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January 7, 2013

Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Perrin Babb; Debbie Babb; Wayne Elstrom, Sarah Elstrom, Alan Jackson; and Kathy Jackson v. Lee County Landfill SC, LLC
Case No. 2012-212741

Dear Mr. Shearouse:

Enclosed for filing please find 15 bound copies and one unbound copy of Plaintiffs' Reply Brief, along with Certificate of Counsel and Certificate of Service upon attorneys for Defendants.

Thank you for your assistance with this matter.

With kindest regards, I am

Very truly yours,

Gary W. Poliakoff

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JAN 11 2013

S.C. SUPREME COURT

GWP/tjd

Enclosures

cc: Kevin A. Dunlap, Esq. (with enclosures)
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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

PERRIN BABB; DEBBIE BABB; WAYNE ELSTROM; SARAH ELSTROM; ALAN JACKSON; and KATHY JACKSON;
Plaintiffs;

v.

LEE COUNTY LANDFILL SC, LLC;
Defendant.

Appellate Case No. 2012-212741

On Certification Pursuant to Rule 244 of the SCACR
Hon. Joseph F. Anderson, Jr.
United States District Court Judge for the District of South Carolina

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PLAINTIFFS' REPLY BRIEF

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A. Introduction

Defendant Lee County Landfill SC, LLC ("Defendant") requests this Court strictly limit the recovery of damages occasioned by landfill odors, including: annoyance, discomfort, inconvenience, interference with their enjoyment of property, loss of quality of life, and interference with mental tranquility (hereinafter collectively referred to as "quality of life damages").

This case included lengthy testimony from six (6) plaintiffs and five (5) community witnesses as to the odors emanating from Defendant's landfill. Such odors were described as horrible, terrible, and serious and frequent enough that quality of life and enjoyment of their residences was substantially and frequently destroyed. Landfill officers admitted that odors from Defendant's landfill had migrated offsite, and admitted that, at times, such odors were horrible. Interestingly, experts of both parties, and Defendant's own engineers, admitted that a landfill such as this can operate without offsite odors if properly managed. Testimony showed that the Lee County Landfill has a history of horrible offsite odors.

Defendant has presented an unlikely scenario where it predicts that if a party is able to recover those types of damages in cases of private temporary nuisance, then Courts will be inundated with litigation. Such a suggestion ignores the inherent limitations that exist to the pursuit of such claims. See Ravan v. Greenville County, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct. App. 1993) (nuisance must be a substantial and unreasonable interference with a plaintiff's use and enjoyment of property).

Disallowing quality of life damages would eviscerate the very concept of the tort of private temporary nuisance. Nuisance is defined as anything working inconvenience or

damage or interfering with the enjoyment of life or property, which includes the use of property in such a way that annoying or injurious odors are emitted. Stoddard v. W. Carolina Regl. Sewer Auth., 784 F.2d 1200, 1207 (4th Cir. 1986) (citing Lever v. Wilder Mobile Homes, Inc., 283 S.C. 452, 454, 322 S.E.2d 692, 693-694 (Ct. App. 1984)).

Defendant's request to disallow such damages would prohibit the recovery for the very elements that define the cause of action of private nuisance. Defendant's interpretation that either property needs to be physically damaged or diminished in value would prevent the recovery of damages where the property is *not* physically damaged or where the property value is *not* diminished. This request runs afoul of many years of decisions by this Court, the Court of Appeals of South Carolina, as well as the United States Supreme Court. It would leave injured parties with a right without a remedy.

Defendant is requesting that the Court impose artificial limitations upon the recovery of damages in nuisance cases, limitations that are tantamount to legislative action. The limitations and restrictions suggested by Defendant would allow the creation of nuisances without providing proper compensation to the individuals whose rights relative to their enjoyment of their property have been injured.

In this situation, a different type of floodgate would be opened. This would allow the waste industry to proliferate and operate without controls of any kind. Current law provides protection to property owners and allows their right to enjoy their own property to be balanced against those who would create a nuisance. Defendant requests the Court create a rule of law that would place the property rights of polluters over that of individual citizens.

