THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2018-001766

Charleston Development Company, LLC, Charleston Housing Company, LLC and NotSo Hostel, LLC, Appellants,

v.

Younesse Alami, Simon M. Adell, Matthew Anderson, Matthew Asher, Daniel Baker, Marie Baker, Matthew and Christina Bare, Andre Bauer, Peter Bierce, Brandon Blount, Barbara Brass, Richard T. Brewer, Sigrid Anne Eilertson, Reginald P. Brown IV, Mary Cahill, Ryan Cockrell, Kevin and Virginia Conlon, Anne Marie Crevar, Christina Cross, Darryl J. Damico, Labar Daniel, Stephen Darwak, Lindsay Davenport, Mary Dickerson, Maxwell Streeter, Kathleen Dougherty, David Dressman, Anna Dressman, Michael Elder, Christopher Scott Farley, Michele Ghastin, Timnah Giller, Virginia Geller, Ryan Gilreath, Sonya Gilreath, Kimberly Glenn, Shaun Halsor, Josephine Rex, Arthur Halvorson, Andrew Halvorson, Linda Hancock, Laura Hyatt, Mike Hartel, Nathan Herring, James Hicks, Jr., Laurie Hicks, Preston G. Hipp, Colin Jones, Matthew F. Jones, Robert C. Jones, Robin Joseph, Molly Keeler, John Kenny, Mandi Walters, Abigail King, Aaron Kless, Laurie Kramer, Robert Kramer, Allison Kreutzer, Benjamin Levitt, Richard Levitt, Jesse Lutz, Nikou Manouchehri, Thomas Naselaris, Zoe Naselaris, Beau O'Steen, Cori O'Steen, Lance Parr, Brandon Perdue, Amanda Lee Raymer, Hadassah Rothenberg, Daniel Ryan, Kimberly Bowlin, Kevin Schnittker, Ginger Scofield, Inderjit Singh, Avtar Singh, Alecia Stevens, Lee Stevens, Justin Swan, Merrick Teichman, John Van Vlack, Jr., William Waterhouse, Jennifer Waterhouse, Anne Wohlfeil, Bryan Young, AJB Trust, Anthony & Jacqueline Bradley, Trustees, Hartshorn Family Trust,

Helene Kenny / Bridget Denny Revocable Trust, Wilhelmina M. Wieters Life Estate Childrens Trust, 33 Bogard Street LLC, 249 Cumming, LLC, 253 Coming Street LLC, 259 East Bay LLC, 259 East Bay 10 B LLC, 272 D Coming St. LLC, Café International, Inc., Corner At Old Canton, LLC, Geer Interests LLC, Kit Properties LLC, Lambert-Weiss LLC, The Naws LLC, New Lease Capital LLC, One Henrietta LLC, Periwinkle Partners, LLC, Porch Properties LLC, Westbury Properties, LLC, and Westendorff Hardware LLC,

Of whom,

Younesse Alami, Simon M. Adell, Matthew Anderson, Matthew Asher, Andre Bauer, Peter Bierce, Brandon Blount, Reginald P. Brown IV, Mary Cahill, Ryan Cockrell, Kevin and Virginia Conlon, Anne Marie Crevar, Darryl J. Damico, Stephen Darwak, Lindsay Davenport, Kathleen Dougherty, David Dressman, Anna Dressman, Michael Elder, Christopher Scott Farley, Michele Ghastin, Ryan Gilreath, Sonya. Gilreath, Shaun Halsor, Josephine Rex, Laura Hyatt, Nathan Herring, James Hicks, Jr., Laurie Hicks, Preston G. Hipp, Colin Jones, Matthew F. Jones, Robert C. Jones, Robin Joseph, Molly Keeler, John Kenny, Abigail King, Aaron Kless, Laurie Kramer, Robert Kramer, Allison Kreutzer, Jesse Lutz, Thomas Naselaris, Zoe Naselaris, Beau O'Steen, Cori O'Steen, Lance Parr, Brandon Perdue, Hadassah Rothenberg, Daniel Ryan, Kimberly Bowlin, Kevin Schnittker, Ginger Scofield, Alecia Stevens, Justin Swan, Merrick Teichman, John Van Vlacic, Jr., William Waterhouse, Jennifer Waterhouse, Anne Wohlfeil, Bryan Young, Helene Kenny / Bridget Denny Revocable Trust, 259 East Bay LLC, 259 East Bay 10 B LLC, Corner At Old Canton, LLC, Kit Properties LLC, The Naws LLC, One Henrietta LLC, Periwinkle Partners, LLC, Porch Properties LLC, Westbury Properties, LLC, and Westendorff Hardware LLC, are

Respondents.

