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

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SC Court of Appeals

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

Appellate Case No. 2017-000866

Richard Ralph and Eugenia Ralph, Appellants,

v.

Paul Dennis McLaughlin
and Susan Rode McLaughlin, Respondents.

APPELLANTS' INITIAL REPLY BRIEF

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THE APPELLANTS' REPLY:

The Respondents' Brief, and in particular its statement of the "Facts of the Case," is rife with references to evidence that was not presented to the Trial Court. The Appellants have filed a Motion with this Court to strike all such material from the Record and from the Respondents' Brief. Also, the Respondents incorrectly claim, in a footnote on page 13 of their Brief, that the Appellants have not set forth a Standard of Review for this Court's consideration of the Issues on Appeal. Because the standard of review varies with each issue, the Appellant included the appropriate standard within the separate arguments of its Initial Brief.

I. The Trial Court erred in granting the Respondents' motion for a directed verdict as to the issue of punitive damages.

a. This Court has jurisdiction to review this issue.

The Respondents contend that the Appellants have failed to preserve this issue for appellate review. The general rule of issue preservation is that, in order to preserve an issue for appeal, that issue must have been raised to and ruled upon by the lower court. *I'on, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (recognizing that ordinarily a party "must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments"). The Appellants raised the issue—with specificity—to the Trial Court, on several different occasions:

- Page 272, line 22, through page 274;
- Page 277, line 24, through page 278, line 1;
- Page 287, line 13, through page 292.

The Trial Court ruled on the issue, as may be seen in the transcript at page 294, line 21, through page 295, line 7. The Trial Court reiterated its grant of a directed verdict on punitive damages in

its *Order Denying Plaintiffs' Motion for a New Trial.* (p. 1, 5). Thus, the issue has been properly preserved for appeal, and this Court has jurisdiction to determine that the Trial Court's ruling was erroneous and should be reversed.

b. It should have been for the jury to decide whether the Respondents' destruction of the drainage pipe and easement was reckless.

The evidence shows that the Respondents foresaw the possibility of harm to their neighbors, but nonetheless consciously undertook that risk when they destroyed the drainage easement. Punitive damages may be awarded in a trespass case when a defendant's acts have been willful, wanton, or in reckless disregard of the property rights of another. *Wimberly v. Barr*, 359 S.C. 414, 423, 597 S.E.2d 853, 858 (Ct. App. 2004). The Respondent admitted at trial that he was aware of the threat that his construction plans presented to his downstream neighbors:

MS. TILLMAN:	Were you at the September 2008 meeting held by the Seabrook Island Property Owner's Association at which Mr. George, Mr. Bob George, gave a presentation?
RESPONDENT:	Yes, ma'am.
MS. TILLMAN:	And what do you remember Mr. George saying about the effect your construction would have on downstream lots?
RESPONDENT:	I heard much of what he said yesterday.[1]
MS. TILLMAN:	So was it your understanding at the meeting that if you were to dig up the drainage pipe and construct your house in the no-build area it would have a negative effect on your neighbors downstream?
RESPONDENT:	That's what [Mr. George] said, yes.

[1] Respondent is referring here to Mr. George's trial testimony, which had occurred the day before. During Mr. George's testimony (as Respondent indicates in the excerpt above), George testified about the study he presented and the warnings that he gave at the September 2008 meeting, which stressed the adverse impact that the Respondents' destruction of the drainage pipe and no build easement would have on the Appellants' lot (Trial Transcript p. 153, line 8-p. 155, line 7; p. 182, line 17-p. 183, line 3).

MS. TILLMAN: All right. Did any of your neighbors voice concerns to you about your construction?

RESPONDENT: Yes, at that meeting they did.

(Trial Transcript, p. 241, lines 6-22).

In their appellate brief—as they did before the Trial Court—the Respondents argue that the requisite willfulness was lacking, due to their purported reliance on alleged promises made by the SIPOA. They point out in their brief to this Court that "[Respondent] consistently testified that he was relying on SIPOA in having his plans approved, in representing that the easement was abandoned, and in having the authority to proceed with construction from the SIPOA....they built on their property in compliance with the procedures required of them by SIPOA." (*Respondents' Initial Brief*, p. 14-15; see also Trial Transcript p. 266, line 23-p. 267, line 6). Thus, the Respondents would like this Court to find that "there is only one inference to be had: the [Respondents] believed they had the right to proceed with approvals from the SIPOA." (Id., p. 17).

