THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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. 2019-002081

Richard Ralph and Eugenia Ralph...Respondents,

v.

Paul Dennis McLaughlin and Susan Rode McLaughlin..Petitioners.

APPENDIX

VOLUME IV

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INDEX

Record on Appeal

Index..i

VOLUME I

ORDERS

Consent Order, filed June 24, 2014..1

Consent Order to Restore Case to the Docket, filed June 23, 2015..........................3

Order of the Honorable G. Thomas Cooper, dated May 26, 2016, Granting Third-Party Defendant Seabrook Island Property Owners Association's Motion for Summary Judgment..5

Order of the Honorable G. Thomas Cooper, dated May 26, 2016, Denying Defendants' and Third-Party Defendant's Motion for summary Judgment........13

Order of the Honorable G. Thomas Cooper, dated May 26, 2016, Denying Plaintiffs' Motion for Summary Judgment..15

Order/Jury Verdict for the Plaintiff, dated January 26, 2017................................19

Order of the Honorable Roger M. Young, Sr., dated February 28, 2017, Denying Plaintiffs' Motion for a New Trial..22

PLEADINGS

Summons and Complaint, filed September 30, 2011...34

Defendants' Answer and Third-Party Complaint, filed December 6, 2011.................50

Answer of Third-Party Defendant, filed January 6, 2011......................................84

Amended Complaint, filed July 17, 2013..97

Defendants' Answer to the Plaintiffs' Amended Complaint and Third Party Complaint, filed July 22, 2013..107

Answer of Third-Party Defendant SIPOA to Amended Complaint and Third Party Complaint, filed August 23, 2013......................................145

Plaintiffs Motion for Partial Summary Judgment, field February 14, 2014...............150

Defendants' Motion for Summary Judgment, filed February 19, 2014.....................171

Third-Party Defendant's Motion for Summary Judgment, filed February 20, 2014......193

Plaintiffs' Motion for Partial Summary Judgment, renewed, filed March 17, 2016......197

Third-Party Defendant's Motion for Summary Judgment, renewed, filed March 25, 2016 217

Defendant's Motion for Summary Judgment, renewed, filed March 28, 2016 220

Exhibits to Defendants' Motion for Summary Judgment, dated March 30, 2016 223

Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, filed May 9, 2016 241

Defendant's SIPOA's Memorandum in Support of Motion for Summary Judgment, filed May 11, 2016 254

Defendants/Third-Party Plaintiffs' Memorandum in Support of Motion for Summary Judgment, filed May 11, 2016 .... 342i

VOLUME II

EXHIBITS

Plaintiffs' Exhibits 1, Ralphs' Title to Real Estate 375

Plaintiffs' Exhibit 2, Plat by E.M. Seabrook, Jr., dated May 8, 1987 380

Plaintiffs' Exhibit 3, McLaughlins' Title to Real Estate 381

Plaintiffs' Exhibit 4, Plat E.M. Seabrook, JR., dated September 6, 1984 387

Plaintiffs' Exhibit 5, Plat by Forsberg Engineering, dated January 17, 2001 388

Plaintiffs' Exhibit 6, Emails from Paul McLaughlin and John Thompson, dated September 23, 2008 389

Plaintiffs' Exhibit 7, Email from Scott Wallinger, dated September 24, 2008 391

Plaintiffs' Exhibit 8, Email from Paul McLaughlin, dated October 3, 2008 392

Plaintiffs' Exhibit 9, Email from C.R. & Deena Ralph, dated October 6, 2008 393

Plaintiffs' Exhibit 10, Letter from SIPOA to Richard and Eugenia Ralph, dated October 22, 2008 395

Plaintiffs' Exhibit 11, Email from Paul McLaughlin, dated December 5, 2008 397

Plaintiffs' Exhibit 12, Email from John Thompson, dated September 22, 2008 400

Plaintiffs' Exhibit 13, Series of photographs 403

Plaintiffs' Exhibit 14, Curriculum Vitae of G. Robert George, P.L.S., P.E 406

Plaintiffs' Exhibit 15, Series of 41 photographs 407

Plaintiffs' Exhibit 16, Site Plan for McLaughlin Residence....456

Plaintiffs' Exhibit 17, Complaint filed December 9, 2008....457

Plaintiffs' Exhibit 18, Email from Bill Crater, dated October 3, 2008....466

Plaintiffs' Exhibit 19, Email from Jon van Heerden, dated October 4, 2008....467

Plaintiffs' Exhibit 20, Title to Real Estate....469

Defendants' Exhibit 1, Minutes of the SIPOA, dated May 20, 2002....474

Defendants' Exhibit 2, Letter from Coy Faster, dated August 18, 2006....479

Defendants' Exhibit 3, Letter from John Thompson, dated June 19, 2007....480

Defendants' Exhibit 4, Series of photographs....481

Defendants' Exhibit 5, Withdrawal of Motion for Temporary Restraining Order, dated December 11, 2008....485

Defendants' Exhibit 6, Form 4 Order, dated January 27, 2011....498

Defendants' Exhibit 7, Email from Paul McLaughlin, dated June 2, 2009....499

Court's Exhibit 2, Note from Jury....506

Court's Exhibit 3, Note from Jury....507

Jury Charges....508

VOLUME III

TRANSCRIPTS

Transcript of the January 23-26 trial proceedings....512

VOLUME IV

Final Brief of Appellants....991

Final Brief of Respondents....1018

S.C. Court of Appeals, Opinion No. 5681, filed August 21, 2019....1047

Petition for Rehearing....1073

Order Denying Petition for Rehearing....1084

Certificate of Counsel....1086

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2011CP-10-7065 and 2015-CP-10-3550

Appellate Case No. 2017-000866

Richard Ralph and Eugenia Ralph, Appellants,

v.

Paul Dennis McLaughlin
and Susan Rode McLaughlin, Respondents.

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TABLE OF CONTENTS

Table of Authorities ii

Statement of the Issues on Appeal 1

Statement of the Case 1

Statement of Facts 3

Argument 7

I. The Trial Court erred in failing to submit the issue of punitive damages to the jury, because more than one reasonable inference could be drawn from the evidence as to whether Respondents acted with reckless disregard for the property rights of the Appellants when they intentionally destroyed the Appellants' easements 7

II. The Trial Court committed reversible error when it failed to apply a previous grant of summary judgment as the law of the case 12

III. The Trial Court's denial of Appellants' Motion for a New Trial was manifestly characterized by error of law and wholly unsupported by the evidence 15

IV. The question of whether the SIPOA could abandon the easements, or give legally sufficient permission to build on them, was a question of law and should not have been submitted to the jury 20

Conclusion 23

TABLE OF AUTHORITIES

Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011)..11

Blue Ridge Company v. Williamson, 247 S.C. 112 (1965)..17, 21

Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (S.C., 1975)..18

Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 525 S.E.2d 869 (2000)............13, 15

Corbin v. Cherokee Realty Co., 229 S.C. 16, 24, 91 S.E.2d 542, 546 (1956)..21

Graham v. Whitaker, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984)..9, 11

Hollis v. Stonington Dev. LLC, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011)........................7, 11

Mishoe v. QHG of Lake City, Inc., 366 S.C. 195, 621 S.E.2d 363 (Ct. App. 2005)........................7

Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991)........................16-18

Restatement of Law- Property Restatement (Third) of Property,
Chapter 2. Creation of Servitudes..17

STATEMENT OF THE ISSUES ON APPEAL

I. Did the Trial Court err in failing to submit the issue of punitive damages to the jury, because more than one reasonable inference could be drawn from the evidence as to whether the Respondents acted with reckless disregard for the property rights of the Appellants when they intentionally destroyed the Appellants' drainage easement?

II. Did the Trial Court err in failing to acknowledge a previous grant of summary judgment, holding that the Respondents could not rely on representations of the SIPOA, as the law of the case?

III. Should the Trial Court's denial of Appellants' Motion for a New Trial be reversed, because its judgment was manifestly characterized by error of law *and* wholly unsupported by the evidence?

IV. Did the Trial Court err in allowing the jury to decide the question of whether the SIPOA could abandon the easement, or give legally sufficient permission to build on it, because it was a question of law and not of fact?

STATEMENT OF THE CASE

On September 30, 2011, the Plaintiffs/Appellants, Richard and Eugenia Ralph, filed a Complaint against their neighbors, Respondents Paul and Susan McLaughlin. (R. p. 34). In the Complaint, the Appellants alleged that the Respondents destroyed a drainage easement, which caused flooding and poor drainage on the Appellants' adjacent property.[1] The Appellants sought actual and punitive damages. The Respondents answered the Complaint on December 6, 2011, denying its allegations and raising affirmative defenses. (R. p. 50). The Respondents also brought a Third-Party Complaint against the Seabrook Island Property Owners Association

[1] On July 17, 2013, the Appellants filed an Amended Complaint against the Respondents, specifying their cause of action as one of trespass and praying for actual and punitive damages against the Respondents. (R. p. 97)

("SIPOA" or "the POA"), in which they alleged reliance on representations by SIPOA and liability on the part of the SIPOA for the Appellants' claims. SIPOA denied the claims against it and raised affirmative defenses in an Answer filed on January 6, 2011. (R. p. 84).

On June 24, 2014, the Court entered an Order striking the case from the docket pursuant to Rule 40(j), SCRCP. (R. p. 1). The case was restored to the docket on June 23, 2015, and a new case number was assigned. (R. p. 3).

Shortly after the case was restored to the docket, each party filed a motion for summary judgement; the SIPOA, significantly, requested summary judgment as to the Respondents' claims for reliance. In an Order filed June 7, 2016, the Honorable G. Thomas Cooper, Jr., granted SIPOA's Motion for Summary Judgment, dismissing the Respondents' Third-Party Claims against SIPOA "because [Respondents] cannot show any evidence of 'reasonable reliance' on a SIPOA representation."[2] (R. pp. 5, 11).

The remaining claims were tried before a jury, in a trial presided over by the Honorable Roger M. Young, Sr., beginning on January 23, 2017. Judge Young granted the Respondents' Motion for a Directed Verdict as to the issue of punitive damages. Judge Young denied the Appellants' request that Judge Cooper's previous ruling would be considered the law of the case; Judge Young also denied Appellants' Motion for a Directed Verdict as to the issue of Respondents' liability for trespass and as to the issue of the SIPOA's ability to abandon the easements. (R. pp. 772-773; 780-806; 893). On January 26, 2017, after hearing closing

[2] Judge Cooper filed three orders on that same day in this case; in the first, discussed above, he granted the SIPOA's Motion for Summary Judgement; in the second, he denied the Appellants' Motion for Partial Summary Judgment; and, in the third, he denied Respondents' Motion for Summary Judgment. (See Orders of the Honorable G. Thomas Cooper, Jr., R. p. 5, R. p. 13, R. p. 15)

arguments and instructions, the jury deliberated for five and half hours before announcing that it was deadlocked. After being given an *Allen* charge, the jury returned to deliberations. An hour later, at approximately 5:22pm, the jury rendered its verdict in favor of the Appellants on their cause of action for trespass and awarded "actual nominal" damages in the amount of $1,000.

On February 2, 2017, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, the Appellants filed a Motion for a New Trial *Nisi Additur*, or, alternatively, a New Trial as to Damages, or, alternatively, a New Trial Absolute. (R. p. 343). Judge Young denied the Appellants' motions in an Order filed on March 2, 2017. (R. p. 22).

Appellants filed and served their Notice of Appeal on March 31, 2017. (R. p. 357).

STATEMENT OF FACTS

This trespass case involves an easement containing a drainage pipe and a "No Build Area," which extends across lots 21 through 28 of Baywood Drive on Seabrook Island, as illustrated on plats prepared by E.M. Seabrook, Jr. ("Seabrook Plats," R. pp. 380, 387).

Appellants are the owners of Lot 23, which they purchased and have lived on since 1997. (R. p. 375). Respondents are the owners of Lot 22, which is upstream of Appellants' lot. Respondents purchased their lot in 2002, and they constructed a home on the lot in 2008-2009. (R. p. 381). In the course of their construction, the Respondents dug up the portion of the drainage pipe that burdened their lot and then built their home in the No Build Area. The Respondents argued at trial that the drainage easement and No Build Area had been abandoned by the SIPOA, as illustrated by a plat found only in the Respondents' chain of title. ("Forsberg Plat," R. p. 388).

At trial, the Appellants presented evidence, including the above-referenced deeds and

plats, demonstrating that the Appellants had a special property interest in the drainage pipe easement and No Build Area that ran under and through lots 21 through 28 of Baywood Drive ("the easements").[3] Howard Yates, qualified as an expert in the law of real property, testified that he personally examined the chain of title on the properties belonging to the Appellants and the Respondents, and that he found that all deeds in their chains of title were subject to the easements. (R. pp. 551-559; R. p. 43-44). Mr. Yates testified that the SIPOA could not have unilaterally extinguished the easements, although it had attempted to do so around the time the Respondents purchased their lot. Rather, successful abandonment of the easements would require at least the agreement of all the owners of properties depicted on the Seabrook Plats, including the Appellants. (Id. p. 555). Additionally, Mr. Yates testified that the recording of the Forsberg Plat, which indicated the easements as "to be abandoned," did not result in the abandonment of the easements. (Id. p. 556, lines 6-24).