FINAL BRIEF OF RESPONDENTS

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
BLOODGOOD & SANDERS, LLC
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
(843) 972-0313

Mary Lee Briggs, Esquire
BRIGGS & INGLESE, LLC
105 Wappoo Creek Dr., Unit 1-A
Charleston, S.C. 29412
(843) 277-9785

Gregory K. Voight, Esquire
VOIGHT MURPHY
815 Savannah Hwy., Suite 201B
Charleston, SC 29407
(843) 571-4300

David B. Marvel, Esquire
MARVEL ET AL, LLC
PO Box 22734
Charleston, SC 29413
(843) 853-4877

Christopher L. Murphy, Esquire
MURPHY LAW OFFICES, LLC
146 Fairchild Street, Suite 130
Charleston, SC 29492
(843)494-5454

Daniel C. Boles, Esquire
BOLES LAW FIRM, LLC
PO Box 381
Charleston, SC 29402
(843) 576-5775

Stafford John McQuillan, III, Esquire
HAYNSWORTH SINKLER BOYD, PA
PO Box 340
Charleston, SC 29402
(843) 724-1120

Counsel for the Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LOCAL ORDINANCES

STATEMENT OF THE CASE

In 2012, the City created a special overlay zone district to allow short-term rentals. (R. pp. 225, 227-230.) The City of Charleston Zoning Ordinance defines short-term rentals as a lease in duration between 1 and 29 days. (R. p. 223.) Appellant Charleston Development Company, LLC owns 106 A and B Cannon Street; Appellant Charleston Housing Company, LLC owns 5 and 6 Tulley Alley and 179 D and E St. Philip Street; and Appellant NotSoHostel, LLC owns 156 Spring Street and 33 Cannon Street. (R. pp. 46-47.) Each LLC is owned by an irrevocable trust called Global Real Property Trust. (R. pp. 88, 250-251.) Bob Holt is the Trustee of Global Real Property Trust and the Chairman of each of the three (3) LLC Plaintiffs. (R. pp. 250-252.) Appellants rent all of the above listed properties as short-term rentals. (R. pp. 46-47.)

On October 7, 2015 (2015-CP-10-5415); November 2, 2015 (2015-CP-10-5900); and March 4, 2016 (2016-CP-10-1117 and 2016-CP-10-1118) Appellants filed four (4) lawsuits in each of which a trust alleged various Respondents violated the City of Charleston's zoning ordinance regarding short-term rentals.

Respondents filed Motions to Dismiss as to all four (4) cases on November 16, 2015 and Amended Motions to Dismiss on December 7, 2015 which were summarily denied by Judge Robert E. Hood on November 17, 2016. (R. p. 278.) Appellants filed a Partial Motion for Summary Judgment on January 29, 2016 which was summarily denied by Judge J. C. Nicholson, Jr. on April 15, 2016. (R. p. 22.)

On April 22, 2016, Appellants moved to transfer the cases to the Business Court Pilot Program. Judge Roger M. Young assigned these cases to the Business Court Pilot

Program in Charleston County on June 14, 2016 and assigned Judge R. Markley Dennis, Jr. exclusive jurisdiction to hear all matters pertaining to these cases. (R. p. 23.)

Judge R. Markley Dennis, Jr. granted summary judgment on November 3, 2016 to Defendants in all four (4) cases based on the Appellant Trust having no standing, and allowed Appellants to amend and consolidate their Complaints. (R. pp. 24-40.) The consolidated Complaint is 2015-CP-10-5415.