Severely restricting the rights of property owners to seek recourse for the creation of a nuisance would amount to an unconstitutional taking prohibited by the South Carolina Constitution. S.C. Const. art. I, § 13 ("[e]xcept as otherwise provided in this constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefore"); Williams v. Haile Gold Mining Co., 85 S.C. 1, 10, 66 S.E. 117 (1910) (to allow creator of nuisance to continue maintenance of nuisance simply because plaintiff had recovered full damages would amount to a taking of plaintiff's property in violation of the constitution).

In the alternative, Defendant suggests that damages occasioned by the loss of enjoyment of property should be capped at the market value of the property. That would promote the interests of wealthy property owners above that of ordinary citizens. Such a rule of law would limit damages for quality of life to the fair market value of the property. Simply put, that would mean the larger/more expensive the property, the more valuable the enjoyment of the property would be. Conversely, the smaller the property or the less economically valuable it is, the less a person's enjoyment of that property would be worth.

Such a policy ignores the purpose of the tort of private temporary nuisance and would create an incentive for polluters to take such actions in more economically disadvantaged areas. Instead, the Court should adhere to the policy that allows recovery based on the relative facts of each case.

B. Quality of Life Damages are Recoverable in Claims for Private Temporary Nuisance and Should Not be Limited by the Market or Rental Value of Property.

1. Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S. Ct. 719 (1883).

Conspicuously absent from Defendant's Brief was any reference to Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S. Ct. 719 (1883). In Fifth Baptist Church, the United States Supreme Court addressed some of the most important issues that have been certified to this Court, which include:

> *Mere depreciation of the property* was not the only element for consideration. That might, indeed, be *entirely disregarded.* The plaintiff was entitled to recover because of the inconvenience and discomfort cause[d] to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and *it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure*.

Id. at 335, 731 (emphasis added).

Fifth Baptist Church has two very important implications for this case. First, it shows that quality of life damages are recoverable in actions for private temporary nuisance. Second, it shows that those damages should not be dictated nor capped by damages tied to property values.

A majority of jurisdictions that have addressed these issues have recognized law similar to that in Fifth Baptist Church. See Tracy A. Batemen, Annotation, Nuisance as Entitling Owner or Occupant of Real Estate to Recover Damages for Personal Inconvenience, Discomfort, Annoyance, Anguish, or Sickness, Distinct from, or in

Addition to, Damages for Depreciation in Value of Property or Use, 25 A.L.R.5th 568 (1994).

Property values often bear little relation to the loss of quality of life associated with a private temporary nuisance. The facts of this case reflect that idea. It is conceded that Defendant, over objection, introduced evidence as to the monthly rental value of the Plaintiffs' properties. Ultimately, the jury returned a verdict for quality of life damages that exceeded those amounts.

Such a verdict is direct evidence that the jury heard evidence of those rentals values, but determined that the right for peaceful enjoyment of Plaintiffs' property exceeded said amounts. Such a verdict is firm indication that the law allows for and reasonable minds may determine that non-pecuniary values of property may far exceed its rental value. This verdict is confirmation that the rule of law set out in Fifth Baptist Church is as true today as it was over one-hundred years ago.

The fact that the jury did not accept Defendant's attempt to impose property values as the cap as to the harm Defendant caused to Plaintiffs is not evidence that the verdict is improper. It is evidence that Defendant attempted to impose an artificial and unrelated "yardstick" to measure unliquidated, non-pecuniary damages. The jury heard the evidence and rejected Defendant's suggested limitation.

Defendant's request that the Court limit damages occasioned by the loss of enjoyment of one's property to the actual market value of such property is akin to another type of limitation – in a personal injury case, capping pain and suffering damages to the amount of medical bills or lost wages. Better yet, it is more akin to a situation where a

defendant attempts to have a jury cap pain and suffering damages to lost wages when the plaintiff is actually retired.