It was not disputed at trial that the Respondents purchased Lot 22 (upstream of Appellants' house on lot 23) and ultimately proceeded to dig up the portion of the drainage pipe located on that lot and to construct part of their home in the No Build Area. Appellants presented evidence that damage was caused to their property by Respondents' destruction of the pipe and No Build Area. The testimony demonstrated that the removal of the drainage pipe increased the

[3] The original developer of the lots on Baywood Drive conveyed the lots subject to the Plat of E.M. Seabrook dated September 6, 1984 and recorded in the Charleston County RMC/ROD Office in Plat Book BD, page 23 and the revised plat dated May 8, 1987 and recorded in the Charleston County RMC/ROD Office in Plat Book BN, page 49 (R. pp. 380, 387, 388). Those plats established a plan for a 20' drainage easement and No Build Area. The plats are referenced in the subsequent deeds in the Appellants' chain of title, as evidenced by the deed to the Appellants recorded in the Charleston County RMC/ROD Office on April 10, 1997 and indexed in Book K282, Page 846 (R. p. 375) (Their complete chain of title is charted in Exhibits A and B to the Plaintiffs' Complaint; R. pp. 43-44). The drainage easements are an appurtenant easement benefitting the Appellants as of the date on which they acquired ownership of Lot 23.

volume of surface water on the Appellants' property after rainfall and also increased the length of time required for that surface water to dissipate. Foremost was the testimony of storm-water drainage engineer Robert George, P.L.S., P.E., who was qualified as an expert in civil engineering, registered land surveying, and storm-water drainage. He stated, in accordance with his scientific analysis and to a reasonable degree of engineering certainty, that poor drainage and flooding on the Appellants' property was a direct result of the Respondents' act of digging up the drainage pipe and building their house on the No Build Area. (R. pp. 683-694; pp. 718-720). Further, the Appellants themselves testified that there was a marked and noticeable difference in the drainage of storm-water from their property before, as opposed to after, the Respondents' construction. (Trial Transcript, pp. 592-594; pp. 638-639).

Mr. George's analysis that the Respondents' trespass caused the flooding and poor drainage on the Appellants' property was largely unrefuted by the Respondents;[4] they focused their defense instead on whether or not the Respondents had permission to build from the SIPOA, and on whether the SIPOA had previously abandoned the drainage easement.

The Appellants also offered the testimony of Nick Thompson, who was qualified as an expert in residential real property appraisal; Mr. Thompson testified that the Appellants' property could be diminished in value by between 40 and 60 percent (40-60%) because of the surface water problem. (R. p. 737, line 14-p. 741). Additionally, the Appellants themselves testified that they believed that their property was worth $775,000 without the drainage problem. They further

[4] The Respondents did claim that they had seen water on the Appellants' property after heavy rains, before the construction of their home. (R. p. 887). However, this assertion was undermined by their own admission that they lived in Winston-Salem prior to their construction on lot 22, and so were only on Seabrook Island for brief weekend visits. Respondent Mrs. McLaughlin admitted that they did not have the opportunity to witness whether and how quickly the water that they saw on the Appellants' lot drained. (R. pp. 888-889).

testified that they thought their property value had been diminished by $200,000 because of the Respondents' act of destroying the easements, which caused the poor drainage and flooding on their lot. (R. pp. 596-599; p. 639). Finally, the Appellants testified that they had paid $17,000 to Mr. George in a fruitless attempt to mitigate the drainage problems caused by the Respondents' destruction of the easements., (R. p. 600).

The Appellants and the Respondents both testified that, prior to the Respondents' construction of their home, the SIPOA had held several meetings of the owners of lots 21 through 28, and that the purpose of those meetings was to discuss the impact that the Respondents' desired construction would have on their neighbors' drainage. The Respondent Paul McLaughlin testified that he attended those meetings. (R. p. 752). The SIPOA had hired Mr. George (the storm water drainage expert), who presented at one of those meetings a study he had conducted on the functionality of the drainage pipe. Mr. George specifically warned that the Respondents' proposed construction plans would cause surface water drainage problems on the neighboring downstream lots (including that belonging to the Appellants). (R. pp. 660-667). Respondent Mr. McLaughlin testified that he was aware of the study and that he had heard Mr. George's warnings. (R. p. 752). Appellants introduced into evidence emails from neighboring lot owners, including the Appellants, asking the Respondents not to construct their home as planned, unless a solution could be found for the drainage issues that would be caused. (R. p. 389-396, 466-467). Appellants and Respondent Mr. McLaughlin testified that the SIPOA was attempting to work with the Respondents to find a resolution for the potential drainage problem. (R. pp. 755-756)

Both parties testified at trial that the dialogue between the Respondents, the Appellants, and the SIPOA escalated in the autumn of 2008. On October 7, 2008, a SIPOA agent who was

working to try to mediate the issues between the Appellants and the Respondents told the Respondents that he was no longer mediating the issue because it was "an impossible situation." (Order of Judge Cooper, R. p. 9). Respondents grew frustrated by the time it was taking to come up with a solution, and so they announced their intention to proceed with construction as planned. (R. pp. 585-586; p. 756, lines 10-11; Pls.' Ex. 11, R. p. 397). On December 9, 2008, the SIPOA filed a lawsuit against the Respondents, seeking an injunction to halt their construction and alleging that Respondents' "unilateral action will result in irreparable damage by diminishing the drainage capacity of the drainage easement as it affects the downstream lots." (R. p. 750, R. p. 457). On the same day that SIPOA filed the lawsuit, the Respondents ordered their construction crew to commence work. (R. pp. 634-635; p. 748, lines 7-10; p. 767, lines 14-19). A backhoe dug up the drainage pipe and began construction, even though neither the SIPOA nor the Appellants had authorized Respondents' actions.. A portion of the Respondents' residence now sits in the No Build Area. (R. p. 747, lines 20-22).

ARGUMENT

I. The Trial Court erred in failing to submit the issue of punitive damages to the jury because more than one reasonable inference could be drawn from the evidence as to whether the Respondents acted with reckless disregard for the property rights of the Appellants when they destroyed the Appellants' drainage easement.

The Trial Court improperly granted the Respondents' motion for a directed verdict as to the issue of punitive damages. When it rules "on a directed verdict motion as to punitive damages, 'the circuit court must view the evidence and the inferences that can reasonably be drawn therefrom in the light most favorable to the nonmoving party.'" *Hollis v. Stonington Dev. Llc*, 394 S.C. 383 at 393-394, 714 S.E.2d 904 at 909-910 (Ct. App. 2011), *quoting Mishoe v.*

QHG of Lake City, Inc., 366 S.C. 195, 621 S.E.2d 363 (Ct. App. 2005). This Court should apply the same standard as the circuit court when it reviews a grant of a motion for directed verdict. *Id.* "The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." *Id.*

At trial, the Appellants presented evidence that when the Respondents dug up the drainage pipe and built their house in the designated No Build Area, they were acting with reckless disregard for the property rights of the Appellants. The Respondents countered that they were acting with permission from the SIPOA and were therefore not willful in their act of destroying the drainage easement. (Trial transcript p. 777, line 23-778, line 6). However, the record is clear that this was not the case, and much evidence exists to the contrary: the Respondents acted in deliberate contravention of the SIPOA's and the Appellants' attempts to halt their construction, and with knowledge that their acts would cause harm to the Appellants' property.

The Respondents asserted a third-party claim against the SIPOA, in which they alleged that they had acted in reliance on representations from the SIPOA when they destroyed the pipe and constructed their home in the No Build Area. The SIPOA moved for summary judgement several months before the case went to trial, and the parties were heard on the issue by the Honorable G. Thomas Cooper, Jr. When he issued an Order dismissing the Respondents' reliance claims against the SIPOA, Judge Cooper specifically held:

> As a practical matter, there is no evidence to show that SIPOA has ever made any promises to the [Respondents]. Accordingly, as a matter of law, there is simply no genuine issue of material fact that the [Respondents] reasonably relied on the unambiguous acts, representations, and writings of SIPOA or otherwise reasonably based their decision to remove the pipe in 2008, which is what prompted the lawsuit brought by [Appellants].

> In fact, the record is completely clear that there was absolutely no "unambiguous representation" from SIPOA that the [Respondents]' only responsibility regarding the pipe was that it had to pay to remove the pipe. **Rather, the entire history of the interactions between SIPOA indicate the opposite**—that the [Respondents] had to assume all responsibility for the disposition of the pipe. **Indeed, by their own admission, (1) the [Respondents] blamed SIPOA for leaving them in "limbo" in 2008 prior to their removal of the pipe, (2) rejected SIPOA's proposals to resolve the matter prior to the [Respondents] unilateral decision to remove the pipe, and (3) were defendants in a lawsuit filed by the SIPOA to stop them from removing the pipe.** For these reasons, the [Respondents] simply cannot prevail on their third-party claim against SIPOA as a matter of law.

(Order of Judge Cooper, R. p. 12, emphasis added.) It is clear from Judge Cooper's Order—and is in fact the law of the case—that the Respondents were not acting on mistake or misunderstanding when they dug up the drainage pipe. The issue of punitive damages should therefore have been submitted to the jury by the trial judge. *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984).

When it erroneously granted the Respondents' directed verdict motion, dismissing the Appellants' claim for punitive damages, the Trial Court's logic was notably conflicted. Its own words indicate that more than one reasonable inference could have been drawn from the evidence as to whether the Respondents acted willfully:

> And, you know, that's where I come in with the problem of whether or not this is a punitive damages case. Again, [the Respondent] was acting on—clearly he was acting willfully. I don't think he was acting recklessly, but he was obviously acting—he knew what he was doing, but, again, he was acting under the mistaken belief he had the right to do that, but if the jury agrees that he wasn't trespassing, then he did have the right to do it. He still maintains that he has the right to do it. I don't think you can be punished for doing something that you had the right to do, and he believes he had the right to do it and he still believes he has the right to do it. I just think there's a genuine issue as to whether or not he had the right to do it, but I don't think he was acting malevolently, certainly

> not to the level of clear and convincing, so I'll grant their motion for punitive damages.

(R. pp. 798-799).

As demonstrated by the Trial Court's own divergent holding, the Appellants had indeed entered evidence tending to show that the Respondents acted willfully and that they could not have reasonably believed that they had the right to dig up the drainage pipe and build in the easement. Specifically, the Respondent Mr. McLaughlin testified that, prior to destroying the easement, he was served with a lawsuit, filed by the SIPOA, the sole purpose of which was to stop the Respondents' construction. (R. p. 767; R. p. 457). The Respondent's own testimony on the matter may be found in the trial transcript on pages 236-260. (R. pp. 747-771). In the course of that testimony, the Respondent admitted that he dug up the drainage pipe even after the SIPOA filed a lawsuit seeking an injunction to halt his construction; the lawsuit alleged that "the [Respondents'] unilateral action [of digging up the drainage pipe and constructing in the No Build Area] will result in irreparable damage by diminishing the drainage capacity of the drainage easement as it affects the [Appellants'] lot[]." (R. p. 749; R. p. 457 ¶17). The SIPOA's lawsuit to halt construction additionally asserted: "[Respondents'] continued actions and destruction of the subject drainage pipe without some alternative plan will seriously and adversely and irreparably impact the...drainage system for lots 21, 23 [belonging to the Appellants], 25, 26, 27, and 28." (R. pp. 750-751, R. p. 457).

Respondent Mr. McLaughlin also testified that he was aware that the Appellants and other lot owners (who owned a property interest in the easements) objected to his construction plans. (R. p. 760; pp. 466-467). Finally, he testified that he attended the meeting organized by the

SIPOA, at which storm water drainage expert Robert George presented his study which demonstrated the anticipated adverse impact of Respondents' plan to destroy the drainage easements. (R. p. 752, lines 7-19; R. p. 400).

The evidence put forth at trial by the Appellants—especially the lawsuit against the Respondents by the SIPOA, the history of opposition from neighboring lot owners, and the many meetings called and attempts made to ascertain and resolve the drainage problems that would be caused by their construction—clearly gives rise to the reasonable inference that the Respondents were acting with reckless disregard for the property rights of the Appellants when they destroyed the easements. When it ruled on the Respondents' directed verdict motion, the Trial Court should have construed that evidence in the light most favorable to the Appellants, the nonmoving party. *Hollis*, 394 S.C. at 383-94, 714 S.E.2d at 909.

Furthermore, the issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. *Id.* (finding that the issue of punitive damages was properly submitted to the jury in a trespass case where Plaintiff submitted "ample evidence from which to find [defendant] acted in reckless disregard of the rights of others"); *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says that person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

The evidence put forth by the Appellants at trial—particularly when paired with Judge Cooper's prior ruling that Respondents could not reasonably have relied on any representation

by the SIPOA—unquestionably raised the inference that the Respondents acted in reckless disregard for the rights of the Appellants when they dug up the drainage pipe and constructed their home in the designated No Build Area. Because more than one inference could be drawn as to the nature of the acts of the Respondents, it should have been for the jury to decide whether a reasonable person would have been aware that the Respondents' trespass would injure the Appellants. The Trial Court's grant of directed verdict on the issue was therefore improper, and a new trial is warranted.

II. The trial judge committed reversible error in failing to apply a previous grant of summary judgment as the law of the case.