Appellants then filed an Amended Complaint with four (4) causes of action: Nuisance, Violation of City Zoning Ordinance; Unfair Trade Practices Act, and Unjust Enrichment. (R. pp. 45-63.) After a hearing on June 7, 2018, the Lower Court granted summary judgment to all Respondents as to all of Appellants' causes of action. (R. pp. 1-21.) Appellants' Motion for Reconsideration was denied without a hearing on September 5, 2018. (R. p. 44.) This appeal followed.[1]

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law." Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). A trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).[2]

---

[1] Although Plaintiffs properly served a Notice of Intent to Appeal on Respondents by US Mail, Plaintiffs' initial brief was served by on Respondents by email only. Plaintiffs respectfully contend that service of Plaintiffs' brief is not in accordance with SCACR, Rule 262 (b), so this appeal should be dismissed per SCACR, Rule 260.

[2] Appellants state in error that the standard of review this Court should apply when reviewing a lower court's order is to address "a scintilla of evidence" or incomplete

ARGUMENT

I. The Lower Court did not err in granting Respondents' Summary Judgment based on City of Charleston Ordinance No. 54-905.

A. Appellants had no standing to bring suit in Circuit Court under City Ordinance No. 54-905 as they failed to comply with City Ordinance 54-904 which requires an appeal of any zoning administrator's determination to the City's Board of Zoning Appeals before filing a zoning appeal in Circuit Court.

Municipal zoning ordinances must comply with the South Carolina Local Government Planning Enabling Act ("Planning Act"). S.C. Code Ann. § 6-29-800 of the Planning Act states:

> The board of appeals has the following powers: ... to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance; ... Appeals to the board may be taken by any person aggrieved. Id.

S.C. Code Ann. § 6-29-820 of the Planning Act states:

> A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county, by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.

---

discovery. This Court's task is to correct errors of law and determine if there is any evidence to support the Lower Court's findings of fact. Further, the issues raised in Appellants' Standard of Review are not set forth in Appellants' Statement of Issues on Appeal as required by SCRAC, Rule 208 (b).

City of Charleston Ordinance No. 54-904 (R. p. 237), which precedes Ordinance No. 54-905 (R. p. 238), is entitled "Procedure when enforcement or interpretation questioned; appeals to court" and states:

> It is the intent of this Chapter that all questions arising in connection with the enforcement or interpretation of this Chapter, except as otherwise provided, shall be presented to the Board of Zoning Appeals, and, that from decisions of the Board of Zoning Appeals, recourse shall be to the courts as provided by law. (R. p. 237) (emphasis added.)

City Ordinance No. 54-905 states:

> Whenever a building or structure is demolished, erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this Chapter, the city engineer or any other appropriate authority, or any property owner, who would be damaged by such violations, in addition to other remedies, may institute injunction, mandamus, or other appropriate action in proceeding to prevent the violation in case of such building, structure or land. (R. p. 238) (emphasis added.)

Therefore, in order to have standing pursuant to City Ordinance No. 54-904 to contest a zoning matter in court, a mandatory prerequisite is presentation of the issue to the City's Board of Zoning Appeals. Ordinance No. 54-904's requirement of allowing a board of zoning appeals to initially decide a matter is in accordance with State law as the Lower Court acknowledged by citing to the case of Moore v. Sumter County Council, 300 S.C. 270, 387 S.E. 2d 455 (1990) (action is premature if plaintiff has failed to exhaust administrative remedies before seeking judicial relief); R. p. 11.)

Appellants admitted that they did not present this matter to the Board of Zoning Appeals. (R. pp. 253, 262.) The Lower Court, therefore, did not err in holding that

Appellants had no standing to raise zoning issues in Circuit Court when Appellants failed to allow the City of Charleston's Board of Zoning Appeals to first consider and decide a zoning matter.

B. As the Appellant's had no standing per Ordinance 54-904, the Lower Court did not err in finding that Appellants were not entitled to injunctive relief under City Ordinance 54-905 and the Lower Court did not err in relying on the Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n case.

Appellants cite no law establishing that they do not need to comply with local zoning ordinances such as City Ordinances No. 54-904 and No. 54-905. State law specifically authorizes municipalities to enact zoning ordinances to regulate property within their municipal boundaries.

> Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare. S.C. Code Ann. § 6-29-710

The Lower Court, acknowledging the importance of State zoning law and case precedent in zoning matters, relied in part on the case of Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 753 S.E. 2d 846 (2014). The Lower Court properly found that, notwithstanding Appellants' failure to present their zoning concerns to the City's Zoning Board of Appeals before filing suit in Circuit Court, Appellants also lacked standing to sue because were not "specially damaged" nor were they "adjacent or neighboring property owner[s]." 407 S.C. 78-81, 753 S.E. 2d. 850-852.