Such artificial limitations, which are unrelated to the evidence and damages in the case, would likely be rejected. Instead, it should also be noted that many cases in South Carolina recognize the unique province of the jury in assessing awards for non-pecuniary or unliquidated damages. See Jennings v. United States, 487 F. Supp. 2d 644, 660-661 (D.S.C. 2006) (damages such as pain and suffering are not susceptible of proof as to monetary value, which means they must be left to the discretion of the factfinder); Anderson v. Elliott, 228 S.C. 371, 375, 90 S.E.2d 367, 369 (1955) (unliquidated damages, which do not have a market price, should be left to the discretion of the jury, because the facts of each case determined the value to be placed on such elements); Wright v. Gilbert, 227 S.C. 334, 88 S.E.2d 72 (1955) (items such as "injured feelings," "personal dignity," "abusive treatment," and "human liberty" are not subject to any fixed standard in assessing damages); Dixie Bell, Inc. v. Redd, 376 S.C. 361, 371, 656 S.E.2d 765, 770 (Ct. App. 2007) ("damages are unliquidated where they are an uncertain quantify, depending on no fixed standard, referred to the wise discretion of a jury"); Scott v. Porter, 340 S.C. 158, 169, 530 S.E.2d 389, 395 (Ct. App. 2000) (determination of reasonable compensation for nonpecuniary damages turns on the facts of each case and is usually left to the jury's discretion).

2. Defendant's own cases show that the Court should allow the recovery of quality of life damages.

a. Kentucky

In its Brief, Defendant cited Ky Rev. Stat. Ann. § 411.560(3) (2012) for the proposition that damages for annoyance, discomfort, sickness, and emotional distress are

disallowed in the Kentucky and that only lost rent is recoverable in a claim for temporary nuisance. (Defendant's Brief, p. 23 n. 4).

A better case could not be made to demonstrate why Defendant's request that the Court eliminate quality of life damages is tantamount to legislative action. For example, prior to the enactment of that statute, courts in Kentucky recognized claims for damages such as quality of life. See Arnoldt v. Ashland Oil, Inc., 186 W.Va. 394, 401-402, 412 S.E.2d 795, 802-803 (W.Va. 1991) (determining that the Kentucky previously permitted the recovery of such injuries in nuisance claims, prior to the codification of limitations on nuisance damages by the Kentucky Legislature).

Although the Commonwealth of Kentucky required legislative action to eliminate certain categories of damages in private temporary nuisance actions, Defendant is requesting the Court initiate such action itself.

Not only would this serve to overturn numerous decisions of this Court, but it interferes with an area the South Carolina Legislature has already recognized that it possesses the authority to act upon. Cf. Shaw v. Coleman, 373 S.C. 485, 645 S.E.2d 252 (Ct. App. 2007) (recognizing that Carolina Shooting Range Protection Act of 2000, S.C. Code Ann. §§ 31-18-10 to-60 has limited circumstances under which plaintiffs may bring a claim for nuisance against a shooting range).

b. Arkansas

Next, Defendant cites Junction City Lumber Co. v. Sharp, 92 Ark. 538, 123 S.W. 370, 372 (Ark. 1909) for the proposition that quality of life damages can be reversed because rental or usable value of the property would give just and full compensation.

(Defendant's Brief, p. 23 n. 4). Interestingly, a later decision of the Arkansas Supreme Court clarified Junction City Lumber Co.

In Yates v. Mo. P. R.R. Co., 168 Ark. 170, 269 S.W. 353 (1925), the Arkansas Supreme Court explained that Junction City Lumber Co. did not allow damages for the discomfort caused to the plaintiff and his family simply because that case involved a "permanent nuisance." Id. at 173, 354.[1]

More importantly, the Arkansas Supreme Court recognized that the correct rule of law for the recovery of damages in such a case could be found in Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S. Ct. 719 (1883). See id. at 172-174, 354. As such, Plaintiffs also request the Court employ the reasoning contained in Fifth Baptist Church.

c. Texas

Similar to Arkansas, various courts in Texas recognize the recovery of damages incurred for the loss of quality of life associated with the loss of use and enjoyment of one's property. See Chandler v. City of Olney, 126Tex. 230, 231-232, 87 S.W.2d 250, 251 (Tex. 1935) (allowing plaintiffs to recover for discomfort and annoyance notwithstanding the absence of other damages); Daniel v. Fort Worth & Rio Grande Ry. Co., 96 Tex. 327, 329, 72 S.W. 578, 579 (1903) (recognizing Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S. Ct. 719 (1883) as correct rule of law and reversing appellate court's failure to allow recovery for physical and mental discomfort).