From the very inception of the trial, the Respondents employed as their theory of the case the argument that the Respondents were acting in justified reliance on representations by the SIPOA when they dug up the pipe and built their home in the No Build Area.[5] This argument was prejudicial to the Appellants and was precluded by an earlier, binding ruling in the case, which held that the Respondents had no right to rely on any representations by the SIPOA. The Trial Court's refusal to acknowledge and apply the previous Order as the law of the case was clearly erroneous; its rulings on the issue must be reversed by this Court and a new trial ordered.

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[5] See, e.g., the opening argument for the Respondents: "nothing gets built on Seabrook Island or Kiawah Island and certain places like that unless you have the approval of your property owner's association...and eventually...their plans were approved to build their home where it's currently situated in the former no-build area...and I think that's important for the testimony to bear out, that my clients went through a lot of time and effort with the property owners association to build in this no-build area with the abandoned easement." (R. pp. 544-546)

Again, in their closing statement, the Respondents reiterated: "[Respondents], of course, relied on the representation of their sellers and the representation of the Seabrook Island Property Owners Association that they could build." (R. p. 904, lines 21-24); "...those letters confirm what the [Respondents] relied on, that the easement had been abandoned, they could remove the pipe they could build in the no-build area." (R. at p. 906); "[Respondents] relied exclusively on the POA to get their house built." (R. p. 309, lines 10-11)

A. The jury should have been bound by the rulings in Judge Cooper's Order.

Shortly before resting, the Appellants reminded the trial judge of Judge Cooper's previous Order of May 26, 2016, which Order had not been appealed by the Respondents. Appellants argued that the jury should be bound by Judge Cooper's decision that the Respondents could not have reasonably relied on any representations by the SIPOA. (R. pp. 772-773). The Trial Court responded:

> Well, there's no third-party claim being made. This is a lawsuit between the plaintiffs and the defendants. I don't know what the—I haven't read the order, so I don't know what would bind anybody else who wasn't a party to the lawsuit.

(R. p. 773, lines 10-14).

The Court's basis for this holding was erroneous. In fact, the ruling by Judge Cooper was within this same case, to which both the Appellants and the Respondents were parties. It is a fundamental rule of law that an un-appealed order is ordinarily the law of the case. *Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000). Respondents did not appeal the findings of fact and law that Judge Cooper made in his Order dismissing their claims against the SIPOA. As such, those findings should have been deemed by the trial judge as the law of the case, and the jury should have been bound by them.

Again, at the close of their case, Appellants made the same argument, maintaining that the previous order should be the law of the case, and they read aloud Judge Cooper's Order to the Trial Court. (R. pp. 800-803). The Trial Court mistakenly responded, "a summary judgement order, unless it's granting summary judgment, doesn't do anything except say it's going on to trial. There's a genuine issue of disputed fact." (R. p. 802, lines 12-15). This was error on the part of the trial judge because the previous Order **did indeed grant summary judgment**; the

previous Order found that there was no question of fact as to lack of reliance and thus granted the SIPOA's motion. Respondents did not appeal that Order. When Appellants brought this to the Trial Court's attention, it reiterated, in error:

> Well, Judge Cooper's order between...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.

(R. p. 803).

The Trial Court's decision to discount Judge Cooper's Order—holding that there was no genuine issue as to the fact that the Respondents could not have relied on the SIPOA—was erroneous, and it imparted credence to the Respondents' frequent testimony before the jury that they were merely acting in reliance on the SIPOA when they destroyed the pipe. Because the Trial Court's failure to apply the previous Order was error as a matter of law, this case should be remanded for a new trial.

B. The Trial Court itself was bound by Judge Cooper's Order.

In arguing for a directed verdict as to the issue of punitive damages, counsel for Respondents stated:

> Your Honor, we also don't think the standard for punitive damages has been reached. You heard Mr. McLaughlin testify that he was relying on the POA when they built their house. There was no wrongdoing of which he was conscious that has been proven by clear and convincing evidence as required for punitive damages, so we would ask Your Honor to strike the punitive damages for the lack of proof and the lack of ability to comply with the case law regarding punitive damages.

(R. p. 777, line 23-p. 778, line 6).

However, as counsel for the Appellants repeatedly pointed out to the Trial Court, the

previous ruling by Judge Cooper specifically held that Respondents had no right to rely on any representations by the SIPOA purportedly authorizing the Respondents to destroy the easements in the construction of their home. (See R. pp. 780-785; 798-806). In response to the Appellants' argument that Judge Cooper's ruling should be applied to his decision, the trial judge replied, "Well, Judge Cooper's order between them...Between the defendants and the property owner's association is not binding on this jury's finding." (R. p. 803, lines 13-18). In this instance, however, Judge Cooper's Order established the fact that Respondents could not have reasonably relied on the SIPOA, and thereby rendered erroneous the Trial Court's determination to remove the decision about punitive damages from the province of the jury.

An un-appealed order is the law of the case. *Charleston Lumber Co.*, 338 S.C. 171, 525 S.E.2d 869 (2000). Respondents did not appeal the findings of fact and law that Judge Cooper made in his Order dismissing their claims against the SIPOA. As such, those findings should have been deemed by the trial judge, in the subsequent trial of the same case, as the controlling facts and law of the case. Moreover, the previous findings went directly to the heart of the question of whether the Respondents acted willfully, and they should absolutely have steered the Trial Court's consideration of the Respondents' motion for directed verdict as to punitive damages. It was prejudicial error for the Trial Court to disregard Judge Cooper's Order, as well as an error of law under the doctrine of the law of the case. Therefore, the Appellants respectfully request that this Court would grant them a new trial.

III. The Trial Court's denial of Appellants' Motion for a New Trial was manifestly characterized by error of law *and* wholly unsupported by the evidence.

Although the determination of whether to deny a new trial is within the discretion of the

Trial Court, this Court should reverse where such a decision is controlled by error of law or is wholly unsupported by the evidence; in this case, the Trial Court's decision was both. In denying the Appellants' Motion for a New Trial, the Trial Court held, "there was sufficient evidence for the jury to determine issues of trespass and abandonment regarding the easement." (R. pp. 32-33). However, both the law of trespass and the evidence itself reveal that the Respondents had trespassed as a matter of law. The issue should not have been submitted to the jury—especially when Respondents' argument before the jury was that the elements of intent and possession were lacking because the easements had been abandoned by the previous lot owner and the SIPOA, which (they claimed) had given them permission to build.

At the close of evidence, the Appellants moved for a directed verdict as to liability because—even when it was viewed in the light most favorable to Respondents—the evidence raised no other reasonable inference but that the Respondents had trespassed on the easements. The elements of a cause of action for trespass are: (1) that the plaintiff was in legal possession of the property; (2) that the defendant or his agent voluntarily entered upon the plaintiff's property; and (3) that such entry was made without the plaintiff's permission. *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991).

a. As a matter of law, the Appellants had a special property interest in the easements that the Respondents destroyed.

The question of whether the Appellants had an ownership interest in the easements (which was the first element in their cause of action for trespass) was ultimately one of law, and it was clear error for the trial judge to submit it to the jury.

At trial, the Appellants presented evidence that the deed by which they acquired their lot

referenced the Seabrook Plat. (See R. pp. 551-552; R. p. 375). The law is clear that where a deed describes land as shown on a specified plat, that plat becomes a part of the deed, and purchasers of lots with reference to such plats acquire every easement, privilege and advantage depicted thereon. *Blue Ridge Company v. Williamson*, 247 S.C. 112 (1965). The Seabrook Plat referenced in the Appellants' deed depicted a drainage easement containing a pipe, and a No Build Area, which extended across every lot on their block on Baywood Drive. (R. pp. 551-555; R. p. 380). By virtue of the conveyance of each lot subject to the 20' easement and No Build Area for the common use or benefit of each lot owner, as a matter of law a servitude was created as to each lot, which restricted the use of the land to that purpose. *Restatement of Law- Property Restatement (Third) of Property, Chapter 2. Creation of Servitudes.*

Thus, the first element of their cause of action, that the Appellants were in legal possession of a property interest in the drainage pipe and No Build Area (which was located in part on the Respondents' lot), was satisfied without question and <u>as a matter of law,</u> by the evidence that the Plaintiffs' title referenced a plat depicting those easements.

b. When viewed in the light most favorable to the Respondents, the evidence gave rise to only one inference: that the Respondents voluntarily entered (and destroyed) the Appellants' drainage easements.

In a cause of action for trespass, intent is proven by showing the defendant acted voluntarily, and that he knew or should have known the result would follow from his act. Although neither deliberation, purpose, motive, nor malice are necessary elements of intent, the defendant must intend the act which in law constitutes the invasion of the plaintiff's right. Trespass is an intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted

entry on another's land. *Snow v. City of Columbia*, 305 S.C. at 553.

The Respondents were aware of the drainage easements burdening their property. The law imputes to a purchaser who proposes to acquire title to real estate notice of the recitals contained in any properly recorded instrument of writing which forms a link in a chain of title to the property proposed to be acquired. *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (S.C., 1975), *citing Moyle v. Campbell*, 126 S.C. 180, 119 S.E. 186 (1923), and *National Bank of Newberry v. Livingston*, 155 S.C. 264, 152 S.E. 410 (1930). The Seabrook Plat depicting the easements could be found within the Respondents' chain of title. (Testimony of Howard Yates, R. pp. 556-560; R. pp. 380, 381, 387).

The Respondents admitted that they authorized their construction crew to dig up the pipe; they admitted that a portion of their house now rests in the No Build Area; and they admitted that they intended for their construction crew to place it there. At trial, Respondent Mr. McLaughlin testified:

MS. TILLMAN:	Is your house currently situated in what was once the no-build zone, or no-build area on your property?
RESPONDENT:	A portion of it is, yes.
MS. TILLMAN:	And did you authorize your construction company to dig up the pipe that was once running through the drainage easement in your back yard?
RESPONDENT:	Yes.

(R. pp. 747-752).

Thus, element two—that the Respondents voluntarily entered the Appellants' property and committed an intentional physical interference with the Appellants' present right to possess it—was satisfied without any other possible inference, by the Respondent's own admissions.

c. **When viewed in the light most favorable to the Respondents, the evidence gave rise to no other inference but that the Respondents did not have permission to destroy the Appellants' easements.**

Finally, there was no question of fact presented as to the third element of trespass: that the Appellants did not grant the Respondents permission to enter or interfere with the property. The Respondents admitted in their testimony that they were aware that the Appellants opposed their construction and that they proceeded without permission to dig up the easements:

MS. TILLMAN:	The neighbors, on the day that you authorized your construction crew to dig up the pipe, had they changed their mind and given you permission?
RESPONDENT:	I didn't ask for permission.

(R. p. 868; see also, pp. 752-755). Because the Appellants had a special property interest in the drainage easements, their permission was required—as a matter of law—before those easements could ever have been lawfully destroyed.

Contrary to the Trial Court's holding in its Order denying a new trial, the Appellants should have prevailed on their motion for a Directed Verdict as to the issue of Respondents' liability for trespass. The Respondents had trespassed as a matter of law because the following facts, constituting the elements of trespass, were utterly uncontroverted: (1) that the Appellants had an ownership interest in the drainage pipe and No Build Area; (2) that the Respondents authorized their construction crews to dig up the pipe and to build a portion of their house in the No Build Area; and (3) that the Appellants did not grant them permission to do so. There could have been no other inference drawn from the evidence, even when viewed in the light most favorable to the Respondents, but that the Respondents were liable to the Appellants.

Because the Trial Court's decision to deny the Appellants' Motion for a New Trial was

corrupted by mistake of law and unsupported by the evidence, this Court should reverse its decision and remand to the Circuit Court for a new trial.

IV. The question of whether the SIPOA could entirely abandon the easement, or give legally sufficient permission to build on it, was a question of law and should not have been presented to the jury.

At the close of evidence, Appellants moved for a directed verdict, asking for a ruling from the Trial Court that the SIPOA's purported abandonment of the easement did not affect the property rights of the Appellants, because extinguishment of the easements would have required the agreement of all the lot owners. (R. p. 890; R. p. 893, line 19-p. 894, line 6). The Trial Court's denial of this motion and its decision to submit the issue to the jury (which it reiterated in its Order of February 28, 2017, R. pp. 24-25) was clear and prejudicial error, because it was a question of law, and not of fact.

In the course of his testimony, Mr. Howard Yates explained that when they purchased their lot with reference to the Seabrook Plat, the Appellants acquired a property interest in the drainage easements running through all of the lots on that portion of Baywood Drive, as depicted on the plats, which easements could not have been abandoned without their consent:

MR. YATES:	[Appellants] have an interest in those easements as well as their lot.
MR. SINKLER:	Is that a legal interest?
MR. YATES:	Yes. According to the cases, this interest is referred to as a special property interest, and it is an interest that must be addressed. It's a legal or equitable interest. It is an interest, whatever you call it.
MR. SINKLER:	All right. And how could that interest—how could that interest be abandoned?
MR. YATES:	Well, the only way it could be abandoned is for everyone, at the minimum, everyone who has a special property interest in that easement to join in an instrument stating

	that they're all in agreement and they want to close the easement. In addition, because so many people have mortgages on properties, the mortgage holders who hold equitable interest in real property that they may divulge, they have to join in it, too, so it is a very cumbersome process. And, least of all, you've got to have all of the people, at least on that area that are benefitting from the easement, to all join in. One person cannot unilaterally close off an easement.
MR. SINKLER:	Did the property owner's association have the right to abandon anything?
MR. YATES:	**No. Categorically no.**

(R. pp. 553-554, emphasis added).