This argument by the Respondents is now (and was, before the Trial Court,) entirely untenable in light of the following findings of fact and law made by Judge Cooper in his previous Order in this same case:

- "SIPOA expressly put the [Respondents] on notice that they bore all responsibility for their actions related to the pipe" (Order p. 3);
- "Between the meetings in early October 2008 and the date that the [Respondents] removed the pipe—December 9, 2008—SIPOA never indicated to the [Respondents] that a resolution to the issue had been reached" (Order p. 5);
- "The [Respondents] removed the pipe on or about December 9, 2008, although SIPOA, the [Respondents], and their neighbors had not come to an

agreement on whether or not the [Respondents] could remove the pipe, or the consequences they would bear for doing so" (p.6) (emphasis added);

- "Because the [Respondents] removed the pipe over the objections of SIPOA, there is no evidence in the record to support this theory of recovery [i.e., indemnification]" (p.7, footnote 1);
- "As a practical matter, ***there is no evidence to show that the SIPOA has ever made any promises to the [Respondents]***" (p. 8) (emphasis added).

The Trial Court erred in failing to apply the findings made Judge Cooper's Order, which was the law of the case. Those findings alone were sufficient to raise the inference that the Respondents were acting recklessly, and they should have compelled the Trial Court to submit the issue of punitive damages to the jury.

Furthermore, the Respondents admitted that they knew their construction plans would impact their downstream neighbors; it does not matter whether the Respondents subjectively believed that they had permission from the SIPOA to destroy the easement. "An act may be willful when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary reason and prudence would say it was in reckless disregard of another's rights." *Leppard v. Southern Ry. Co.*, 174 S.C. 237, 177 S.E. 129, 133 (1934).

The Respondents' testimony at trial, their confessed knowledge of the results of the study by Mr. George, the many concerned emails that the Respondents admitted to receiving from neighboring lot owners (including the Appellants), the lawsuit filed by the SIPOA to stop their construction, and the findings of fact and law contained in Judge Cooper's Order, all give rise to the reasonable inference that the Respondents acted recklessly. (See Plaintiffs' Trial Exhibits 6-10, 17-19). It should have been for the jury to weigh that evidence and to assess whether punitive damages were warranted. *See Fairchild v. S.C. Department of Transportation*, 398 S.C. 90, 797

S.E.2d 407, 413 (2012) (Finding that the trial court erred in granting a directed verdict on the issue of punitive damages because the evidence and reasonable inferences, viewed in the light most favorable to the plaintiff, created a jury question as to whether defendant was reckless; and further holding "[i]t is not the duty of a trial court to weigh the evidence"); *see also Joyner v. St. Matthew's Builders,* 263 S.C. 136, 139-140, 208 S.E.2d 48, 49 (1974) (holding that the issue of punitive damages was properly submitted to the jury, despite confusing and conflicting testimony, where, when viewed in the light most favorable to plaintiff, the evidence was susceptible to the reasonable inference that defendant acted with reckless disregard for plaintiff's property rights.)

The Trial Court erred in removing the consideration of punitive damages from the province of the jury, and this Court should reverse its grant of a directed verdict to the Respondents.

II. The Trial Court erred when it allowed the Respondents to base their arguments on facts that were directly contradictory to those that had already been established as the law of the case.

As the Respondents point out in their brief to this Court: "The jury believed that the Respondents thought they were acting lawfully." (Respondents' Brief, p.21). This is the very crux of the case. Throughout the trial, the Respondents claimed that the SIPOA had: (1) abandoned the easement; and (2) given them permission to destroy the easement in the course of their construction. The Respondents argued before the jury, and before the trial judge on directed verdict motions, that the alleged fact of their reliance on the SIPOA's permission somehow shifted their own liability for the harm done to the Appellants' property as a result of the Respondents' construction. (*see*, e.g., Trial Transcript p. 266, line 23-p.267, line 6; p. 393, lines 20-24; p. 398, lines 10-11; p.403, lines 3-4). The Trial Court wrongly allowed these arguments and assertions to color the jury's deliberations; further, those same arguments improperly steered the court's own

decisions on the directed verdict motions made at trial, as well as on the Appellants' Motion for a New Trial.