The Lower Court properly held, based on Appellant Bob Holt's testimony that he did not suffer particularized harm or damages that affected him in a personal manner. (R.

pp. 254, 266-267, 270, 272-273.) The Lower Court also properly held Appellants were not adjacent or neighboring property owners, rejecting Appellant's contention that everyone who lives on the peninsula of Charleston are neighbors. Although the City's zoning ordinances do not define "neighbor," Ordinance No. 54-904 requires all questions regarding interpretation of zoning laws to be presented to the Board of Zoning Appeals. (R. p. 237.) As that was not done by Appellants in this case, Appellants' personal belief as to the interpretation of the term "neighbor" is irrelevant.

The case of Freemantle v. Preston, 398 SC 186, 728 S.E.2d 40 (2012), cited by Appellants, is not on point. Freemantle was not a zoning case; it involved the issue of whether a County Council had authority to enter into a severance agreement with a County Administrator. The Freemantle case dealt with whether the plaintiff had standing under the State's Freedom of Information Act. 398 SC 1194-195, 728 S.E.2d 44-45. The State's Freedom of Information Act is not at issue in this case.

Appellants also argue in their brief that they have been damaged and have suffered concrete and individualized damages through reduced bookings; reduced profits and diminished property values, but Appellant Holt testified there was no sum certain amount of money owed to him as damage and none of Appellants' properties had diminished in value. (R. pp. 269, 271-272.) In Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 559, 671 S.E.2d 79, 85-86 (Ct. App. 2008), the Court held that "Neither the existence, causation nor amount of damages can be let to conjecture, guess or speculation." See also, Baughman v. AT&T, 306 S.C. 101, 116, 410 S.E.2d 531, 546 (1991) ("[I]n order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.")

Appellant Holt's testified in his deposition that in the three (3) years the case was pending he had not hired an expert to determine damages and he did not know how an expert would determine damages. (R. pp. 256, 270-272.) Additionally, in those three (3) years, Appellant Holt had not had any recent appraisals of his property performed and he only had a reasonable belief that Respondents had caused him damages. (R. pp. 257-258.) Clearly, there was ample evidence to support the Lower Court's finding that Appellants did not prove particularized damages and, thus, had no standing.

C. The Lower Court did not err in finding Appellants lacked standing because Appellants were claiming damages solely as a result of decreased income because Appellants were also claiming damages for the diminution in value of their properties.

Appellant's argues the Lower Court should not have relied on the case of Connor Holdings LLC v. Cousins, 373 S.C. 81, 644 S.E. 2d 58 (2007). The Connor case was cited by the Lower Court for the proposition that commercial property owners do not have standing in zoning matters when the damages alleged to have been suffered are due to increased competition. 373 S.C. 83, 644 S.E. 2d 59. Appellant Holt testified he had been harmed by increased competition, (R. pp. 254, 259, 273, 277.) Appellants evidently do not contest the holding in the Connor case but allege they have standing due to the diminution in value of their properties, yet Appellant Holt testified to the contrary when he stated none of Appellants' properties decreased in value because they are all located in downtown Charleston. (R. p. 119.) Appellant Holt's sworn testimony contradicts Appellants' argument that their properties decreased in value and for a variety of reasons stated by the Lower Court, it did not rely on an Affidavit filed after Appellant Holt's deposition. (R. p. 3.)

D. The Lower Court did not err in holding Appellants had to comply with Ordinance No. 54-904.

Appellants argue that "except as otherwise provided" language in Ordinance No. 54-904 permits them to interpret Ordinance No. 54-905 as granting them standing. Appellants' argument is based on several false premises. First, the Lower Court held this case is about the enforcement of a City zoning ordinance. When the City did not enforce its short-term rental ordinance, Appellants tried to enforce its provisions privately. However, State law does not allow circumvention of the Board of Zoning Appeals. "The board of appeals has the following powers: (1) to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance;" (S.C. Code Ann. § 6-29-800.)

Second, individuals cannot enforce Ordinances; only the public entity that enacts an Ordinance can enforce it and enforcement is discretionary. (See Argument III C. below.)