C. South Carolina Law is in Line with Fifth Baptist Church.

1. The purpose of nuisance is to protect a person's use and enjoyment of their property.

[1] There is no dispute that this case does not involve a permanent nuisance; the parties stipulated that this case involves a temporary nuisance.

a. Nuisance defined

"A private nuisance in South Carolina is a substantial and unreasonable interference with the use and enjoyment of another's property." In re Wildewood Litig., 52 F.3d 499, 503 (4th Cir. 1995). A nuisance is anything that works hurt, inconvenience, or damages; anything that essentially interferes with the enjoyment of life and property. Sanders v. Norfolk So. Corp., 2010 U.S. Dist. LEXIS 4270 *6 (D.S.C. Jan. 20, 2010).

The modern trend in nuisance law is to afford more protection to the comfortable enjoyment of property:

> Many things now uniformly held to be nuisances would not have been so classified under the definition given by Blackstone. The older authorities emphasized the right of the property owner to use his property for any lawful purpose but the trend of modern authority is to give more consideration than formerly to the right of the owner to the reasonable and comfortable enjoyment of his property. And the comfortable enjoyment means mental as well as physical comfort.

Young v. Brown, 212 S.C. 156, 169, 46 S.E.2d 673, 679 (1948).

The essence of nuisance is that "every citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property." Meixner v. Emerson Electric Co., 2006 U.S. Dist. LEXIS 87289 (D.S.C. Dec. 1, 2006) (citing Peden v. Furman Univ., 155 S.C. 1, 151 S.E. 907, 912 (1930)); see Sanders v. Norfolk So. Corp., 2010 U.S. Dist. LEXIS 4270 *6 (D.S.C. Jan. 20, 2010).

A cause of action for temporary nuisance does not require actual physical invasion of a plaintiff's property. Conestee Mills v. City of Greenville, 160 S.C. 10, 15, 158 S.E. 113, 115 (1931).

Instead, a private nuisance protects the more expansive interest in the use and enjoyment of land, which allows nuisance claims that take the form of physical discomfort to the occupants of the plaintiff's land. See Fraser v. Fred Parker Funeral Home, 201 S.C. 88, 21 S.E.2d 577, 1942 S.C. LEXIS 103 *10 (1942) (substantial invasion of property sufficient to qualify as nuisance satisfied by inordinate noises and noxious odors).

According to the Restatement (Second) of Torts, "[f]reedom from discomfort and annoyance while using land is often as important to a person as freedom from physical interruption with his use or freedom from detrimental change in the physical condition in the land itself." Restatement (Second) of Torts § 821D, cmt. b (1979).

The above-referenced citations demonstrate that the limitations Defendant has attempted to impose on nuisance claims are contrary to long-established precedent as to the basic contours of such claims in this State.

b. Temporary nuisance claims require successive causes of action if a nuisance is not abated.

Every day that a nuisance is continued causes new injury the plaintiff and renders the defendant liable to the plaintiff in a suit for damages. Conestee Mills v. City of Greenville, 160 S.C. 10, 23, 158 S.E. 113, 118 (1931). In such a case, a plaintiff is entitled "to all damages" incurred within the statutory time period. Id.

The law of temporary nuisance entitles a plaintiff to bring "successive actions" for any injuries occurring within the statutory timeframe. Id. at 28, 120. "Every continuance of a nuisance or recurrence of the injury is an additional nuisance forming in itself the subject-matter of a new action." Deason v. So. Ry. Co., 142 S.C. 328, 336, 140 S.E. 575, 577 (1927).

Defendant's attempt to impose a limitation as to the market value of the property on claims for private temporary nuisance would undermine the nature of the continuing nature of the tort. Defendant requests the Court cap all damages at the market value of the property. This argument ignores the fact that a plaintiff may bring successive claims until the nuisance is abated. Preventing the plaintiff from bringing successive claims would, in effect, grant a tortfeasor a license to create a nuisance, which is tantamount to an unconstitutional taking.

2. Defendant has attempted to impose requirements on causes of action for private temporary nuisance that do not exist under South Carolina law.

Defendant cites a series of cases in an attempt to impose a restrictive framework upon the damages recoverable in the case of a private temporary nuisance. Defendant borrows restrictions from a mismatch of various types of cases, trying to show that "environmental torts" are unique from common law nuisance claims such that the failure to prove "physical injury" to property results in the recovery of rental value or property value only.

