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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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

Appellate Case No. 2017-00866

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

v.

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

THE RESPONDENTS PAUL DENNIS MCLAUGHLIN AND SUSAN RODE MCLAUGHLIN'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

The Respondents Paul Dennis McLaughlin and Susan Rode McLaughlin (the "McLaughlins"), pursuant to Rule 221(a), SCACR, hereby move and petition the Court to reconsider and rehear the within appeal and the Court's opinion entered August 21, 2019, as Opinion Number 5681 (the "Opinion").

This Petition is based on the grounds that the Court overlooked or misapprehended certain matters set forth herein, including some factual matters as demonstrated in the Record on Appeal,

and as set forth in the Order of the Honorable G. Thomas Cooper, Jr., (R. pp. 5-12). The Respondents respectfully request the Court grant this Petition for Rehearing, vacate the Opinion, and affirm the circuit court's order. In addition, pursuant to Rule 219(b), SCACR, the Respondents suggest that such rehearing should be *en banc*.

SUMMARY OF ARGUMENT

The Opinion focuses at length on facts which differ from the full Record submitted to the Court as well as Judge Cooper's Order granting summary judgment to the Seabrook Island Property Owners Association ("SIPOA") as being the law of the case in order to grant the Appellants what will essentially be a damages hearing. As written, the Opinion misapprehends the facts, the ruling of Judge Cooper, and subverts the well-reasoned and much deliberated verdict of the jury in this case which ultimately ruled for the Appellants but found only nominal damages and which was supported by more than just "any evidence". (R. p. 923; R. pp. 927-934). The Court ignored its own prior rulings in invading Judge Young's decision to deny a motion for a new trial. *Curtis v. Blake*, 392 S.C. 494, 505-06; 708 S.E.2d 79, 85 (Ct. App. 2011)(quoting *Lane v. Gilbert Constr. Co., Ltd.* 383 S.C. 590, 597, 681 S.E. 2d 879, 883 (2009)). All inferences as to such a motion were to have been considered in the light most favorable to the Respondents. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E. 2d 715 (Ct. App. 1996); *Morris v. Jensen*, 309 S.C. 153, 420 S.E.2d 710 (Ct. App. 1992); *Umhoefer v. Bollinger*, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989). Judge Young's rulings should not have been disturbed on appeal due to the plethora of evidence supporting his denial of a new trial in this case.

The findings and conclusions of the Court should not be taken lightly in this case. To follow the Court's analysis and ruling in this matter, all orders affecting any part of a case must be appealed in order to overcome the Court's expansion of the Law of the Case doctrine in contravention of the Supreme Court's rulings that different issues in question ruled upon by

different judges do not constitute the law of the case. *Shirley's Iron Works, Inc. v. City of Union,* 403 S.C. 560, 573, 7434 S.E.2d 778, 785 (2013). Judge Cooper's Order ruled on issues entirely different from those of Judge Young and the jury. (R. pp. 5-18).

For these reasons, which are outlined in detail below, the Respondents request the Court grant this Petition for Rehearing, vacate the Opinion, affirm Judge Young's Order denying the new trial, and reinstate the jury's verdict.

ARGUMENT

In its Opinion, the Court overlooked or misapprehended the following matters:

1. **The Court focused on limited facts in the Record and not on the entirety of the circumstances surrounding the Respondents' decision to build their house on what they fully believed was an abandoned easement as shown on the plat from Forsberg Engineering and Surveying, Inc., and with which the jury agreed**

In October of 2002, the Respondents took title to their property by deed which referenced, and incorporated, a Plat by Forsberg Engineering and Surveying, Inc., entitled "Plat Showing Abandonment of an Existing 20' Drainage Easement Lot 22 Block 23 Town of Seabrook Island Charleston South Carolina" dated January 17, 2002 (R. p. 388; R. pp. 381-386). Both the McLaughlins' predecessors in title and SIPOA informed the McLaughlins that the drainage easement had been abandoned. (R. p. 757; R. pp. 763-764; R. p. 766) The Forsberg Plat showed that the easement area had been abandoned. (R. p. 388)

Some months earlier, on May 20, 2002, the SIPOA Board of Directors took a vote, recorded in their minutes, to abandon the easement not only on Lot 22, but on Lots 21 to 28 on Baywood Drive. (R. p. 81) SIPOA's Directors