The case law is in accord with Mr. Yates' testimony at trial. It is an established principle of South Carolina law that:

> The Florenza Company by subdividing and platting this property into lots and streets and selling and conveying lots with reference to the plat, thereby manifested an intent to dedicate said streets to the use of the public, and is estopped to deny the rights of such purchasers and those claiming under them, to an easement in all the streets represented and as represented on the plat. ***Such purchasers acquired every easement, privilege and advantage which the plat represented as belonging to them.***

Corbin v. Cherokee Realty Co., 229 S.C. 16, 24, 91 S.E.2d 542, 546 (1956); see also *Blue Ridge Realty Co. v. Williamson*, 27 S.C. 112 at 121, 145 S.E.2d 922 (1965) ("Where lots in a subdivision are sold by reference to a map or plat upon which roads are shown which are or become public highways, the *private easement which arises upon such a sale survives the vacation, abandonment, or closing* of the road or highway by the public") (emphasis added).

The Respondents argued at trial that the SIPOA abandoned the easements in 2001,[6] which was four years after the Appellants acquired Lot 23 and the appurtenant drainage and No Build Area easements running with title to that lot. However, this contention is legally unfounded. A third party can no more abandon an easement belonging to another than it could effectively sell real estate owned by another. SIPOA's purported abandonment did not in any way impact the enforceability of Appellants' drainage and No Build Area easements, and no reasonable inference could have existed that this was somehow possible. Furthermore, Judge Cooper's previous Order in the case foreclosed the argument that the Respondents' reliance on representations by the SIPOA was proper.

It was error of law on the part of the Trial Court to allow the jury to consider the issue of whether the Respondents had trespassed, or whether they had permission to build (steeped as that issue was in repeated testimony by the Respondents that the SIPOA had abandoned the easements and given permission to destroy them), because, as a matter of law, the SIPOA could not have abandoned the property rights of the Appellants. This Court should reverse that holding and remand the case for a new trial.

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[6] "[Respondents] purchased this property...according to a plat. It's the plat you'll take back into the jury room, the plat from Forsberg Engineering. It's the plat that shows the abandonment of the easement by the Seabrook Island Property Owner's Association and the abandonment of the no-build area on their lot. And that's important, because you didn't hear the plaintiffs' counsel mention the permission that my clients had to build because they know it's fatal to their case." (R. p. 904, lines 4-12)

CONCLUSION

Because the Trial Court's denial of the Appellants' directed verdict motions—as to the SIPOA's ineffective abandonment of the easement, as to the SIPOA's legal inability to permit the destruction of the easements, as to the previous Order's applicability as the law of the case, and as to the Respondents' liability for trespass—was error of law, this Court should reverse those holdings and remand this case for a new trial. Furthermore, because the Trial Court improperly issued a directed verdict as to the issue of punitive damages when more than one reasonable inference could have been drawn from the evidence, this Court should reverse the decision and remand the case to the Circuit Court.

Respectfully submitted,

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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.

RESPONDENTS' FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..ii

STATEMENT OF ISSUES ON APPEAL..1

STATEMENT OF THE CASE...2

STATEMENT OF FACTS...9

STANDARD OF REVIEW..13

ARGUMENT 14

I. THE TRIAL COURT PROPERLY GRANTED A DIRECTED VERDICT AS TO PUNITIVE DAMAGES WHERE THERE WAS NO SHOWING BY ANY EVIDENCE, LET ALONE CLEAR AND CONVINCING EVIDENCE, EVEN IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS, THAT THERE WAS ANY WILLFUL, WANTON, OR RECKLESS BEHAVIOR ON THE PART OF THE MCLAUGHLINS TO WARRANT AN AWARD OF PUNITIVE DAMAGES AND, ADDITIONALLY, THE ISSUE WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW 14

II. THE TRIAL COURT PROPERLY DENIED THE PLAINITFFS' MOTION FOR A NEW TRIAL, A NEW TRIAL ABSOLUTE, NEW TRIAL NISI ADDITUR, AND A NEW TRIAL AS TO DAMAGES WHERE IT THOROUGLY CONSIDERED THE ARGUMENTS AND COULD NOT FIND COMPELLING REASONS TO INVADE THE JURY'S PROVINCE, AS IT WOULD HAVE BEEN REQURIED TO DO 18

III. THE PRIOR ORDER GRANTING THE FORMER THIRD PARTY DEFENDANT SUMMARY JUDGMENT WAS NOT BINDING ON THE PLAINTIFFS AND THE DEFENDANT AS TO LIABILITY AND WAS NOT BINDING ON ANY DELIBERATIONS OR DETERMINATIONS OF THE JURY 23

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Allen v. United States, 164 U.S. 492 (1896)..21

Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690 (1995)..13, 18

Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607 (2011)..16, 17

Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171,
525 S.E.2d 869 (2000)..24, 25

Curtis v. Blake, 392 S.C. 494, 709 S.E.2d 79 (2011)..13, 18

Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984)..16, 17

Green v. Fritz, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003)..13, 18, 22

Hinson v. A.T. Sistare Const. Co., 236 S.C. 125, 113 S.E.2d 341 (1960)..20

Hollis v. Stonington Dev., LLC, 394 S.C. 383,
714 S.E.2d 904 (Ct. App. 2001)..13, 14, 15, 16

Johnson v. Sam English Grading, Inc., 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015)..21

Morris v. Jensen, 309 S.C. 153, 420 S.E.2d 710 (Ct. App. 1992)..13, 19

Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56,
427 S.E.2d 673 (1993)..22, 23

Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000)..17, 18

Toole v. Toole, 260 S.C. 235, 195 S.E.2d 389 (1973)..13, 18

Umhoefer v. Bollinger, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989)..13, 19

Vinson v. Hartley, 324 S.C. 389, 477 S.E. 2d 715 (Ct. App. 1996)..13, 19, 20, 21

Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000)..20, 22

Youmans v. S.C. Dep't of Transportation, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2009)..16

Zinn v. CFI Sales & Marketing, Ltd., 415 S.C 93, 780 S.E.2d 611 (Ct. App. 2015)..14

STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

On September 30, 2011, the Appellants Richard Ralph and Eugenia Ralph (the "Ralphs") filed their Summons and Complaint against Paul Dennis McLaughlin and Susan Rode McLaughlin. (R. pp. 34-49). In their Complaint, the Ralphs sued over their ownership of Lot 22, Block 32 on Seabrook Island. (the Ralphs' Lot)(*Id.*). The McLaughlins own the neighboring Lot 23, Block 32 on Seabrook Island. (the McLaughlins' Lot) (*Id.*). The Ralphs' Lot is shown on that Plat by E.M. Seabrook, Jr., dated April 29, 1987, and recorded May 8, 1987, in the Charleston County Register of Deeds Office in Plat Book BN at Page 49. (*Id.*; R. p. 380). The McLaughlins' Lot is shown on an almost identical plat by E.M. Seabrook, Jr., dated September 6, 1984, and recorded in the Charleston County Register of Deeds Office in Plat Book BD at Page 23 . (*Id.*;R. p. 387). The McLaughlins; Lot was formerly subject to a twenty (20') foot easement for drainage and a ten (10') foot easement for drainage. (*Id.*) The easement was in favor of the Seabrook Island Property Owners Association ("SIPOA"). (R. p. 388; R. pp. 22-31; R. pp. 547-565).

In May of 2002, SIPOA passed a motion to abandon the drainage easement on the McLaughlins' Lot and on other lots on the same portion of Seabrook Island. (R. pp. 474-478). In October of 2002, the McLaughlins took title to their property by deed which referenced, and incorporated, a Plat by Forsberg Engineering and Surveying, Inc., entitled "Plat Showing Abandonment of an Existing 20' Drainage Easement Lot 22 Block 23 Town of Seabrook Island Charleston South Carolina" dated January 17, 2002 (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).

The McLaughlins ultimately decided to build on their property, and, in the process, removed a drainage pipe on the McLaughlins' Lot in the portion of the abandoned easement and removed a culvert running under their property. (R. pp. 34-49; R. p. 588). The McLaughlins built a portion of their residence on a portion of the former "No Build" area and the drainage easement area with approval from SIPOA. (R. pp. 34-49; R. p. 747; R. p. 756).

In their Complaint, the Ralphs sued the McLaughlins for actual and punitive damages and for emotional anguish and discomfort for removing the culvert and building on the McLaughlins' Lot claiming that such actions caused flooding on the Ralphs' property. (R. pp. 34-49). Interestingly, there are no causes of action individually pled in the Ralphs' original Complaint. At trial, the Ralphs admitted their only cause of action against the McLaughlins was for trespass.[1] (R. p. 530)

On December 6, 2011, the McLaughlins filed their Answer and Third Party Complaint asserting affirmative defenses and suing SIPOA for indemnification due to SIPOA's approval of the McLaughlins' building plans, the abandonment of the easement, and the attempts by the McLaughlins to provide a new easement on their property, which was rejected by the Ralphs and SIPOA (R. pp. 50-83). SIPOA answered the Third Party Complaint on January 6, 2012. (R. pp. 145-149). Discovery commenced in the matter.

On January 30, 2013, the Ralphs moved to amend their Complaint to assert a more detailed cause of action, including asserting an alleged action for trespass and for punitive damages. (R. pp. 97-106). The Motion was granted and the Amended Complaint was filed July 17, 2013. (R. pp. 97-106). The McLaughlins filed their Answer to the Plaintiffs' Amended

[1] The original Complaint does not specify a cause of action. Counsel for the Ralphs explained to the Court that trespass was the actual cause of action even though there is nothing specific in the pleadings. (R. p. 530).

Complaint and Third-Party Complaint on July 22, 2013. (R. pp. 107-144). On August 23, 2013, SIPOA filed its Answer to the Third-Party Complaint. (R pp. 145-149).

On February 14, 2014, the Ralphs moved for partial summary judgment seeking to have the Court declare the McLaughlins committed trespass in removing the drainage pipe on their own McLaughlins' Lot and causing damages. (R. pp. 150-170). The Motion was based upon an Affidavit of J. Howard Yates, Jr., Esq., as to his opinion regarding the easement. (*Id.*)

On February 19, 2014, the McLaughlins filed their motion for summary judgment based upon the Ralphs' responses to Requests for Admission, the statute of limitations, and the filing of a prior lawsuit captioned *Seabrook Island Property Owners Association v. McLaughlin*, Case No. 2008-CP-10-6975 (the "SIPOA case")(R. pp. 171-192).

On February 20, 2014, SIPOA filed its motion for summary judgment as to the third-party causes of action and as to the Ralphs' underlying claims. (R. pp. 193-196).

While the motions for summary judgment were pending, the parties agreed to dismiss the case pursuant to Rule 40(j) SCRCP. (R. pp. 1-2).

On May 11, 2015, the Ralphs moved to restore the case to the active docket for Charleston County. (R. pp. 3-4). The case was restored by Consent Order filed June 23, 2015. (*Id.*).

The parties to the case re-filed their motions for summary judgment. (R. pp. 197-222).

On May 11, 2016, the Honorable G. Thomas Cooper, Jr., heard all three motions for summary judgment. (R. pp. 5-18) Judge Cooper denied both the Ralphs' and the McLaughlins' respective motion for summary judgment. (*Id.*). Judge Cooper granted SIPOA's motions for summary judgment as to the McLaughlins' claims that they should be indemnified by SIPOA. (*Id.*).

This case was called for trial the week of January 23, 2017. The Honorable Roger M Young, Sr., tried this case before a jury in Charleston County from January 23 to January 26, 2017. (R. pp. 22-33; R. p. 512).

At trial, the Ralphs each testified. (R. pp. 22-33; R. pp. 566-649) They also called Howard Yates, G. Robert George, and C.O. "Nick" Thompson, III. (R. pp. 22-33; R. pp. 547-575; R. pp. 653-725; R. pp. 728-746) The McLaughlins each testified, as did John Wells. (R. pp. 22-33; R. pp. 747-888).

At trial, the Ralphs presented evidence that the abandonment of the easement by SIPOA would not have extinguished the easement. (R. pp. 554-556; R. pp. 22-33). That evidence came in the form of the expert testimony of Howard Yates. (R. pp. 554-556; R. pp. 22-33). Mr. Yates testified that plats do become part of the deed to property and the plat showing an abandonment of the easement was recorded. (R. p. 553; R. pp. 22-33). Mr. Yates also testified that recorded plats become part of a deed, including the Forsberg plat, which became part of the McLaughlins' deed. (R. p. 558; R. pp. 22-33). Mr. Yates testified that plat unilaterally terminated the easement in question. (R. p. 558).

The Ralphs testified as to alleged damages to their property as did Robert George, their expert in civil engineering. (R. pp. 566-725). Mr. George testified that the removal of the drainage pipe caused poor drainage and flooding on the Ralphs' property. (R. p. 663). He also testified that this portion of Seabrook Island consists of dunes and troughs, which is typical landscape for that type of island. (R. pp. 661-662). The Ralphs' front yard is in a trough, according to Mr. George. (R. p. 689). Mrs. Ralph testified that after a rain there was always standing water on her property before any pipe was removed. (R. p. 609; R. pp. 22-33).