When Judge Cooper granted summary judgement to the SIPOA as to the Respondents' third-party claims against it for reliance, he made specific findings of fact and law that were never appealed by the Respondents. Those findings of fact and law can be distilled into a single statement: **The SIPOA never authorized the Respondents to destroy the pipe and the No Build easement.** "Where no exception is taken to findings of fact or conclusions of law, they become the law of the case." *Walters v. Canal Ins. Co.*, 294 S.C. 150, 363 S.E.2d 120 (Ct. App. 1987), *quoting Ashy v. WeCare Distributors, Inc.*, 289 S.C. 526, 528, 347 S.E.2d 123, 125 (Ct. App. 1986).

The Respondents' claims against the SIPOA were derivative of the Appellants' claims against the Respondents.[2] The Appellants, the Respondents, and the SIPOA were all present at the summary judgment motions hearing before Judge Cooper, and each of those parties argued before him on that day, as well as in separate briefs to the Court.[3] The Appellants, the Respondents, and the SIPOA each disputed the facts and law on which Judge Cooper would go on to base his decision. When Judge Cooper ultimately granted the SIPOA's summary judgment motion, thereby making a determination as to disputed facts, his findings were not appealed by the Respondents. Those findings therefore became the law of the case, and the Respondents should not later have

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[2] The Respondents demanded judgment against SIPOA "for all or part of those claims against them" brought by the Appellants. (Answer and Third-Party Complaint, filed December 6, 2011, ¶ 62)

[3] See Plaintiffs' Motion for Partial Summary Judgment, filed March 17, 2016, and Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, filed May 9, 2016; Motion for Summary Judgment of Third-Party Defendant Seabrook Island Property Owners Association, filed March 25, 2016, and Defendant SIPOA's Memorandum of Law in Support of Motion for Summary Judgment, filed May 11, 2016; and Defendants' Notice of Motion and Motion for Summary Judgment, filed March 28, 2016, and The Defendants and Third Party Plaintiffs Paul Dennis McLaughlin and Susan Rode McLaughlin's Memorandum of Law in Support of their Motions for Summary Judgment, filed May 11, 2016.

been able to successfully argue the very opposite of Judge Cooper's verdict to the Trial Court and the jury.

Because the Trial Court improperly disregarded the findings of fact and law made in the previous, un-appealed ruling in this same case, this Court should reverse the Trial Court and grant the Appellants a new trial.

III. This Court should reverse the Trial Court's *Order Denying Plaintiffs a New Trial* because it was controlled by error of law and fact.

The Rules of Civil Procedure allow a new trial as to all or part of the issues; the Appellants filed a motion for the same with the Trial Court. SCRCP Rule 59 (Plaintiffs' Motion for a New Trial, filed February 3, 2017 and Plaintiffs' Reply to the Defendants' Reply, filed February 14, 2017). "The law in South Carolina is clear that when a verdict in favor of the plaintiff is fully supported by the evidence on the evidence of liability but the damages awarded are inadequate, a new trial may be ordered on the damages alone." *Cartin v. Keller Bldg. Products of Charleston*, 299 S.C.152, 153, 382 S.E.2d 922, 923 (1989). The Trial Court erred in denying Appellants' motion for a new trial, because his decision to do so was improperly governed by error as to the law and the facts. *Sorin Equipment Co., Inc. v. The Firm, Inc.*, 323 S.C. 359,364, 474 S.E.2d 819 (Ct. App. 1996).

a. The Trial Court misperceived evidence that was essential to its determination of the issues before it.