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

(*Id.*)

Part of the easement was a drainage pipe that ran under Lots 21 to 28 on Baywood Drive. (*Id*). The easement as described on the plat from E. M. Seabrook was in favor of the Seabrook Island Property Owners Association and not in favor of the individual Lot owners. (R. p. 388, R. pp. 22-31; R. pp. 547-565). It was SIPOA's easement and SIPOA's to abandon. The McLaughlin's predecessors in title to Lot 22, the Gantzes, made sure that a new plat was recorded as approved by SIPOA and the Town of Seabrook Island showing the abandonment of the easement by SIPOA. (R. p. 388, R. p. 381-386). The McLaughlins bought Lot 22 with the full assurance and belief that the easement had been abandoned. (R. p. 757, R. pp. 763-764; R. p. 766; R. p. 388).

In submitting their house plans to SIPOA's Architectural Review Board, the plans were approved unanimously. (S.C. Court App., Opinion No. 5681)(R. p. 702, R. p. 83.) At the time of the submittal, SIPA advised that the McLaughlins were to assume all **financial** responsibility for the easement, which SIPOA had abandoned. (R. p. 83)

Prior to their building, the McLaughlins attempted to discuss issues with their neighbors to implement a plan for another drainage way as proposed by the Ralph's later retained expert engineer Robert George. (R. p. 246). This plan was not supported by the Ralphs, even though the testimony at trial proved that the Ralphs have always had standing water on their property during any and all rain events. (R. pp. 22-31; R. p. 609)

The McLaughlins always believed that the easement had been abandoned. The Ralphs own expert witness as to title and the easement, Howard Yates, testified and confirmed at trial that the Forsberg Plat also became part of the McLaughlins' deed showing the abandonment of the easement (R. pp. 21-31). Mr. Yates further testified that the easement was originally in favor of

SIPOA. *Id.* Judge Young certainly consider these facts in his Order Denying Plaintiffs' Motion for New Trial (R. pp. 21-31). The SIPOA Board voted to abandon the easement on Lots 22 to 28 on Baywood Drive and SIPOA signed off on the Forsberg plat. (R. p. 388). The facts show that there was no consciousness of wrongdoing demonstrated by the Defendants at any time where the McLaughlins testified consistently that they relied on SIPOA and on the documents presented to them stating that the easement had been abandoned.

Judge Young further stated:

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

(R. pp. 805-806).

The jury agreed with Judge Young and the McLaughlins, and, this Court has now invaded that purview which its own Opinions and that of the Supreme Court of South Carolina state it should not if there is ANY evidence to support the same. *See Curtis v. Blake*, 392 S.C. 494, 709 S.E.2d 79 (2011)' *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995); *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973); *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003); ; *Vinson v. Hartley*, 324 S.C. 389, 477 S.E. 2d 715 (Ct. App. 1996); *Morris v. Jensen*, 309 S.C. 153, 420 S.E.2d 710 (Ct. App. 1992); *Umhoefer v. Bollinger*, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989). All of these facts not only support the jury's verdict but also Judge Young's well-reasoned and thorough Order denying the motion for a new trial (R. pp. 22-31; R. pp. 508-511)

2. The Court expanded the Law of the Case as set forth in Judge Cooper's June 7, 2016 Order Granting SIPOA Summary Judgment to an extent not contemplated in that Order and which makes a final determination of matters distinctly different and not contemplated in that Order

The Court has expanded Judge Cooper's Order granting summary judgment to the former third party defendant, the Seabrook Island Property Owners Association to an extent that it now establishes liability on the McLaughlins where that Order did not constitute a final ruling by and between the remaining parties as being conclusive.