The Ralphs' appraiser expert C.O. "Nick" Thompson, III, testified that the Ralphs' property had been devalued between ten and fifty or sixty per cent based upon problems with surface water. (R. p. 740; R. pp. 22-33). Mr. Thompson was not able to offer any report in evidence. (R. p. 734). Mrs. Ralph testified that she thought the value of her property was Seven Hundred Seventy-five Thousand ($775,000.00) Dollars. (R. p. 612). Mr. Ralph agreed. (R. p. 639). Their appraiser, Mr. Thompson, had done no updates in valuation since 2011. (R. p. 745).

At the close of the Ralphs' case, they moved for a direct verdict as to their cause of action for trespass, which the Court denied. (R. pp. 22-33). The McLaughlins moved for a directed verdict on the Ralphs' causes of action for trespass, intentional infliction of emotional distress, and punitive damages. (R. p. 22-33; R. pp. 775-779) Judge Young granted the McLaughlins' motion for a directed verdict as to their claims for punitive damages and intentional infliction of emotional distress. (R. pp. 797-798; R. p. 805; R. pp. 22-33). At the close of all evidence, Judge Young determined there was evidence to present the issue of trespass to the jury, denying the McLaughlins' renewed motion for a directed verdict. (R. p. 892; R. pp. 22-33). The Court also denied the Ralphs' directed verdict motion at the same time. (*Id.*)

The only cause of action submitted to the Jury was for trespass. (R. pp. 508-511; R. pp. 22-33; R. p. 804).

Judge Young charged the jury as to the duty of the Court, the jurors being the judge of the facts, the credibility of witnesses, the burden of proof, direct and circumstantial evidence, expert witnesses, easements, trespass, nominal damages, actual damages, mitigation of damages, and the verdict form. (R. pp. 917-927)

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

Nominal Damages

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

(R. p. 923; R. pp. 508-511).

There were no objections from the Ralphs as to the charges presented by Judge Young. (R. p. 927).

During their deliberations, the jury requested to re-hear the testimony of Howard Yates. (R. pp. 22-33) The jury deliberated for over five hours. (R. p. 928; R. pp. 22-33). At one point, the jury advised the Court that it was deadlocked. (R. p. 928; R. pp. 22-33). The Court provided an *Allen* charge. (R. p. 928; R. pp. 22-33). *See Allen v. United States*, 164 U.S. 492 (1896). There were no objections to the *Allen* charge. (*Id*). The jury continued its deliberations for another hour before returning its unanimous verdict. (R. pp. 930-931).

Ultimately, the jury returned their verdict in favor of the Ralphs for trespass in the amount of One Thousand and No/100 ($1,000.00) Dollars (R. pp. 930-931; R. pp. 19-20)

On the Verdict Form, the foreman wrote the following:

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

(R. p. 21). The jury foreman specifically wrote the word "nominal" on the verdict form. (*Id.*)

Judge Young asked the members of the jury to raise their right hands if that indeed was their verdict; all raised their right hand. (R. p. 931).

No motions were made before the jury was dismissed by the Court. (R. p. 931-934).

Judge Young allowed for five days to make post-trial motions (R. p. 934).

On February 3, 2017, the Ralphs moved for a new trial *additur*, a new trial as to damages, and a new trial absolute pursuant to Rule 59 SCRCP. (R. pp. 343-357).

By his Order filed March 2, 2017, Judge Young denied all of the Ralphs' post-trial motions of and found no compelling reason to invade the jury's province. (R. pp. 22-33)

The Ralphs filed their Notice of Appeal of Judge Young's Order on March 31, 2017. (R. pp. 358-374)

FACTS OF THE CASE

The McLaughlins are the owners of Lot 22, Block 32, 3016 Baywood Drive on Seabrook Island. (R. pp. 381-386). The McLaughlins purchased this property on October 1, 2002, from Carroll M. Gantz and Lorraine Gantz. *Id.* The Ralphs are the McLaughlins' next door neighbors and own Lot 23, Block 32 3055 Baywood Drive. (R. pp. 375-379). The Ralphs have owned their property since 1997. *Id.* The Seabrook Island Property Owners Association ("SIPOA") is the property owners association for Seabrook Island and the former owner of a 20' Drainage Easement across the north end of the McLaughlins' property. (R. p. 388). That drainage easement contained a "NO BUILD" area as identified on Plats by E.M. Seabrook (R. pp. 375-380).

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

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

(R. p. 81). Part of the easement was a drainage pipe that ran under Lots 21 to 28 on Baywood Drive. (*Id*).

On September 22, 2002, a new plat was recorded in the Office of the Register of Deeds for Charleston County in Book EF at Page 883 of that January 17, 2001, plat from Forsberg Engineering and Surveying entitled "PLAT SHOWING ABANDONMENT OF AN EXISTING 20' DRAINAGE EASEMENT." (R. p. 388). The plat was approved by Mr. Randy Pierce, the Town Administrator for Seabrook Island. *Id.* Using the reference to this new plat, the Plaintiffs purchased Lot 22, Block 32 from Carroll M. and Lorraine D. Gantz. (R. pp. 381-386) The deed from Mr. and Mrs. Gantz to the McLaughlins references the property description in the new plat

by Forsberg. (*Id.*) The deed from the Gantzes was recorded on October 9, 2002, in Book L421 at Page 820. (*Id.*) Both the plat and the deed were recorded as of October, 2002. The McLaughlins have always contended that the easement was abandoned. *Id.*

The Plaintiffs' predecessor in title obtained approval from the Executive Vice President of SIPOA as well as from the Town Administrator to record a new plat showing the abandonment of the easement and the "no build area" in that easement. (R. pp. 68-69). There was no objection from the Plaintiffs or anyone else on Seabrook Island as to the abandonment of the easement in 2002.

In the spring of 2006, the McLaughlins submitted a plan to the SIPOA Architectural Review Board to build their home on Lot 22 at 3061 Baywood Drive. Nothing is built on Seabrook Island without approval of the SIPOA Architectural Review Board. (R. p. 702) The McLaughlins understood from SIPOA that they had the obligation to pay for the removal of any pipe in the No Build Area. (*Id.*) The McLaughlins submitted house plans through their architect Whitney Powers and were told by Coy Foster, SIPOA's ARB administrator, that the McLaughlins were financially responsible for removing the pipe from the drainage area. (R. p. 83). The SIPOA Architectural Review Board approved the plans for the McLaughlins on August 18, 2006, through Coy Foster's letter. (*Id.*).

In June 2007, SIPOA contacted the McLaughlins about creating a plan to address the abandoned easement and pipe. (R. p. 480). The Ralphs also received this letter. (R. p. 58; R. p. 92). Richard Ralph testified that the pipe was working and did not want the McLaughlins to "tear the thing apart or filling it in or whatever they wanted to do on the property. And that is when I argued against it." (*Id.*).

The McLaughlins sought financing for their construction in 2008. (R. p. 247). During that time, Mr. McLaughlin contacted Ron Ciancio of the SIPOA legal committee who gave him verbal approval to continue the process in order to obtain a loan and begin construction. The Ralphs continued to express concerns during this time.

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

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

(R. pp. 400-402).

On September 29, 2008, the President of SIPOA, Sam Reed, convened a meeting with the McLaughlins and their neighbors. The McLaughlins brought their then attorney, their architect, and representatives of their contracting company, too, to discuss a plan from Robert George, a professional engineer, regarding the removal of the pipe and a remedy. (R. p. 246) At that meeting, the McLaughlins agreed to give SIPOA a new easement in the setback area between their property and the Ralphs to install Mr. George's plan and remedy. (*Id*). Mr. McLaughlin allowed a tour of the property and a proposed solution. The Ralphs withdrew any support for that plan. From September through December, 2008, the McLaughlins attempted to resolve the issue. (*Id.*). Ultimately, on December 9, 2008, the McLaughlins removed the pipe in the "NO BUILD" area. (*Id.*).

On that same day, SIPOA filed a complaint and motion for a temporary restraining order in that case captioned *Seabrook Island Property Owners Assoc. v. Paul Dennis McLaughlin and Susan Rhode McLaughlin*, Case Number 2008-CP-10-6975, in the Court of Common Pleas for Charleston County (the "2008 suit")(R. pp. 457-465). In that lawsuit, SIPOA requested relief for all property owners on Seabrook Island, including the Ralphs, in order to stop the McLaughlins from building their home unless the McLaughlins installed another drainage system. The Plaintiff dismissed its lawsuit two (2) days after it was filed on December 11, 2008. (R. pp. 485-498).

In allowing the abandonment of the easement in 2002, approving plans in 2008, the McLaughlins relied upon SIPOA in constructing their house. (R. p. 757). The Ralphs knew that SIPOA ultimately approved plans for the McLaughlins to build on their property. (R. p. 610)

STANDARD OF REVIEW

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

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

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

ARGUMENT

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

The trial court property directed a verdict as to punitive damages. Judge Young properly directed a verdict where there was no issue as to punitive damages to be submitted to the jury. Further, this matter was not properly preserved for appellate review by this court. When ruling on a motion for directed verdict, the court must view the evidence in the light most favorable to the non-moving party. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2010. The reviewing court will apply the same standard. *Id.* The appellate court will reverse a ruling on a directed verdict motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Zinn v. CFI Sales & Marketing, Ltd.*, 415 S.C 93, 780 S.E.2d 611 (Ct. App. 2015). Judge Young property directed a verdict supported by the evidence: there were no actions rising to the level needed for the imposition of punitive damages and where he found evidence to support his ruling that the McLaughlins' actions did not rise to a level requiring punishment. There was no error of law in the striking of the punitive damages demand.

There was no clear and convincing evidence of conscious wrongdoing by the McLaughlins in this case. Mr. McLaughlin consistently testified that he was relying on SIPOA in having his plans approved, in representing that the easement had been abandoned, and in having the authority to proceed with construction from SIPOA. (R. p. 748; R. p. 757; R. p. 761; R. p. 762; R. pp. 763-764; R. pp. 766-767; R. p. 769; R. p. 771). Even the Ralphs testified that

they knew that the McLaughlins' plans were approved and the easement had been purportedly abandoned: Mrs. Ralph testified that she knew the SIPOA approved the plans to build.[3] (R. p. 610). In their own Exhibit 11 presented at trial, Mrs. Ralph confirmed receipt of an email correspondence regarding the abandonment of the easement, representations by the prior owner, and that SIPOA had agreed to an abandonment of the easement. (R. pp. 397-399). Mr. Ralph also acknowledged receiving correspondence from SIPOA that the easement had been abandoned. (R. p. 641). Mr. George, the Plaintiffs' engineering expert, also testified that SIPOA had abandoned the easement, and that the McLaughlins could not have built without SIPOA's approval. (R. p. 716; R. p. 725). The McLaughlins proceeded to build their house based upon what they perceived to be correct, approved plans from the SIPOA. Their actions were not those rising to the level of conscious wrongdoing. *See* contra *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011)(Defendant showed reckless disregard of landowners' rights as required due to consistent and repeated misconduct and violations of regulations regarding flooding, stormwater runoff and intrusion onto neighbors property). The McLaughlins demonstrated no consistent disregard for anyone else's rights. Instead, they built on their property in compliance with the procedures required of them by SIPOA.

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

> He [Mr. McLaughlin] still maintains that he has the right to do it. I don't think you can be punished for doing something that you had the right to do, and he believes he had the right to do it and he still believes he has the right to do it. I just think there's a genuine issue as to whether or not he had the right to do it, but I don't think he was activing malevolently, certainly not to the level of clear and convincing, so I'll grant their motion for punitive damages.

[3] Mrs. Ralph testified that neither she nor her husband took any action to prohibit the McLaughlins from building on their property. (R. pp. 610-611).

(R. pp. 798-799). Judge Young based his decision on the uncontroverted lack of evidence showing any acts on the part of the McLaughlins warranting any punishment, certainly not to the level of clear and convincing evidence. (*Id.*). There was no consciousness of wrongdoing proven by clear and convincing evidence demonstrated by the Defendants at any time where the McLaughlins testified consistently that they relied on SIPOA and on the documents presented to them stating that the easement had been abandoned.

Judge Young further stated:

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

(R. pp. 805-806). Nowhere in their Brief do the Appellants address the clear and convincing standard required for punitive damages; they cannot.

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

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

In addition to the grant of directed verdict being proper, this issue has not been properly preserved for review. The Ralphs' motion for a new trial pursuant to Rule 59 SCRCP was for a new trial absolute, a new trial nisi additur, and a new trial as to damages. (R. pp. 343-348). The Ralphs did not raise the issue of punitive damages in the post trial motion before the trial court and did not object at the time the directed verdict was granted; accordingly, the issue is not preserved. (R. pp. 779-798; R. p. 805; R. p. 892). It is well settled that an issue must have been raise to and ruled upon by the trial court to be preserved for appellate review. *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000). The initial ruling as to the directed verdict as to punitive damages must stand as the Plaintiffs did not raise this issue in their post-trial motions. Without a ruling by the trial court, the reviewing court would not be able to determine whether

the trial court committed error. *Id.* The issue as to the directed verdict as to punitive damages was not raised by the Plaintiffs in their post-trial motions, and, it is not preserved. Further, there was no objection made at the time of the trial as to this issue. (R. p. 934). Accordingly, the issue has not been preserved for appellate review, being another grounds for sustaining Judge Young's ruling as to punitive damages.