The cases themselves demonstrate that Defendant is attempting to misapply them to the facts governing this case. More importantly, they actually demonstrate the quality of life damages are recoverable in cases of private temporary nuisance.

a. Gray v. So. Facilities, Inc., 256 S.C. 558, 183 S.E.2d 438 (1971) does not support the framework for analyzing cases of private temporary nuisance suggested by Defendant.

Defendant suggests that Gray v. S. Facilities, Inc., 256 S.C. 558, 183 S.E.2d 438 (1971) stands for the following tenuous proposition:

> *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 of 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.

(Brief of Defendant, p. 13) (emphasis in original).

This loaded statement contains multiple suggestions as to the damages recoverable in situations such as this case. First, it suggests that "environmental tort[s]" are somehow different than other torts as to the types of damages recoverable. Second, Defendant contends that an allegation of "physical injury" dictates whether recoverable damages are limited to lost property value. Third, Defendant suggests that the fact that damages may not be based upon speculation, guess, or conjecture prevents the recovery of quality of life damages in cases of private temporary nuisance.

A more careful analysis of Gray and its progeny, however, reveals it does not support Defendant's contentions and, more importantly, it even supports the recovery of inconvenience and discomfort damages without the limitations Defendant has attempted to impose.

While Defendant has correctly stated some elements of the Supreme Court of South Carolina's opinion from Gray, there are material parts of that case that need to be brought to the Court's attention. First, the only legal theory of recovery presented in Gray was negligence. Id. at 568, 442. "[T]here was no claim therein of a cause of action based on a theory of nuisance." Id.

Gray was a case involving the negligent pumping of gasoline into a creek, which ignited and resulted in a fire. Id. at 561, 439. The plaintiff alleged that his damages

included "great depreciation in the value of his property," in addition to "depriving him of the full enjoyment and use of his residence." Id. At trial, the plaintiff only testified that he *believed* the value of his property had been decreased by $6,000. Id. at 563, 440. The plaintiff also testified that there was no physical damage to his property and that he had suffered no out-of-pocket expenses for repairs, etc. Id. Additionally, the plaintiff did not testify as to any diminution in the rental value of the property. Id. at 564, 440.

Instead, the plaintiff merely attempted to recover "stigma damages" with respect to the real property, providing testimony from a local real estate appraiser who testified that the value of the property had been depreciated by approximately 10%. Id. In examining the appraiser, it was elicited that the damage to which the appraiser was testifying was actually damage to the "reputation" of the property. Id. at 565, 441.

It was upon that basis that this Court reiterated the general rules that the amount of damages cannot be left to "conjecture, guess, or speculation." Id. at 570-571, 444. Although it appeared that the Court was suggesting that the stigma damages to the property were speculative, the Court decided the case on the basis that the landowner failed to prove proximate cause because other petroleum plants were located in the same area and occasionally leaked gasoline into the creek. Id. at 570, 444; see also Jennifer L. Young, Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty, 52 S.C. L. Rev. 409, 420 (2001).

On appeal, the plaintiff attempted to argue that the trial court erred in not treating his case as one for nuisance. Id. at 568. It should also be noted that the plaintiff had initially alleged that the gasoline ignition deprived him of the full enjoyment and use of

his residence. Id. at 561. However, at trial, the plaintiff landowner failed to prove those damages. The Supreme Court of South Carolina specifically stated that:

> Even though the appellant testified that gasoline fumes were present in the neighborhood, he did not say they were noxious or offensive to him or that such caused him any discomfort, illness, annoyance or inconvenience.
>
> ...
>
> There is no evidence on behalf of appellant that he or his family sustained any personal injury, discomfort, illness, annoyance, or inconvenience as a result of the fire in the creek.

Id. at 563-64, 567. In the decision, the Court noted the absence of testimony that would prove those damages, but also declined to treat the case as a nuisance case because the plaintiff had only alleged a singular escape of gasoline, whereas the maintenance of a nuisance implies "a continuity of action over a period of time." Id. at 568, 442-443.

The statements made by the Court may properly be read as implying that the plaintiff landowner may have recovered for quality of life damages, had there been proof of such at trial to justify their recovery.[2] Any statement by the Court regarding the necessity of proving damages without speculation were addressed to the diminution of the market value of the property, rather than the recovery of quality of life damages. Id. at 571, 444.