E. The Lower Court did not err in finding Appellants failed to exhaust their administrative remedies.

The Lower Court's finding in its Order (R. p. 11-12) that Appellants started the administrative review process but failed to complete the process before filing suit in Circuit Court is based on Appellant Holt's sworn deposition testimony. (R. p. 253, 262.) The Lower Court recognized that Appellants had previously made complaints to the City Zoning Administrator about the City's failure to enforce the short-term rental ordinance

against dozens of property owners and noted that Appellants had started the administrative process but failed to complete it. (R. p. 12, ftnt. 3.)

F. The Lower Court did not err in holding that in the first instance the City zoning administrator and City Board of Zoning Appeals make decisions about enforcing City zoning ordinances, not the courts.

The clear language of Ordinance No. 54-904 states that all questions arising in connection with zoning enforcement shall be presented to the Board of Zoning Appeals and, that from decisions of the Board of Zoning Appeals, recourse shall be to the courts. Appellants argue they can avoid the Board of Zoning Appeals and go directly to Circuit Court, which argument the Court properly rejected.

Appellants contend that Ordinance No. 54-905 permitted an immediate appeal to circuit court but Ordinance No. 54-905 only provides equitable relief, not the monetary relief from individuals that Appellants are requesting, and Ordinance No. 54-905 is in accord with state law. (See S.C. Code Ann.§ 6-29-820.) Per Ordinance No. 54-905, a property owner "may institute injunction, mandamus, or other appropriate action in proceeding to prevent the violation." (R. p. 238.)

In short, Appellants had to allow the Board of Zoning Appeals to decide enforcement issues in the first instance rather than the courts. The Lower Court rejected Appellants' contention that in the capacity of private individuals they could obtain monetary damages by asking a Court to enforce a zoning ordinance that the Board of Zoning Appeals had not been asked to enforce.

Appellant Holt testified in response to the questions as to whether it was the City's job to enforce its laws, "I think the City is one party. I think in the zoning ordinance the

City has said they are not the exclusive party. So I think the City does have a responsibility but not the sole responsibility." (R. p. 259.) Appellant Holt testified he wanted the Court to enforce the short-term rental ordinance but he acknowledged he did not know if the City was enforcing the ordinance, although he had been told the City was dedicating resources in the future to enforce it. (R. pp. 262, 267.)

Although Appellants could appeal a final Board of Zoning Appeals decision to the circuit court, the Lower Court properly held Appellants had no standing under state or local law to ask a circuit court to make decisions regarding zoning enforcement before the Board of Zoning Appeals had addressed the issue.

G. The Lower Court did not err in finding Appellants had not proven irreparable harm and, thus, were not entitled to injunctive relief.

Respondents admit that they were all, at one time or another, in violation of the City's short-term rental ordinance and that the City never started an enforcement action against them. However, contrary to Appellants' assertion, it does not follow that Appellants can, therefore, enforce the ordinance, and the Momeier v. John McAlister, Inc. case does not stand for such a proposition as Appellants argue in their brief. Momeier v. John McAlister, Inc., 203 S.C. 353, 27 S.E.2d 504 (1943) was a zoning case involving a funeral home operating in a residential district. The Court acknowledged, "It is clear that one who sustains special damages by reason of the violation of a zoning ordinance has a right to invoke the aid of the Court of equity, and to ask for injunctive relief." (203 S.C. 369, 27 S.E.2d 510) The Court found the neighboring property owners were entitled to injunctive relief because their homes had decreased in value. However, Appellant Holt admitted he did not know if any property owned by any Respondent was within 100 yards

of any property owned by Appellants (thus, failing to establish he was a "neighbor") and that Appellants' property did not decrease in value. (R. p. 270.) Additionally, the plaintiffs in Momeier applied to the Zoning Board for a variance to allow their commercial business in a residential area before going to circuit court. ("Application was made to the Zoning Board and a public hearing was had, after which the Board refused the petition.") Momeier v. John McAlister, Inc., 203 S.C. at 369, 27 S.E. 2d at 510. In short, the facts in Momeier are entirely different from the facts in this case.

II. The Lower Court did not err in finding the regulatory exception of the South Carolina Unfair Trade Practices Act (SCUPTA) provides immunity for Respondents.