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

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

wholly unsupported by evidence. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E. 2d 715 (Ct. App. 1996); *Morris v. Jensen*, 309 S.C. 153, 420 S.E.2d 710 (Ct. App. 1992); *Umhoefer v. Bollinger*, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989). Judge Young's well-written and thorough twelve (12) page Order demonstrates his dedicated review of the case prior to denying the motion from the Ralphs. (R. pp. 22-31). His decision is wholly supported by the evidence presented at trial as referenced in the Statement of Facts of the Order. (*Id.*) His decision is wholly supported by his recitation of the relevant law as referenced in the Discussion section of the Order. (*Id.*) His decision showed no abuse of discretion. (*Id.*)

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

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

(R. pp. 22-31). To say that the Order is "wholly unsupported" by the evidence is to either to mischaracterize it, at best, or to ignore the words on the page, at worst. Based upon the thorough references in over three pages of the Order to the evidence presented at trial, Judge Young's Order should be affirmed.

Judge Young's Order is further supported by the application of the cases referenced as applied to the evidence in the Discussion section of the Order. Judge Young carefully distinguished a case which the Ralphs' made reference to in reliance that they should be granted a new trial, *Hinson v. A.T. Sistare Const. Co.*, 236 S.C. 125, 113 S.E.2d 341 (1960). (R. pp. 22-31). For unknown reasons, the Ralphs make no reference to this case in their Brief before this Court. Judge Young dissected *Hinson* as being distinguishable from this matter. (*Id.*). Judge Young described in detail the difference between *Hinson* and this case: the damages issues were not the same. (*Id.*). Judge Young carefully calculated that the jury's award of One Thousand and No/100 ($1,000.00) Dollars as being a truly nominal sum representing one half of one percent (0.5%) of the claim of damages by the Plaintiff. (*Id.*). Judge Young ruled that it was indeed the jury's intention to award only nominal damages. (*Id.*). Obviously, the jury paid close attention to the charges given to them, none of which were objected to by the Plaintiffs, one of which was as follows:

<u>Nominal Damages</u>

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

(R. pp. 508-511).

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

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

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

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

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

(R. pp. 22-33).

The jury's verdict was supported by more than just "any evidence" so that Judge Young had no choice but to sustain their verdict. The jury deliberated most of the day on January 26, 2017, after closing arguments and the jury charge, over five hours (R. p. 923; R. pp. 927-934). The deliberations followed two full days of detailed testimony by the Plaintiffs, the Defendants, Howard Yates, Robert George, "Nick" Thompson, and John Wells. During their deliberations, the jury asked to re-hear the testimony of Howard Yates. After that testimony was re-heard, the jury advised the Court that it could not reach a decision. Around 4:30 p.m. on the last day of trial, the jury received an *Allen* charge. *Allen v. United States*, 164 U.S. 492 (1896); *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015), *reh'g denied, cert. denied.* (R. pp. 928-930). There were no objections given by the Plaintiffs to the jury receiving an *Allen* charge or to any of the jury charges. The length of deliberation alone and the careful consideration given over hours of deliberation must be allowed to stand as set forth in Young's Order. Judge Young properly held the amount awarded was consistent and denied the motion for a new trial absolute.

Judge Young further properly denied the motion for a new trial nisi additur. The motion requires the court to consider the adequacy of the verdict in light of the evidence presented. *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 200). There must be compelling reasons offered to invade the jury's province in granting a new trial nisi additur. *Luchok v. Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010). Judge Young could not find any compelling reason as, ultimately, the jury returned its verdict scratching out "actual" by damages and inserting "nominal." (R. p. 19-21; R. pp. 22-32). For the same reasons Judge Young could not grant a new trial, he could not grant a new trial nisi additur. There was ample evidence supported the jury's award.

Lastly, Judge Young properly denied the motion for a new trial as to damages only. A new trial on damages alone is not warranted unless the evidence indicated that a directed verdict as to liability would have been proper. *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993). The Court denied both the Plaintiffs' and Defendants' motions for a directed verdict, finding that there were issues of fact regarding the trespass cause of action. (R. pp. 22-33). The one cause of action for trespass was ruled to be a question of fact, which fact question the jury answered, finding trespass but awarding only nominal damages after much deliberation. (*Id.*). That the Plaintiffs' are upset with the amount of the jury's nominal damage award does not justify a new trial nisi additur, a new trial on damages, or a new trial absolute. Because the Plaintiffs are upset with the lack of an award of damages does not constitute compelling reasons for invading the jury's province. *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003). The amount of the verdict is not grossly inadequate or shocking where the jury specifically named the damages to be nominal. *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000). Judge Young carefully considered that

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

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

The trial court properly ruled that the prior order granting summary judgment to the former third party defendant, the Seabrook Island Property Owners Association, did not constitute a final ruling by and between the remaining parties as being conclusive. On June 7, 2016, the Honorable G. Thomas Cooper, Jr., entered his order granting the third party defendant SIPOA judgment as a matter of law as to the cause of action pending against it for indemnity by the McLaughlins. (R. pp. 5-12). The Judge based his ruling on the lack of evidence showing an unambiguous promise from SIPOA on which the McLaughlins would be entitled to rely so that their third-party complaint cause of action could proceed. (*Id.*) The Order did not relate to the only issue in the case by and between the Ralphs and the McLaughlins: the alleged trespass. There is not one ruling in that order regarding trespass or the lawful or unlawful acts of the

McLaughlins in relation to the Ralphs' property. It is simply inapplicable to the Ralphs' causes of action against the McLaughlins. It is not the law of the case as to these parties as it makes no ruling as to the matters brought by the Ralphs. In fact, at the same time, Judge Cooper denied both the Ralphs' and the McLaughlins' motions for summary judgment as to the issues between them. (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 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).

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

the law of the case. Unlike in *Charleston Lumber*, there was not a complete adjudication of the matters by Judge Cooper to make his ruling the law of the case where he also found there to be issues for trial by and between the Ralphs and the McLaughlins. (R. pp. 5-18). Judge Cooper made no ruling as to the Ralphs cause of action for trespass, and Judge Young properly allowed to consider the McLaughlins' belief that they had the right to rely on SIPOA in building their house.

Judge Cooper's ruling about reliance on SIPOA by the McLaughlins related only to the McLaughlins' claim for indemnity from SIPOA and did not relate to the alleged trespass by the McLaughlins as complained of by the Ralphs. (R. pp. 5-18; R. p. 50-84). Judge Cooper ruled there were no issues of material fact regarding the McLaughlins right to rely on SIPOA in order to bring their third party action. (R. pp. 5-18.) His Orders of that same date stated there were issues for trial by and between the Ralphs and the McLaughlins. Judge Young agreed and submitted the case to the jury. Accordingly, there are no grounds to overturn the jury's verdict based upon Judge Cooper's Order granting SIPOA judgment as a matter of law.

CONCLUSION

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

Mt. Pleasant, South Carolina
April 18, 2018

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Ralph and Eugenia Ralph, Appellants,

v.

Paul Dennis McLaughlin and Susan Rode McLaughlin, Respondents.

Appellate Case No. 2017-000866

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5681
Heard May 15, 2019 – Filed August 21, 2019

REVERSED AND REMANDED

G. Dana Sinkler, of Gibbs & Holmes, of Wadmalaw Island, and Ainsley Fisher Tillman, of Ford Wallace Thomson LLC, of Charleston, both for Appellants.

George Hamlin O'Kelley, III, of Buist Byars & Taylor, LLC, of Mt. Pleasant, for Respondents.

GEATHERS, J.: This case involves a property dispute on Seabrook Island between neighbors Richard and Eugenia Ralph ("the Ralphs"), and Paul and Susan McLaughlin ("the McLaughlins"). The dispute in question concerns the destruction of a drainage easement by the McLaughlins that, the Ralphs allege, exacerbated drainage issues on the Ralphs' property. At trial, the jury found for the Ralphs on their cause of action for trespass and awarded them $1,000 in nominal damages. On appeal, the Ralphs argue the circuit court erred in 1) failing to apply the rulings and

factual determinations from a previous grant of summary judgment to a third-party defendant as the law of the case; 2) entering a directed verdict for the McLaughlins on the issue of punitive damages; 3) failing to find the McLaughlins trespassed as a matter of law; and 4) failing to grant the Ralphs a new trial absolute, a new trial *nisi additur*, or a new trial on damages. We reverse and remand the case for a new trial on compensatory damages and punitive damages.

FACTS

In 1984, E.M. Seabrook, Jr. prepared and recorded a plat depicting blocks 32 and 33 of Seabrook Island ("the Seabrook plat"). In 1987, he similarly prepared and recorded a second plat depicting blocks 32 and 33. To alleviate drainage issues concerning several lots on block 32, Seabrook established a twenty-foot-wide drainage easement and a corresponding no-build area across the back of lots 21 through 28, which are reflected in the plats. The plats also reflect a twenty-foot-wide drainage easement running between the property lines of lots 21 and 22, extending ten feet into each lot. The drainage easements contained a pipe that began at the front corner of lot 22, ran down the property line, turned ninety degrees, and extended across lots 22 through 28 before emptying into a water hazard on the neighboring golf course.[1]

In 1997, the Ralphs purchased lot 23 and recorded their deed, which granted them the property "with, all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining." The deed also indicated the property was subject to "the Covenants, Conditions, Restrictions, Limitations, Affirmative Obligations and Easements of Record . . . ." Similarly, in 1998 or 1999, Carroll and Lorraine Gantz ("the Gantzes") purchased lot 22 and recorded their deed. The Gantzes' deed indicated lot 22 was subject to "a twenty[-]foot (20') easement for drainage and a ten[-]foot (10') easement for drainage as shown on the [Seabrook plat]," as well as "the area designated as 'No Build Area' shown on the [Seabrook plat]."

In 2002, the Gantzes, predecessors in title to the McLaughlins, approached the Seabrook Island Property Owners Association ("SIPOA") about eliminating the twenty-foot drainage easement and no-build area on the back of lot 22. Thereafter, SIPOA unanimously voted to give the easement back to the owners of lot 22. On September 11, 2002, a new plat prepared by Forsberg Engineering ("the Forsberg plat") entitled "Plat Showing Abandonment of an Existing 20' Drainage Easement

[1] Lots 23 through 28 are downstream from lot 22.

Lot 22, Block 32," was recorded. The Forsberg plat also indicated the current no-build area was to be abandoned.

In October 2002, the Gantzes conveyed lot 22 to the McLaughlins, and the deed was recorded. The legal description of the property indicated that it remained subject to the ten-foot drainage easement depicted in the Forsberg plat and "all Restrictions, Covenants, Easements, Rights-of-Way, Matters and Conditions of record affecting said property . . . ." Mr. McLaughlin indicated he never discussed the twenty-foot easement with the Gantzes or SIPOA prior to closing, but he maintained that the real estate agent asserted the easement had been abandoned.[2] Mr. McLaughlin also testified his closing attorney brought the twenty-foot easement to his attention before indicating that it had been abandoned, telling him "everything was appropriate and in order."

In 2006, the McLaughlins approached SIPOA's Architectural Review Board about building a house on their property. According to the plans, part of the house was to be sited over the twenty-foot easement and no-build area. At an August 15, 2006 SIPOA meeting, the preliminary plans were unanimously approved subject to several stipulations.[3] Thereafter, the McLaughlins received a letter from the administrator of the Architectural Review Board, dated August 18, 2006, stating:

> The Architectural Review Board has approved the Preliminary Plans submitted for Block 32 Lot 22, Seabrook Island, SC. Please address the following comments of the ARB and re-submit plans for Conditional Review.
>
> 1. Owner is to assume all responsibility for the underground drainage line at the 20' drainage easement/driveway.[4]

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[2] However, Mr. McLaughlin conceded that the real estate agent had never shown him any documents concerning the abandonment of the easement.

[3] These stipulations are identical to the comments included in the letter from the administrator of the Architectural Review Board. *See infra*.

[4] In a later lawsuit, SIPOA indicated it "defined the 'cost necessary to remove the easement' to be the cost of re-working the drainage in a manner that maintains the existing drainage for other related lots, i.e., the cost of installing alternative drainage in a manner that will not undermine or adversely affect such existing drainage system 'downstream.'" Mr. McLaughlin indicated he understood this to mean the

2. Owner is to assume all responsibility for the abandoned drainage easement that may contain a pipe.
3. Property lines must be located prior to any grading because of the Right-Of-Way for the SIPOA 20' drainage easement.

In June 2007, the McLaughlins received a letter from SIPOA regarding a plan to address the drainage pipe and eliminate the twenty-foot easement. The Ralphs received the same letter. After receiving the letter, Mr. Ralph met with John Thompson, the executive director of SIPOA, to voice his objections regarding any plans to remove the drainage pipe.

Over the course of the next year, the McLaughlins sought financing for their construction, closing on a loan in June 2008. At some point, the McLaughlins received a call from the chair of the SIPOA legal committee indicating there were some issues concerning the drainage pipe. On September 22, 2008, Thompson sent an email to the owners of lots 21 through 28 seeking to schedule a meeting concerning the easement. The email summarized the dispute surrounding the easement[5] and indicated the drainage pipe was still functioning. The email further indicated that several neighbors objected to the removal of the pipe due to concerns over adverse effects it would have on drainage and that SIPOA had hired an engineer, Robert George, to evaluate the consequences of removing the pipe.[6]

The meeting between SIPOA, the McLaughlins, and the affected property owners was held on September 29, 2008. At the meeting, Mr. George presented his findings and advised against removing the drainage pipe on lot 22, indicating that doing so would increase the likelihood of flooding and exacerbate existing drainage problems. Another meeting was held to discuss the issue on October 1, 2008. Following the meetings, several emails were exchanged between the affected property owners and the McLaughlins. In these emails, the property owners continued to express their concerns about the adverse impact the removal of the pipe

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McLaughlins, "bore the financial responsibility of taking care of removing [the pipe] if [they] wanted to."

