughlin and Susan Rode McLaughlin.....Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Respondents' Initial Brief and Designation of Matters to be Included in the Record on Appeal were served upon G. Dana Sinkler, Esq., at 2180 Rosebank Plantation Road, Wadmalaw Island, SC 29487 and Ainsley F. Tillman, Esq., 29 Brisbane Drive, Charleston, SC 29407,by United States Mail, first class, postage prepaid on the 5th Day of February, 2017

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SC Court of Appeals

February 5, 2018

G. HAMLIN O'KELLEY, III
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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Richard Ralph and Eugenia Ralph v. Paul Dennis McLaughlin and Susan Rhode McLaughlin, et al.
Appellate Case No. 2017-000866
File No.: 1219.0003

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are an original and one (1) copy of the following:

1. Respondents' Initial Brief;
2. Respondents' Designation of Matters to be Included in the Record on Appeal;
3. Proof of Service.

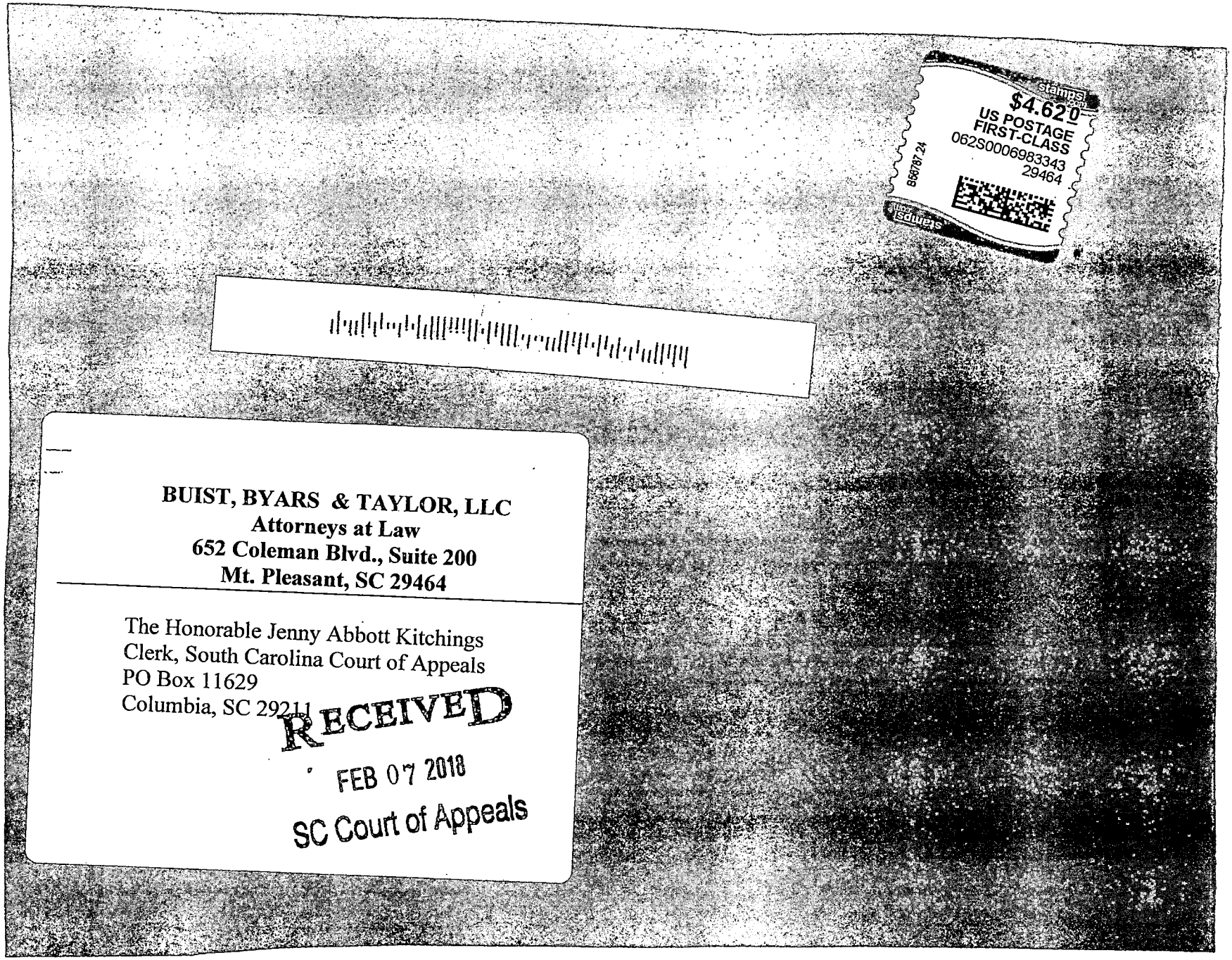
Please file the originals and return a file-stamped copy to me in the enclosed envelope. By copy of this letter, I am serving same upon G. Dana Sinkler, Esq., and Ainsley F. Tillman, Esq., attorneys for the Appellants. Should you have any questions or concerns, please feel free to contact me. With kind regards, I remain

Yours very truly,

G. Hamlin O'Kelley, III

GHOIII/act
Enclosures

cc. (w/enc.) G. Dana Sinkler, Esq.
Ainsley F. Tillman, Esq.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