The Trial Court's *Order Denying Plaintiff a New Trial* reveals a significant error as to the evidence presented at trial, and the subsequent findings of law that were dependent on that evidence. In denying the Appellants' request for a new trial, the Trial Court quoted: "The law in South Carolina is clear that when a verdict in favor of a plaintiff is fully supported by the evidence on the issue of liability, but the damages awarded are inadequate, a new trial may be ordered on

the issue of damages alone." Order, p. 11, *quoting Cartin v. Keller Bldg. Products of Charleston*, 299 S.C.152, 153, 382 S.E.2d 922, 923 (1989). The court then reasoned that a grant of a new trial as to damages would not be appropriate in this instance, because there existed "sufficient evidence" such that a directed verdict as to liability would not have been proper. (Order, p. 11-12). However, an examination of the Statement of Facts contained in the Order, on which it was presumably based, demonstrates that the Trial Court misapprehended expert testimony that went directly to issue of liability.

In its Statement of Facts, when recounting the testimony given at trial by Howard Yates, the Trial Court's Order incorrectly recalls: "Mr. Yates also testified on cross examination that recorded plats become part of the deed to a property and that the Forsberg plat did become part of the Defendants' deed. **Mr. Yates also testified that the easement was originally in favor of SIPOA.**" (p. 2) (emphasis added). These findings were not supported by the testimony of Howard Yates:

MR. O'KELLEY:	And my clients took title subject to the Forsberg Engineering plat, correct?
MR. YATES:	Well, they took title subject to the earlier ones.
MR. O'KELLEY:	But this plat, the Forsberg Engineering plat, is specifically referenced in the deed, correct?
MR. YATES:	Yes, but so were the others by implication. They're all included in the derivation clause. You can't escape and willy-nilly decide, 'I don't want to take this; I don't want to take that.' They took it subject to the other plats as well.
MR. O'KELLEY:	And the easement that you've described on the prior plat, the drainage easement; that was in favor of Seabrook Island Property Owners Association, correct?
MR. YATES:	It was dedicated by whoever it was that drew the—developed the tract—but under multiple real estate cases,

as you mentioned *Blue Ridge Realty vs. Williamson*, and I'll mention *Carolina Land vs. Bland*, those interests are 'special property interests,' and those exact words are used in those decisions that say that anyone that buys according to a plat that has roads, alleys, avenues, areas, particularly no-build areas, on them, then they have a 'special property interest' in those, and one person cannot unilaterally say, 'I don't want to be subject to that.'

MR. O'KELLEY: **I'll ask the question again: Was the easement in favor of the Seabrook Island Property Owners Association to your understanding?**

MR. YATES: **No. It was to the interest of everybody that purchased on that plat.**

(Trial Transcript p.51, line 21-p.52, line 24).

The Trial Court's apparent misapprehension of Mr. Yates' testimony guided its decision to deny the Appellants a new trial as to damages. The Court based its ruling on its erroneous understanding of the evidence as set forth in its own Statement of Facts: "at the close of all evidence, this Court ruled that there was sufficient evidence for the jury to determine issues of trespass and abandonment regarding the easement." (Order p. 11-12). Thus, the Trial Court improperly applied the principle that "a new trial on damages alone is not warranted unless the evidence presented indicated that a directed verdict on the issue of liability would have been proper." (Order, p. 11, *quoting Pelican Building Centers of Horry-Georgetown v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993). In its *Initial Brief* to this Court, the Appellants have set forth in detail the reasons that there did not ever properly exist any question of fact as to the issues of trespass and abandonment.[4]

[4] See *Appellants' Initial Brief*, particularly the arguments on issues III and IV, pp. 15-22.

The Trial Court's Order reveals that its view of the evidence was tainted by a crucial error as to Mr. Yates' testimony, which error underpinned its denial of Appellants' Motion for a New Trial, along with its disregard for the findings of fact in Judge Cooper's prior Order. Because the decision was unsupported by the evidence, this Court should reverse the *Order Denying Plaintiff a New Trial* and remand this case to the Circuit Court.

b. The Trial Court's denial of Appellants' Motion for a New Trial was based on error of law.