On June 7, 2016, the Honorable G. Thomas Cooper, Jr., entered his order granting the third party defendant SIPOA judgment as a matter of law as to the cause of action pending against it for **indemnity** by the McLaughlins. (R. pp. 5-12). Nowhere in his Order did Judge Cooper make a ruling as to what he quoted as being "trespass" by the McLaughlins on the Ralphs' property or any interest on what the McLaughlins thought was the abandoned drainage easement in favor of SIPOA. (R. pp. 5-12). The Order never once states that the McLaughlins committed any trespass. *Id.* The Order rules that the Ralphs' claim was not barred by the statute of limitation, that the claim against SIPOA for indemnification had to be dismissed as to a lack of reliance. In fact, Judge Cooper specifically omitted the claim by the Ralphs against the McLaughlins from his ruling having written the following:

> However, regardless of the disposition of the Ralphs' claim against the McLaughlins, because the McLaughlins cannot produce evidence of an unambiguous promise or representation of SIPOA authorizing them to remove the pipe in December 2008, their third-party claim against SIPOA must be dismissed.

(R. pp. 5-12)

Judge Cooper wrote "...regardless of the disposition of the Ralphs' claim against the McLaughlins..." *Id.* He had to write that as there was no final determination of the issue of

trespass or the issue of willfulness that would lead to a submission of punitive damages to the jury at the time of trial.

Judge Cooper then goes on to set forth the failure of the McLaughlins to meet the elements of promissory estoppel. *Id.* This is the extent of his ruling. It has no bearing on the issue of trespass or the McLaughlins' firmly held belief that the easement had been abandoned and they had a right to move forward based upon representations made to them.

As stated in this Court's Opinion of August 21, 2019, where separate judges issue unappealed orders on distinctly different issues, the law of the case does not apply. (Opinion No. 5681). *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.D.2d 778, 785 (2013). The Order did not relate to the only issue in the case by and between the Ralphs and the McLaughlins: the alleged trespass. There is not one ruling in that order regarding trespass or the lawful or unlawful acts of the McLaughlins in relation to the Ralphs' property. It is simply inapplicable to the Ralphs' causes of action against the McLaughlins. It is not the law of the case as to these parties as it makes no ruling as to the matters brought by the Ralphs. In fact, at the same time, Judge Cooper denied both the Ralphs' and the McLaughlins' motions for summary judgment as to the issues between them. (R. pp. 5-12). Judge Cooper noted in those orders "there are disputed issues of fact regarding Plaintiffs' claims" and "there are disputed issues of fact regarding Defendants' claims." *Id.* It was these very same disputed issues of fact that were tried before Judge Young and which were ultimately determined by the jury.

As Judge Young noted

> Well, Judge Cooper's order between them....[b]etween the defendants and the property owners association is not binding on this jury's finding. I don't know how to put it any other way. We're having this argument, but I don't understand why we're having it necessarily. There's a genuine issue in my mind whether or not he was acting lawfully. I'm letting you go forward and argue to the jury that he was not acting lawfully....

(R. p. 803).

Judge Cooper's ruling was limited to the third party complaint only and the reliance of the McLaughlins in order to hold SIPOA liable. Period. There is no determination of the trespass, as that is ultimately an issue of fact for the jury to determine. This was not an error requiring this Court to overturn Judge Young's Order denying the motion for a new trial or to overturn the Jury's verdict. There was not a complete adjudication of the matters by Judge Cooper to make his ruling the law of the case where he also found there to be issues for trial by and between the Ralphs and the McLaughlins. (R. pp. 5-18). Judge Cooper made no ruling as to the Ralphs' cause of action for trespass, and Judge Young properly allowed the jury to consider the McLaughlins' belief that they had the right to rely on SIPOA in building their house.

Further, ultimately, as this Court asked during the oral arguments of this matter, the Ralphs won in the Circuit Court with the jury finding a trespass and awarding damages, albeit nominal damages. Judge Young made a charge to the jury on nominal damages, which charge was not objected to by the Ralphs. (R. p. 923, R. pp. 508-511; R. p. 927; R. p. 21; R. p. 931-934).