The South Carolina Unfair Trade Practices Act (SCUTPA) exempts conduct already regulated by law. Appellants argue Respondents are their competitors. As the Lower Court noted, the regulation of short-term rentals through zoning is regulated by the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 and several City of Charleston Zoning Ordinances including S.C. Code Ann. § 6-29-310 et seq. (1994); City of Charleston Zoning Ordinance §54-120; 54-202; 54-208; 54-208.1; 54-220; Article 2, Part 3 Table of Permitted Uses; 54-901 et seq.; and Appendix C to the City of Charleston Zoning Ordinance. (R. pp. 17, 223, 227-230, 231-234, 236-238.)

However, Appellants argue that the regulatory exception to SCUTPA does not apply because Respondents have admitted they were at some point in violation of the City's short-term rental ordinance. Appellants argument is based solely on their narrow interpretation of the word "permitted" in S.C. Code § 39-5-40 (a) to mean "legal." In fact, the word "permitted" is also understood to mean "authorized," in the context of

actions authorized under laws administered by a particular administrative body. Municipal zoning departments are clearly authorized (and permitted) to enforce zoning ordinances, grant variances, interpret zoning terms, and determine contested issues. There is no language in the state zoning law or the City's zoning ordinances that limit municipal zoning action or inaction to those residents who are not in violation of an ordinance and Appellants cite no legal authority for such a proposition.

Appellants' cite to Beattie v. Nations Credit Fin. Servc. Corp., 69 Fed. App'x. 585 (4th Cir. 2003) is misplaced. In Beattie, the Fair Credit Reporting Act (FCRA) was at issue (not a zoning ordinance) and the Court held the defendant was not exempt because it failed to show that its attempt to collect on an account was required under FCRA. (Id. at 588.) Here, an appeal to the Zoning Board of Appeals is required by the City's Zoning ordinances. As the regulatory exception to the SCUTPA applies to the facts in this case because the Zoning Board of Appeals is permitted to make zoning determinations, Appellants have no cause of action under SCUTPA.

III. The Lower Court did not err in summarily dismissing Appellants' nuisance claim.

A. A private nuisance claim does not require Appellants to be the only persons affected by Respondents' actions.

Damages are an essential element of a nuisance claim. "A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. It produces damage to but one or two persons, and cannot be said to be public." Deason v. Southern R. Co., 142 S.C. 328, 334, 140 S.E. 575, 577 (1927). While differentiating between a private and public nuisance (as it was unclear which Appellants were alleging), the Lower Court cited several cases for the proposition that whereas a

public nuisance affects the public at large, a private nuisance affects a limited number of individuals who suffer injuries that are special to them; this was a correct statement of the law. A Plaintiff is "specially damaged" when it has suffered a particularized harm separate and apart from the harm that the public at large may experience. A particularized harm occurs when the allegations "affect the Plaintiff in a personal and individual way." Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 75, 753 S.E. 2d at 850; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Appellant Holt testified there were many aggrieved parties (R. p. 254) so the Lower Court did not err in finding Appellants suffered no special damages.

Further, Appellant Holt testified he did not know what the actual amount of Plaintiffs damages were (R. p. 83, 84, 256-257, 269); he had not hired an expert to determine damages and he did not know how an expert would determine damages (R. pp. 256-258.); and he had not had any recent appraisals done of Appellants' property (R. pp. 257-258.) Appellant Holt's testimony that he could not provide a number but he believed it is "reasonable" to assume Defendants' actions have caused damages (R. pp. 87, 254) is insufficient as a matter of law to establish damages.

Appellants alleged in Paragraph 137 of their Amended Complaint that they "suffered damages which only they can claim and are individual to them, including decreased rental income and diminution of property values." (R. p. 59.) However, decreased rental income and diminution of property values are not injuries unique to these Appellants as there are many people in the City renting their property as short-term rentals. As Appellants admit there are a lot of aggrieved parties injured in the same

manner as they are, as a matter of law Plaintiffs have suffered no special or particularized injury and their private nuisance cause of action fails.

B. Rental income is not recoverable in a private nuisance claim.

"A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." Deason v. Southern R. Co., 142 S.C. 328, 334, 140 S.E. 575, 577 (1927). Tenements are buildings and hereditaments are physical objects that are inherited along with land and buildings. Here, Appellant Holt testified Appellants' ability to make money is the damage they have suffered. (R. pp. 119-122, 263.) Notwithstanding the fact that the Lower Court found there was no evidence that any of Respondents' actions were the proximate cause of any damage to Appellants, "the ability to earn income" from property is not the type of damage encompassed in a private nuisance claim.