[5] In his email, Thompson indicated SIPOA had voted to give the easement back to the property owners, but only two had chosen "to take the formal action to remove the easement from the recorded documents at the [c]ounty record[]s office . . . ."

[6] Additionally, the email contained an attached report prepared by Mr. George advising against the removal of the drainage pipe on lot 22.

would have on their properties, and the McLaughlins adamantly denied the existence of an easement on their lot. After the McLaughlins and their neighbors failed to reach an agreement, SIPOA indicated it had exhausted its options. On October 22, 2008, SIPOA sent a letter to the affected property owners indicating that it had rescinded the May 2002 resolution abandoning the easement.

On December 5, 2008, the McLaughlins emailed the neighboring property owners asserting that there was no easement on their property, they had been patient with SIPOA, and they would begin construction on their home. On December 9, 2008, the McLaughlins authorized their construction team to remove the drainage pipe. On the same day, SIPOA filed a lawsuit against the McLaughlins seeking a temporary restraining order to prevent the removal of the pipe.[7] However, SIPOA withdrew the lawsuit two days later on December 11, 2008.[8] Following the removal of the pipe, the McLaughlins built part of their home over the no-build area and the area formerly containing the pipe.

On September 30, 2011, the Ralphs filed a complaint[9] against the McLaughlins seeking actual and punitive damages and alleging the McLaughlins caused flooding and poor drainage on the Ralphs' property by destroying the drainage easement. On December 6, 2011, the McLaughlins filed an answer and a third-party complaint against SIPOA alleging reliance on representations by SIPOA. On February 14, 2014, the Ralphs moved for partial summary judgment on their trespass claim. The McLaughlins filed a motion for summary judgment on February 19, 2014, and, a day later, SIPOA filed a motion for summary judgment. While these motions were pending, the Ralphs moved to strike the matter from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure (SCRCP),[10] and the parties entered into a consent order striking the case from the docket on June 24, 2014. The Ralphs moved to restore the case to the active docket on May 11,

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[7] It is unclear whether the McLaughlins removed the pipe before the filing of the lawsuit. The lawsuit was filed at 11:40 a.m., and Mr. Ralph testified the pipe was removed around 2:00 or 3:00 p.m. However, Mr. McLaughlin testified the pipe was removed before the lawsuit was filed.

[8] In his deposition, Thompson indicated the lawsuit was withdrawn as moot because the pipe had already been removed.

[9] The Ralphs filed an amended complaint on July 17, 2013, pleading trespass, punitive damages, and intentional infliction of emotional distress.

[10] Pursuant to Rule 40(j), "[a] party may strike its complaint . . . from any docket one time as a matter of right, provided that all parties adverse to that claim . . . agree in writing that it may be stricken . . . ."

2015, and the case was restored by consent order on June 23, 2015, pursuant to Rule 40(j), SCRCP.[11]

After the case was restored, the parties refiled their motions for summary judgment. On May 11, 2016, the Honorable G. Thomas Cooper, Jr.,[12] heard all three motions for summary judgment, denying both the Ralphs' motion and the McLaughlins' motion. However, Judge Cooper granted SIPOA's motion for summary judgment, finding there was no evidence to show SIPOA had made any promises to the McLaughlins and, as a matter of law, the McLaughlins could not have reasonably relied on SIPOA.

At trial, the Ralphs presented Howard Yates as an expert in real property. Yates indicated that he examined the chains of title for the Ralphs and McLaughlins and opined that both properties became subject to the drainage easement after the properties were first purchased according to the Seabrook Island plat. Yates explained the lot owners each held a special property interest in the easement. Yates further testified SIPOA could not unilaterally abandon the easement, indicating abandonment would require the consent of everyone who held a special property interest. Additionally, while Yates conceded that lot 22 was subject to the Forsberg plat, he maintained that it was still subject to the earlier plats as well. Yates further testified that determining whether SIPOA had authority to abandon the easement would require an attorney to look at the deed and plats and that such a review would only take twenty to thirty minutes.

The Ralphs also presented Robert George as an expert in civil engineering, registered land surveying, and storm-water drainage. George testified that the Ralphs' yard is a trough and the original design for Seabrook Island was meant to alleviate this issue. George further explained this design was interrupted by the McLaughlins' removal of the pipe, leading to increased water flow into the Ralphs' yard, increased "ponding,"[13] and poor drainage. Additionally, Mrs. Ralph indicated the standing water in their yard could reach a depth of eight inches and could take several days to drain, whereas the water would typically dissipate within a day and a half before removal of the pipe.

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[11] Pursuant to Rule 40(j), "[u]pon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule."

[12] While Judge Cooper ruled on the motions for summary judgment, the rest of the case was before the Honorable Roger M. Young, Sr.

[13] The term "ponding" was used to describe the accumulation of standing water as a result of poor surface absorption caused by the high water table on Seabrook Island.

Concerning damages, the Ralphs estimated their house was worth $775,000 without the backyard ponding issues. After removal of the pipe, both of the Ralphs testified that they believed the value of their property had dropped by at least $200,000. The Ralphs also presented Nick Thompson as an expert in commercial and residential appraisal. Thompson indicated he had trouble appraising the Ralphs' property because he had not been able to find any sales with a similar problem. According to Thompson, the lack of comparable sales indicated that either the Ralphs' drainage problems were unique and a similar situation had never existed before or property owners with the same problems had not been able to find a buyer. Thompson then estimated the Ralphs' property had decreased in value by ten, fifty, or sixty percent. Thompson further indicated he believed the Ralphs' property to be worth approximately $567,000 before the pipe was removed, opining that the Ralphs would be lucky to sell their property for half that price afterwards. Additionally, Mrs. Ralph testified that they had paid Mr. George $17,000 in an attempt to alleviate the drainage problem, but no solution could be implemented.

After the Ralphs rested their case, the McLaughlins moved for a directed verdict on several issues, including punitive damages. The Ralphs argued Mr. McLaughlin's testimony indicated that he acted with reckless disregard for the rights of his neighbors.[14] The circuit court indicated it did not think punitive damages were applicable because Mr. McLaughlin believed he had the right to remove the pipe. Ultimately, the circuit court found, "I don't think he was acting malevolently, certainly not to the level of clear and convincing, so I'll grant their motion for punitive damages."

After this ruling, the Ralphs made two additional arguments in support of punitive damages. First, the Ralphs argued that, under South Carolina law, a purchaser is imputed with knowledge of all the other deeds in his chain of title and the act of digging up the pipe could be construed as willful because the McLaughlins are presumed to have known the easement ran across their property. The circuit court responded, "Well, I got to disagree with you on that. That's language in the deed. I doubt there's probably anybody in this room, including all the lawyers, who read the deed when they bought their piece of property. They had their lawyer read it, and it's there." Second, the Ralphs argued the conclusion in Judge Cooper's unappealed grant of summary judgment—that the McLaughlins could not rely on

[14] Mr. McLaughlin testified he attended the SIPOA meeting where Mr. George presented his findings, was aware removing the pipe could have adverse effects on the downstream lots, and proceeded with construction despite the concerns of his neighbors.

any representations by SIPOA—was the law of the case. As such, the Ralphs argued this conclusion should be binding, and they should be allowed to argue to the jury that the removal of the pipe was intentional and punitive damages applied. However, the circuit court ruled the grant of summary judgment to SIPOA was not binding on the jury. After dismissing these arguments, the circuit court reiterated that it was granting the directed verdict on punitive damages.

The McLaughlins' case centered on the theory that they had justifiably relied on SIPOA and the purported abandonment of the easement in removing the pipe. The McLaughlins also testified they had observed significant amounts of standing water in the Ralphs' yard when visiting their property prior to construction. Additionally, Mr. McLaughlin explained that when determining where to site their house, SIPOA's Architectural Review Board required the McLaughlins to preserve a large oak tree in the middle of their property. As such, the McLaughlins had the option to site the house on the front or back side of the oak tree, and they ultimately decided to site the house on the back side.[15] Mr. McLaughlin further indicated he removed the pipe because he was frustrated; he had not asked any of his neighbors for permission to remove the pipe or begin construction; and following construction, he told SIPOA that it could take on the responsibility of providing a solution to the Ralphs' drainage problem.

After the close of the McLaughlins' case, the Ralphs moved for a directed verdict on trespass, arguing SIPOA's purported abandonment of the drainage easement would not have affected the Ralphs' property rights. The circuit court denied the motion, finding the issues of trespass and abandonment were both for the jury. After closing arguments, the circuit court charged the jury on, among other things, the law of easements, trespass, abandonment, and nominal damages. After deliberating for about five hours, the jury indicated it was deadlocked, and the circuit court issued an *Allen*[16] charge. After resuming deliberations for a little over an hour, the jury returned the following verdict: "We, the jury, find for the plaintiff against the defendant in the amount of $1,000 actual nominal[[17]] damages . . . ."

On February 3, 2017, the Ralphs moved for, in the alternative, a new trial absolute, a new trial as to damages, or a new trial *nisi additur* pursuant to Rule 59, SCRCP. In denying the motions for a new trial absolute and a new trial *nisi additur*,

[15] The drainage easement and no-build area ran along the back side of the property.
[16] *Allen v. United States*, 164 U.S. 492 (1896).
[17] The verdict form only had a space for actual damages, but the jury wrote in the word nominal underneath.

the circuit court found it was the jury's intention to award nominal damages and that such an award was supported by the evidence at trial. Additionally, in denying the motion for a new trial as to damages, the circuit court cited the same rationale and indicated a new trial as to damages was not warranted because a directed verdict on the issue of trespass would not have been proper. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by failing to apply the rulings and factual determinations in the previous grant of summary judgment to SIPOA as the law of the case?

2. Did the circuit court err by entering a directed verdict for the McLaughlins on the issue of punitive damages?

3. Did the circuit court err in failing to find the McLaughlins trespassed as a matter of law?

4. Did the circuit court err in failing to grant the Ralphs a new trial absolute, a new trial *nisi additur*, or a new trial on damages?

STANDARD OF REVIEW

Directed Verdict

"In reviewing [] a motion for directed verdict . . . , the appellate court applies the same standard as the circuit court." *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 394, 714 S.E.2d 904, 910 (Ct. App. 2011) (second alteration in original) (quoting *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 200, 621 S.E.2d 363, 366 (Ct. App. 2005)). As such, "this [c]ourt must view the evidence and all reasonable inferences from the evidence in the light most favorable to the party opposing the motion." *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411 (2012). "In essence, we must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." *Hurd v. Williamsburg Cty.*, 353 S.C. 596, 608, 579 S.E.2d 136, 142 (Ct. App. 2003). "The appellate court will reverse the [circuit] court's ruling on a [directed verdict] motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Zinn v. CFI Sales & Mktg., Ltd*, 415 S.C. 93, 108–09, 780 S.E.2d 611, 619 (Ct. App. 2015) (second alteration in original) (quoting *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006)).

New Trial

"A [circuit court]'s order granting or denying a new trial upon the facts will not be disturbed unless [its] decision is wholly unsupported by the evidence[] or the conclusion was controlled by an error of law." *Curtis v. Blake*, 392 S.C. 494, 500, 709 S.E.2d 79, 82 (Ct. App. 2011) (quoting *Folkens v. Hunt*, 300 S.C. 251, 254–55, 387 S.E.2d 265, 267 (1990)). "Review by an appellate court of the grant or denial of a new trial is 'limited to consideration of whether evidence exists to support the [circuit] court's order.'" *Id.* at 505–06, 709 S.E.2d at 85 (quoting *Lane v. Gilbert Constr. Co., Ltd.*, 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009)). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996); *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989).

New Trial *Nisi Additur*

"The denial of a motion for a new trial *nisi* is within the [circuit court]'s discretion and will not be reversed on appeal absent an abuse of discretion." *Vinson*, 324 S.C. at 406, 477 S.E.2d at 723. "This [c]ourt has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law." *Id.* at 406, 477 S.E.2d at 723–24. "We will only reverse if the [circuit court] abused [its] discretion in deciding a motion for new trial *nisi additur* to the extent that an error of law results." *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). "The [circuit court] who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this [c]ourt. Accordingly, great deference is given to the [circuit court]." *Vinson*, 324 S.C. at 405–06, 477 S.E.2d at 723 (internal citation omitted). "Therefore, on appeal of the denial of a motion for a new trial *nisi,* this [c]ourt will reverse when the verdict is grossly inadequate or excessive requiring the granting of a new trial absolute." *Id.* at 406, 477 S.E.2d at 724.

LAW/ANALYSIS

I. Law of the Case

The Ralphs argue the circuit court erred in failing to apply the findings of fact and conclusions of law in the grant of summary judgment to SIPOA as the law of the case. The McLaughlins argue the circuit court properly refused to apply the findings of fact and conclusions of law in Judge Cooper's summary judgment order

as the law of the case because there was no ruling in his order applying to the Ralphs and McLaughlins; Judge Cooper denied the summary judgment motions of the Ralphs and the McLaughlins; and Judge Cooper ruled on the issue of indemnity, not trespass or punitive damages. We agree with the Ralphs.