3. Judge Young properly determined that punitive damages were not to be submitted to the jury due to the lack of willful, wanton, or reckless behavior on the part of the McLaughlins who testified that they did rely on SIPOA to build their house in the "No Build" area and which was not determined with finality by Judge Cooper's Order granting SIPOA summary judgment

Judge Young rightfully granted a directly verdict as to punitive damages despite this Court's determination that was an issue for the jury. A duty of inquiry as to easement rights would not have been something that the McLaughlins would have ever been charged with as the public record showed a plat with an abandonment of the easement as the latest plat in their chain of title (R. p. 22-31; R. p. 388, R. pp. 381-286). This Court's Order reiterates a duty on the part of purchasers to inquire as to the status of easements in a chain of title. (Op. No. 5681). The

McLaughlins testified that they were told by the Gantzes, their sellers, that SIPOA had abandoned the easement . (R. pp. 375-379). The evidence further showed that the SIPOA voted to abandon the easement. (R. 81) SIPOA stated that the McLaughlins would bear **financial** responsibility for removing the drain pipe. (R. p. 83)(emphasis added) SIPOA approved their house plans. *Id.* They fully believed the easement was gone, abandoned, removed. Judge Young was in the courtroom for the entirety of the trial and, based upon that, he knew that there was no willful conduct on the part of the McLaughlins' despite the Plaintiffs' best attempts to paint them as willful and wonton in their conduct. Even their own experts conceded that the SIPOA had abandoned the easement and the new plat from Forsberg was part of their deed. (R. p. 715, R. p. 725; R. p. 558, R. pp. 22-33).

By necessity, the McLaughlin's belief they were acting within their rights does preclude a finding of reckless behavior to allow for a submission to punitive damages. Unlike in the case of *Hollis v. Stonington Dev., LLC,* 394 S.C. 383 714, S.E.2d 904)(Ct. App. 2011), which this Court references in its Opinion and which the McLaughlins referenced in their Brief, there was no consistent, repeated misconduct as to violations of regulations regarding intrusion into a neighbor's property and notice from governmental authorities as to the violations of regulations regarding stormwater. *Id.* In *Hollis*, there was notice given and the defendant there attempted to bully and threaten the plaintiff. *Id.* There was no testimony of bullying or threatening here. The McLaughlins built their house as they thought they were allowed to do so. The jury, which was not overburdened nor confused as demonstrated by their deliberations and specific jury form, was unlikely to have awarded any punitive damages anyway giving only a nominal damages award. (R. p. 928; R. pp. 930-931).

As the Opinion now stands, this Court has tried the case again in favor of the Ralphs so that only a damages hearing will take place, which is not substantial deference to the jury's verdict in any way shape or form. *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003). It further goes against the sound discretion of the trial court in refusing to grant a new trial. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E. 2d 715 (Ct. App. 1996); *Morris v. Jensen*, 309 S.C. 153, 420 S.E.2d 710 (Ct. App. 1992); *Umhoefer v. Bollinger*, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989). Both of which go against the long standing precedent of this tribunal.

CONCLUSION

The Respondents respectfully submit that the Court misapprehended or overlooked the facts and the law as set forth above, requests the Opinion be withdrawn, asks that the Circuit Court's Order denying the motion for a new trial be affirmed, and requests that the jury's verdict be reinstated.

Mount Pleasant, SC
Sept. 18, 2019

Respectfully submitted,

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

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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Respondents' Petition for Rehearing and Suggestion for Rehearing *En Banc* via overnight delivery, on September 18, 2019, upon G. Dana Sinkler, Esq., Gibbs & Holmes, 2180 Rosebank Plantation Road, Wadmalaw Island, SC 29487 and Ainsley F. Tillman, Esq., Ford, Wallace, Thomson, LLC, 29 Brisbane Drive, Charleston, SC 29407

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September 18, 2019

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VIA OVERNIGHT DELIVERY
The Honorable Jenny Abbott Kitchings
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1220 Senate Street
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Re: *Richard Ralph and Eugenia Ralph v. Paul Dennis McLaughlin and Susan Rhode McLaughlin, et al.*
Appellate Case No. 2017-000866
File No.: 1219.0003

Dear Ms. Kitchings:

Enclosed please for filing please find the following:

1. An original and seven (7) copies of the Respondents' Motion for a Petition for Rehearing and Suggestion for Rehearing *En Banc*;
2. An original and one (1) copy of the Proof of Service.

Also enclosed is the filing fee of Fifty ($50.00) Dollars.

Please file the originals and return file-stamped copies to me in the enclosed envelope. By copy of this letter, I am serving same upon all counsel. Should you have any questions, please feel free to contact me. With kindest regards, I remain

Yours very truly,

G. Hamlin O'Kelley, III

cc: (w/Encl.)
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