As such, Gray does not support Defendant's contentions. Gray does not require physical damage to property prior to the recovery of damages in a private temporary nuisance case. Gray did not recognize a separate cause of action for an "environmental

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[2] In Gray, the Court cited the cases collected in "***49 A.L.R. (2d), page 253***." Id. at 569, 443. (emphasis added). 49 A.L.R.2d 253 § 14 specifically states that: "[a]lthough there are a few cases to the contrary, ***in most instances it has been held or recognized that discomfort, annoyance, and inconvenience constitute elements of damages for the pollution of a stream***." Id. (emphasis added).

tort" or suggest that the damages recoverable for such torts are somehow limited. Finally, the analysis of damages were limited to property value in Gray, not because those were the only damages that would have been recoverable, but rather, those were the only damages the plaintiff landowner sought to recover.

b. The other cases cited by Defendant also do not support restrictions of damages for private temporary nuisance.

Clark v. Greenville County, 313 S.C. 205, 437S.E.2d 117 (1993) does not dictate that a plaintiff may not recover for quality of life damages caused by the loss enjoyment of his or her property in a private temporary nuisance case.

Clark involved claims for inverse condemnation, nuisance, negligence, trespass, and strict liability against a landfill. Id. at 206, 118. The Supreme Court of South Carolina affirmed the trial court's grant of the defendant's motion for summary judgment as to all the claims except for nuisance because the plaintiffs "failed to produce any evidence of damage from contamination caused by the landfill." Id. at 207, 118.

As to the plaintiff's nuisance claim, the Supreme Court of South Carolina affirmed the dismissal of that claim solely because the corporate defendants could not be liable for nuisance because "they had no control over the property allegedly used as a nuisance." Id. at 210, 119.

The citation presented by Defendant that "[b]ald allegations of diminution in property value are insufficient to create a genuine issue of act regarding damages..." was limited to the discussion of proving a material dispute of fact as to damages for the other claims, not the nuisance cause of action. Id. at 208, 118. Those claims were dismissed because the plaintiffs could not present competent evidence of causation, beyond mere speculation that their property values were diminished. Id. Clark does not state nor even

suggest that quality of life damages are disallowed in a case of private temporary nuisance in South Carolina.

Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000) was cited by Defendant for the idea that property values are *the* measure of damages in the "environmental context." This is not the law and that was not the holding in Yadkin.[3]

Yadkin involved the appeal of a directed verdict on the plaintiff's claim for diminution in property values caused by the contamination of a shipyard by materials transported by the defendant. Id. at 643, 765. It should be noted that the Court of Appeals noted that the plaintiff had only sought to recover damages for: the cost of cleanup, lost profits, and "other damages." Id. at 644, 766.

After the trial court directed the verdict in favor of defendant, the only issue regarding recoverable damages on appeal was for diminution of property value. Id. at 645, 766. Moreover, the plaintiff even consented to a directed verdict on the lost profits claims at trial. Id. 644, 766 n. 1.

In analyzing the diminution in property value claims, the Court held that the directed verdict was proper because the plaintiff could not demonstrate that the damage to the property was permanent. Id. at 647, 768. There was no evidence that the contamination would remain after the cleanup of the property was complete. Id. As such, the only damages that should have been submitted to the jury were those of cleanup costs. Id. at 648, 768.

[3] Yadkin has also been cited as merely being a case involving claims for stigma damages. See Jennifer L. Young, Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty, 52 S.C. L. Rev. 409, 420 (2001).

It should also be noted that previous attempts to read Yadkin as restricting the types of recoverable damages have been rejected. See Peoples Fed. Sav. and Loan Assn. of S.C. v. Resources Plan. Corp., 358 S.C. 460, 472, 596 S.E.2d 51, 58 (2004) (noting that Yadkin should not be read for the idea that "damages for the temporary, non-physical injury to property is limited to the loss or rental value" because Yadkin only concerned the appropriate measure of damages for physical injury to property and did not analyze other types of damages).

Defendant's citation to Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 295 (Ct. App. 1993) for the proposition that damages are somehow restricted to diminution in market value is also inaccurate. In Ravan, the Court of Appeals of South Carolina merely held that the plaintiffs could not have been prejudiced by the failure of the trial court to submit the claims or trespass and nuisance to the jury; the Court noted that the measure of damages that would have been applicable to the trespass and nuisance claims was recovered through the landowner's inverse condemnation claim and negligence claim, *which allowed for incidental and consequential damages*. Id. at 465. 307.