> Generally, a private nuisance is "that class of wrongs that arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property, personal or real." Peden v. Furman University, 155 S.C. 1, 151 S.E. 907, 912 (1930) (emphasis added). Nuisance law is based on the premise 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.' Id.; see also Winget v. Winn-Dixie Stores Inc., 242 S.C. 152, 130 S.E.2d 363 (1963) (property owner must not unreasonably interfere with another's use and enjoyment of property).

Clark v. Greenville County, 313 S.C. 205, 209, 437 S.E.2d 117, 119 (1993). Appellant Holt testified he has standing to file suit due to Defendants' illegal competition. (R. p. 277.) Appellant Holt testified that the value of the property Appellants owned was diminished by increased competition and it was the illegal competition that caused harm. (R. pp. 264-265, 267, 273-274.) However, "An owner of

commercial property generally does not have standing in a zoning enforcement action if special damages amount to a loss of business due to the position of the violating use as a competing business, but a commercial property owner may be specially damaged if he alleges adverse impact on his business other than by increased competition." Connor Holdings, LLC v. Cousins, 373 S.C. 81, 83, 644 S.E.2d 58, 59 (2007) (emphasis added.)

C. Respondents' admissions of violating an ordinance are not relevant to Appellants' nuisance claim.

Respondents admit that at one time or another they were in violation of the City's short-term rental ordinance. However, the City of Charleston, not any individual, is charged with enforcing laws and enforcement is discretionary.

"The enactment of laws is one of the high prerogatives of a sovereign power." Santee Mills v. Query, 122 S.C. 158, 168, 115 S.E. 202, 205 (1922). Sovereigns enforce laws- individuals do not. The General Assembly provided that:

> The governing authorities of municipalities or counties may provide for the enforcement of any ordinance adopted pursuant to the provisions of this chapter by means of the withholding of building or zoning permits, or both, and the issuance of stop orders against any work undertaken by an entity not having a proper building or zoning permit, or both.

S.C. Code Ann. § 6-29-950; see also, State v. Bridges, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997) (law enforcement officers are charged with the discretionary exercise of the sovereign power.) Individuals who do not like a municipality's enforcement of zoning laws cannot avoid the municipality's administrative procedures for requesting enforcement of zoning laws by personally seeking enforcement in the courts as it is the sovereign who enacts and enforces its laws, not individual citizens.

D. The Lower Court did not err in its ruling as to negligence because, as a matter of law, no facts could make Appellants' claim viable.

Nuisance cases are factual but Appellants had three (3) years to develop the facts and failed to produce any evidence that Respondents' actions were the proximate cause of any damages to Appellants. Appellant Holt testified as follows:

> Q. Okay. Sitting here today, you cannot give me a number as to the diminution of the value of any of Plaintiffs' property due to the alleged actions of the Defendants, correct?
> A. The number is greater than zero and I do not know the precise number greater than zero.
> Q. Okay. And you also cannot give me the lost profits that the Plaintiffs have suffered?
> A. The lost profits would be -- would closely approximate whatever that number is above zero that I cannot give you definitively. So that is correct." (R. p. 269.)

As Appellants cannot put a monetary amount on their damages, they cannot prove damages different in kind than anyone else in the general public so the Lower Court properly held Appellants they bring a public nuisance claim. "A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991). Absent proof of damages, not facts can save Appellant's nuisance claim.

IV. An Appellate Court cannot order a circuit court judge to require a videotaped deposition before he has made a final ruling.

An Appellate Court cannot rule on behalf of a circuit court judge in a matter still pending in circuit court when no final decision has been made. SCACR, Rule 201. In the event this matter is remanded to circuit court, Judge Dennis, as presiding judge, would rule on any pending discovery motions. After he makes a final ruling, Appellants can appeal that final decision.

CONCLUSION

For all of the above reasons, Respondents respectfully request Appellants' appeal be dismissed in its entirety and costs be awarded to each Respondent pursuant to SCACR, Rule 222.

Respectfully submitted,

Nancy Bloodgood, Esquire #6459
Bloodgood & Sanders, LLC
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
(843) 972-0313

On behalf of above-named
Counsel for the Respondents