As grounds for its denial of Appellants' request for a new trial as to damages only, the Trial Court reiterated its erroneous decisions to deny the Appellants' directed verdict motions as to trespass and abandonment. (Order, pp. 11-12). Its rulings at trial were improper in light of the previous decision by Judge Cooper, which found that the SIPOA never authorized the Respondents to destroy the easements. Moreover, the Trial Court's holdings were in erroneous contravention of the law of real property, which is unequivocal in its tenet that an easement depicted on a plat for the benefit of a subdivision cannot be unilaterally abandoned. *See Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 145 S.E.2d 922 (1965).

The jury should never have been allowed to view the evidence through the legally false filter of the possible rightful abandonment of the easement by the SIPOA (which the Respondents repeatedly suggested had diluted their responsibility for damage to the Appellants' property). As a matter of law, the SIPOA could neither have abandoned the easement nor given the Respondents legally sufficient permission to destroy it. Because its conclusions are controlled by error as to the law of real property, this Court should reverse the Trial Court's *Order Denying Plaintiffs' Motion for New Trial.*

CONCLUSION

For the reasons set forth above and in their Initial Brief, Appellants pray that this Court would reverse the Trial Court's erroneous decisions and grant them a New Trial.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this 2nd day of March, 2018, I served the *Appellants' Initial Reply Brief* on counsel for the Respondents by mailing a copy of the same, postage prepaid, addressed as follows:

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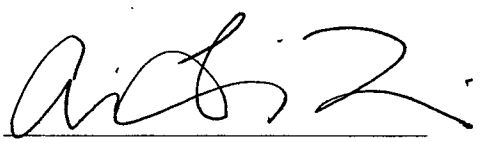

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March 2, 2018

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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Re: *Richard Ralph and Eugenia Ralph v. Paul Dennis McLaughlin and Susan Rode McLaughlin*
Appellate Case No. 2017-000866

Dear Ms. Kitchings,

Enclosed for filing in the above-referenced matter, please find the *Appellants' Initial Reply Brief*, along with proof of service of the same.

I appreciate your assistance with this matter. Please do not hesitate to contact me with any questions that you may have.

Yours very truly,

Ainsley F. Tillman
Attorney for Appellants

cc: G. Hamlin O'Kelley, III, Esquire
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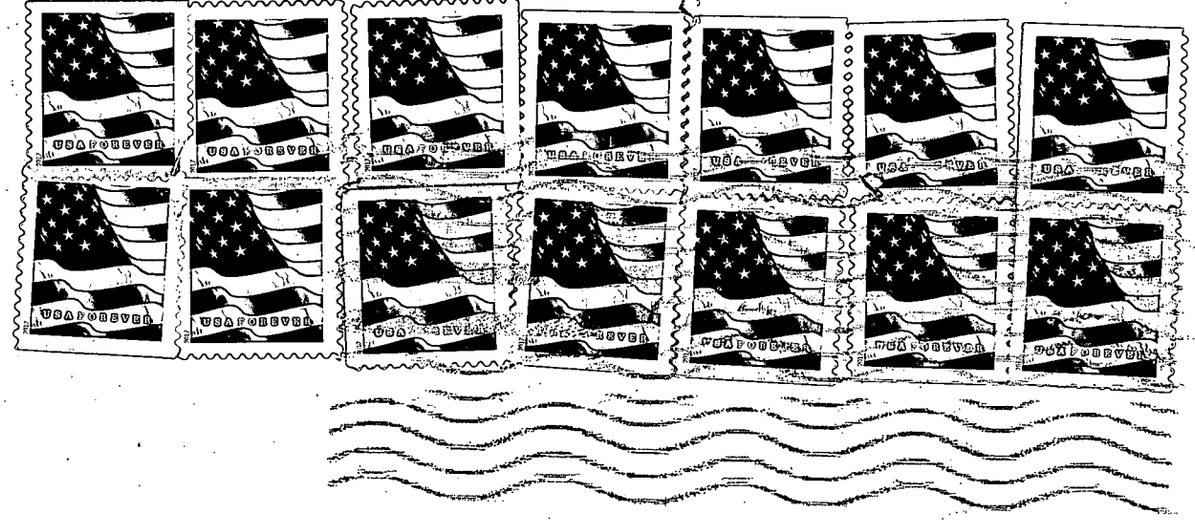

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