It should be noted that each of the individual landowners testified to "personal inconvenience and loss of enjoyment of their land, and their belief that the use of their properties posed health hazards to them and their families." Id. at 453, 300. The Court of Appeals did not hold that inconvenience and discomfort damages are not recoverable in a claim for private temporary nuisance. Instead, Ravan could more properly be read as allowing such incidental and consequential damages in a nuisance cause of action. See id. n. 4 ("[a] nuisance presupposes negligence in many instances, if not in most, and the two

torts may be coexisting and practically inseparable if the acts or omissions constituting negligence create a nuisance").

Likewise, AVX Corp. v. Horry Land Co., 66 F. Supp. 2d 621 (D.S.C. 2010) cannot be read to hold that quality of life damages associated with the loss of use and enjoyment of property are not recoverable in an action for private temporary nuisance. Instead, although the counterclaim-plaintiff in AVX had brought several causes of action for environmental contamination, including negligence, negligence *per se*, strict liability, nuisance, and trespass, the "heart of the suit" was the "allegation by Horry Land that its real estate ha[d] diminished in value as a result of the contamination caused by AVX." Id. at 623. The loss of the value of property, in addition to punitive damages, was the only damage claim at issue in the case. Id.

The counterclaim-defendants moved for summary judgment as to all of the claims on the basis that the injury to the property was temporary, not permanent, meaning that damages were limited to the loss of rental value. Id. at 624-625. Interestingly, in AVX, the counterclaim-defendants cited a series of cases, including Gray, Clark, Yadkin, and Ravan, not for the proposition that they disallow inconvenience and discomfort damages, but rather, that "stigma damages" are not recoverable in South Carolina. Id. at 626.

The District of South Carolina entered an Order denying counterclaim-defendant's motion for summary judgment as to all of the claims, including punitive damages. Id. at 630. AVX made no mention of quality of life damages.

None of the cases cited by Defendant holds, nor even as much suggests, that loss of property value are the *only* type of damages recoverable in a case of private temporary nuisance or trespass.

c. Physical injury is not required.

Defendant has also maintained that other damages besides property value are recoverable in nuisance cases only where there is "physical damage" to property. This is not the law of South Carolina.

The seminal case on this issue is Allen v. Union Oil and Mfg. Co., 59 S.C. 571, 38 S.E. 274 (1901). Allen involved damages caused by an oil and manufacturing plant. Prior to the filing of the case, the plaintiff died. Id. at 576, 276. The complaint alleged, among other things, that the defendant: emitted sparks that fall upon the plaintiff's residence, emitted disagreeable smells and fumes that annoy the plaintiff and his family, created loud noises that "distract and distress" the plaintiff, emitted smoke and dust that "harass, inconvenience and irritate the plaintiff," created a lot of traffic that annoys an inconveniences the plaintiff, and created "noxious and offensive smells."

The trial court substituted the administrator for the plaintiff after his death. Id. The defendant appealed the entry of that order. In affirming the order of the trial court, this Court noted that actions in tort do not survive to the administrator of the injured plaintiff unless they fall under the terms of the statute 1892, 21 Stat. 18, which, in part, provided:

> SECTION 1. Be it enacted by the Senate and the House of Representatives of the State of South Carolina, now met and sitting in the General Assembly, and by the authority of the same, That causes of action for and in respect to any and all injuries and trespasses to and upon real estate shall survive both to and against the personal or real representative (as the case may be) of deceased persons, and the legal representative of insolvent persons and defunct or insolvent corporations, any law or rule to the contrary notwithstanding.

Id. at 577, 276.

In affirming the order of the trial court, the Supreme Court of South Carolina cautioned the trial court to exercise care in limiting plaintiff's claims and evidence to conduct that caused injury to plaintiff's real estate only because:

> [T]o bring an actionable nuisance, either private or mixed, within the statute [1892, 21 Stat. 18], the nuisance must produce some physical injury to the real estate of another, as distinguished from mere discomfort or inconvenience or bodily injury to the person of the owner. If the nuisance merely operated upon the mind or body of the owners, and does not injuriously affect the property itself in some material manner, it is not within the statute.

Id. at 578, 277.

For illustration, the court specifically noted that noise, odors, fumes, gases, smoke, dust, and/or soot may constitute a nuisance. Id. However, claims for damages as a result of such nuisance may not be maintained *by the administrator of an estate* because of express limitations contained in the survival statute.

The Court could have held that claims for such damages were not recoverable in actions for private temporary nuisance. It did not, but rather, held that only the administrator is not statutorily authorized to pursue such claims. As such, it can be read as authorizing the recovery of such damages when an estate is not involved.

Defendant also cites Vaught v. Hardee & Sons, Inc., 366 S.C. 475, 623 S.E.2d 373 (2005) for the proposition that physical injury is required to property before other damages may be recovered, such as cleanup costs. Defendant also notes that Vaught capped the cleanup costs in that case at the market value of the property.

It should first be noted that Vaught deals entirely with the recovery of restoration costs as a proper measure of damages for injury to real property. Id. at 481. Nowhere in

the opinion does it address quality of life damages caused by a private temporary nuisance nor does it hold that the same may not be recovered in such a case.

It should be further noted that the Supreme Court of South Carolina, in Vaught, cites the Restatements (Second) of Torts § 929 extensively. Id. at 481-484. That section of the Restatement specifically allows for the recovery of quality of life damages. See Restatement (Second) of Torts § 929(1)(c) (injured party entitled to compensation for "discomfort and annoyance" for invasion of property).

D. Trespass Claims Based upon Odors are Viable Because They Involve Use of Air Particles to Carry the Odors.

The issue of whether invisible particles may be considered trespass has been addressed as follows:

> Historically, an invasion by smoke, dust or invisible particles was not considered trespass because this type of invasion was not considered "physical" invasion "in the primitive society where trespass had its roots." Invasions of the particulates or smoke were typically seen to infringe on a plaintiff's use and enjoyment of the land and thus were heard as nuisances, rather than trespasses. Modern scientific advances have caused many courts to abandon the notion that an invasion by smoke, dust, or particles is not "physical." Courts have instead allowed plaintiffs to claim trespass by invisible contaminants; while at the same time limiting such claims, for example, by requiring proof of substantial damage.

In re MTBE Products Liability Litig., 457 F. Supp.2d 298, 314 (S.D.N.Y. 2006).

Like the Southern District of New York, the Court should recognize the modern trend in allowing trespass claims for microscopic particles that wrongfully invade another person's property. Such odors do not travel by themselves in a vacuum. Rather, they odors attach to air molecules and are transported accordingly.

E. Expert Testimony is Not Required Where Defendant Has Admitted Its Duty and Breach Thereof.

Duty is generally defined as the obligation to conform to a particular standard of conduct toward another. Huggins v. Citibank, N.A., 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003). The Supreme Court of South Carolina has emphasized that the "concept of duty in tort liability will not be extended beyond reasonable limits." McCullough v. Goodrich Pennington Mortgage Fund, Inc., 2006 U.S. Dist. LEXIS 33643 (D.S.C. May 23, 2006) (citing Huggins v. Citibank, N.A., 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003)). The existence of a duty is a question of law for the courts. Sanders v. Norfolk So. Corp., 2010 U.S. Dist. LEXIS 4270 *10 (D.S.C. Jan. 20, 2010).

In cases of a landfill where the operator has admitted that it has a specific duty, to prevent odors from leaving the site, the existence and breach of such a duty do not require any expert testimony. The standard of conduct is within the realm of knowledge of an average layperson – an average person knows what odors and stench are and they know when a person has testified that they experience those odors at their own property. It is the same case here. Accordingly, expert testimony is not required when admissions have been made which greatly simplify the issues.

Conclusion

Under the foregoing authorities and argument, Plaintiffs respectfully request the Court answer each of the certified questions accordingly. In addition, Plaintiffs are certainly willing to provide any supplemental briefs, citations to authority, records, transcripts, etc., if the Court determines such items would provide assistance in addressing the certified questions.

[Signature Follows]

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The undersigned certified that this Plaintiffs' Reply Brief complies with Rule 211(b), SCACR.

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The undersigned attorney hereby certifies that a true and correct copy of Plaintiffs' Reply Brief has been served this date via U.S. Mail, with adequate postage attached, to the following:

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