"An unappealed ruling is the law of the case and requires affirmance." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013); *see also Berry v. McLeod*, 328 S.C. 435, 442, 492 S.E.2d 794, 798 (Ct. App. 1997) ("There is no appeal from this ruling, and thus, it becomes the law of the case."). "Where no exception is taken to findings of fact or conclusions of law, they become the 'law of the case.'" *Walters v. Canal Ins. Co.*, 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct. App. 1987) (quoting *Ashy v. WeCare Distribs., Inc.*, 289 S.C. 526, 528, 347 S.E.2d 123, 125 (Ct. App. 1986)). "The law of the case applies both to those issues explicitly decided and to those issues [that] were necessarily decided in the former case." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). "This State has a long-standing rule that one judge of the same court cannot overrule another." *Shirley's*, 403 S.C. at 573, 743 S.E.2d at 785.

In *Shirley's*, our supreme court found that previous unappealed orders by separate judges did not constitute the law of the case because the issues in question were distinctly different. *Id.* In so holding, the supreme court found that neither of the previous unappealed orders specifically ruled on the issue in question. *Id.* Similarly, in *Binkley v. Burry*, this court found that a previous judge's unappealed order in regard to notice of the existence of an easement did not constitute the law of the case concerning notice of the scope of the easement. 352 S.C. 286, 294–95, 573 S.E.2d 838, 843 (Ct. App. 2002). The *Binkley* court held, "the question of notice regarding the existence of an easement is distinct from the question of notice as it relates to the scope and enforceability of the easement." *Id.* at 294, 573 S.E.2d at 843. The court further held that while "the law of the case doctrine may preclude [] challenging [the] finding that the Binkleys did not have notice of the scope and enforceability of the easement, the doctrine does not prevent [] raising the issue of when the Binkleys had notice of the existence of the easement." *Id.* at 294–95, 573 S.E.2d at 843.

Here, Judge Cooper's grant of summary judgment made explicit rulings and findings of fact concerning the McLaughlins. Specifically, Judge Cooper ruled "as a matter of law, there is simply no genuine issue of material fact that the McLaughlins reasonably relied on the unambiguous acts, representations, and writings of SIPOA or otherwise reasonably based their decision to remove the pipe in 2008 . . . ." Judge Cooper's grant of summary judgment was not appealed. As such, the finding that the McLaughlins could not claim reliance on SIPOA in

removing the pipe was the law of the case. *See Shirley's*, 403 S.C. at 573, 743 S.E.2d at 785 ("An unappealed ruling is the law of the case and requires affirmance.").

The issue of whether the McLaughlins could rely on SIPOA is the exact issue the Ralphs raised to the circuit court in arguing that Judge Cooper's order constituted the law of the case. Accordingly, we find the circuit court erred in ruling that Judge Cooper's findings were not binding on the court and the jury. We note the McLaughlins' defense was significantly based on the theory that they were acting in reliance on SIPOA. Moreover, the circuit court's decision to grant the directed verdict on punitive damages was based largely on its determination that the McLaughlins believed they had the right to remove the pipe based on SIPOA's representations. We address the impact of this error below.

II. Punitive Damages

The Ralphs argue the circuit court erred in granting a directed verdict as to punitive damages because more than one reasonable inference could be drawn from the evidence as to whether the McLaughlins acted with reckless disregard for the property rights of the Ralphs. We agree.

Preservation

At the outset, the McLaughlins argue this issue is not preserved because the Ralphs did not raise the issue of punitive damages in their post-trial motions and did not object when the directed verdict was granted. We disagree.

"It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). "The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Without an initial ruling by the [circuit] court, a reviewing court simply would not be able to evaluate whether the [circuit] court committed error." *Staubes*, 339 S.C. at 412, 529 S.E.2d at 546. "If the losing party has raised an issue in the lower court, *but the court fails to rule upon it*, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On*, 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file such a motion when an issue or argument has been raised, *but not ruled on*, in order to preserve it for appellate review." (second emphasis added)). "Imposing this

preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On*, 338 S.C. at 422, 526 S.E.2d at 724. However, "[p]ost-trial motions are not necessary to preserve issues that have been ruled upon at trial . . . ." *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). As such, the mere fact that a party received an unfavorable ruling does not require that party to re-raise the issue in a Rule 59(e) motion to preserve it. *See Eubank v. Eubank*, 347 S.C. 367, 373 n.2, 555 S.E.2d 413, 416 n.2 (Ct. App. 2001) ("The 'raised to and ruled on' rule of error preservation requires only a ruling, *not necessarily a favorable one*." (emphasis added)).

The issue of punitive damages was raised to the circuit court when the McLaughlins moved for a directed verdict. In opposing the motion, the Ralphs argued that evidence in the record supported the inference that the McLaughlins acted recklessly, that the McLaughlins had imputed knowledge of the easement through their chain of title, and that the law of the case precluded the McLaughlins from claiming reliance on SIPOA. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). After hearing arguments from both sides, the circuit court granted a directed verdict in favor of the McLaughlins. *See Staubes*, 339 S.C. at 412, 529 S.E.2d at 546 ("Without an initial ruling by the [circuit] court, a reviewing court simply would not be able to evaluate whether the [circuit] court committed error."). Accordingly, because this issue was raised to and ruled upon by the circuit court, the Ralphs were not required to make an objection or raise the issue in a post-trial motion to preserve it for appellate review. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("If the losing party has raised an issue in the lower court, *but the court fails to rule upon it*, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." (emphasis added)); *Wilder Corp.*, 330 S.C. at 77, 497 S.E.2d at 734 ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial . . . .").

Merits

The Ralphs argue the circuit court erred in failing to submit the issue of punitive damages to the jury. The McLaughlins argue the circuit court properly granted a directed verdict on punitive damages because there was no evidence to support the inference that the McLaughlins acted recklessly, willfully, or wantonly. We agree with the Ralphs.

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or

malicious conduct in the future." *Wimberly v. Barr*, 359 S.C. 414, 423, 597 S.E.2d 853, 858 (Ct. App. 2004). "Punitive damages may be awarded for trespass when a defendant's acts have been willful, wanton or in reckless disregard of the rights of another." *Id.*; *see also Hinson v. A. T. Sistare Constr. Co.*, 236 S.C. 125, 131, 113 S.E.2d 341, 344 (1960) ("Trespass through mere negligence affords no ground for punitive damages; but such damages may be awarded whe[n] the trespass is wil[l]ful and deliberate."), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). "'Recklessness implies the doing of a negligent act knowingly'; it is a 'conscious failure to exercise due care.'" *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting *Yaun v. Baldridge*, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." *Id.* Moreover, "[a] jury may award punitive damages even 'when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights.'" *Fairchild v. S.C. Dep't of Transp.*, 385 S.C. 344, 353–54, 683 S.E.2d 818, 823 (Ct. App. 2009) (quoting *Camp v. Components, Inc.*, 285 S.C. 443, 444, 330 S.E.2d 315, 316 (Ct. App. 1985)).

"When ruling on a directed verdict motion as to punitive damages, 'the circuit court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party.'" *Hollis*, 394 S.C. at 393–94, 714 S.E.2d at 909–10 (quoting *Mishoe*, 366 S.C. at 200, 621 S.E.2d at 366). "It is not the duty of the [circuit] court to weigh the testimony in ruling on a motion for a directed verdict." *Fairchild*, 398 S.C. at 99, 727 S.E.2d at 411. Rather, "[t]he issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." *Hollis*, 394 S.C. at 394, 714 S.E.2d at 910 (quoting *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366). Once the issue has been submitted to the jury, "the plaintiff has the burden of proving [punitive] damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135 (2005). Accordingly, in ruling on a directed verdict motion as to punitive damages, the circuit court must determine whether there are any reasonable inferences from the evidence to support the conclusion that the defendant's behavior was reckless. If such an inference can be made, the issue should be submitted to the jury, who in turn must determine whether recklessness was proven by clear and convincing evidence.

As referenced above, this court has previously addressed when the issue of punitive damages must be submitted to the jury in *Mishoe* and *Hollis*. In *Mishoe*, the plaintiff suffered serious injuries to her left ankle and right knee when her foot got caught in a hole while walking across the pavement near a hospital's emergency room exit. 366 S.C. at 199, 621 S.E.2d at 365. In determining that the circuit court correctly denied the defendant's motions for a directed verdict and a judgment not withstanding the verdict, this court noted that the chief executive officer of the hospital was provided with actual, written notice of the hole almost a year before the plaintiff's accident. *Id.* at 201, 621 S.E.2d at 366. The court then stressed that, despite such notice, the hospital took no action to repair the hole or to warn visitors or patients of its existence. *Id.* at 201–02, 621 S.E.2d at 366. Accordingly, the court determined "evidence of this written notice [was] sufficient to submit the issue of [Defendant]'s willful, wanton, reckless, or malicious conduct to the jury." *Id.* at 202, 621 S.E.2d at 366.

In *Hollis*, this court again found that the circuit court properly denied a directed verdict on the issue of punitive damages. 394 S.C. at 390, 714 S.E.2d at 907–08. In the case, the defendant purchased property directly upstream from the plaintiffs for the purpose of developing a residential subdivision. *Id.* at 390, 714 S.E.2d at 908. As a result of the defendant's development, the plaintiffs experienced severe flooding on their property that inhibited access to their home and filled their ponds with up to four feet of sediment. *Id.* In determining the issue was correctly submitted to the jury, the *Hollis* court noted that the defendant "ignored regulations regarding erosion control, stormwater runoff, and even its own engineer's plans; took no action to prevent or correct damage it knew it was causing to the ponds; and used threats and deception to avoid the consequences of its misconduct." *Id.* at 394, 714 S.E.2d at 910. The court then highlighted the circuit court's summary of the evidence, finding that the plaintiffs had expressed concerns about the development's effects on their property both before and during construction, the South Carolina Department of Health and Environmental Control and Richland County had put the defendant on notice that it was not maintaining its stormwater management plan, the defendant inadequately maintained the stormwater management system, and the defendant attempted to bully and threaten the plaintiffs. *Id.* After reviewing the record, the *Hollis* court found that the circuit court "correctly denied the motion because, viewing the evidence in the light most favorable to the [plaintiffs], the jury had ample evidence from which to find [defendant] acted in reckless disregard of the rights of others." *Id.* at 395, 714 S.E.2d at 910.

We find the decision to grant the directed verdict was based on an error of law, as the circuit court's determination that the McLaughlins justifiably relied on

SIPOA's representations in removing the pipe was in direct contravention of Judge Cooper's determinations of law.[18] *See Zinn*, 415 S.C. at 108–09, 780 S.E.2d at 619 ("The appellate court will reverse the [circuit] court's ruling on a [directed verdict] motion [] when . . . the ruling is controlled by an error of law." (second alteration in original) (quoting *Law*, 368 S.C. at 434–35, 629 S.E.2d at 648)). However, even absent Judge Cooper's ruling, the circuit court should have submitted the issue of punitive damages to the jury.

First, the jury could have found the McLaughlins knew or should have known that their downstream neighbors had property interests in the drainage easement and no-build area before the McLaughlins removed the pipe and built their house. Mr. McLaughlin indicated he relied on the representations of his real estate agent and did not speak to SIPOA about the existence of the easement before purchasing the property. However, under South Carolina law, the McLaughlins had a duty to inquire into the property rights in the easement, as they are presumed to have knowledge of the recorded easements in their chain of title. *See Moyle v. Campbell*, 126 S.C. 180, 193–94, 119 S.E. 186, 190 (1923) ("The law imputes to a purchaser of real estate notice of the recitals contained in the written instruments[] forming his chain of title *and charges him with the duty of making such reasonable inquiry and investigation* as is suggested by the recitals and references therein contained." (emphasis added) (internal citations omitted)); *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) ("Notice of a deed is notice of its whole contents . . . and *it is also notice of whatever matters one would have learned by any inquiry which the recitals of the instrument made it one's duty to pursue*." (alteration in original) (quoting 66 C.J.S. *Notice* § 19, at 454 (1998))); *Harbison Cmty. Ass'n, Inc. v. Mueller*, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995) ("A homeowner is charged with constructive notice of any restriction properly recorded within the chain of title.").[19] Additionally, SIPOA notified the McLaughlins that if they removed the drainage pipe, they bore the responsibility of doing so in a manner that maintained the drainage system for the downstream lots. Despite receiving such notice and hearing the objections of their neighbors, the McLaughlins refused to acknowledge the

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[18] *See supra* Section I.

[19] As such, we do not agree that the circuit court's contention that most people do not read their deeds overcomes this presumption, particularly when considering Mr. Yates's testimony that an attorney could have discovered the easement after twenty to thirty minutes of searching the title. *See Moyle*, 126 S.C. at 194, 119 S.E. at 190 ("Generally the means of knowledge and the duty of using them are equivalent to knowledge.").

existence of the easement. Finally, Mr. McLaughlin conceded that he authorized his contractors to remove the pipe after getting "frustrated" with SIPOA's inability to provide a solution that allowed the McLaughlins to build their house as sited. Therefore, when viewing the facts in the light most favorable to the Ralphs, we find the jury could have determined that a person of ordinary reason and prudence would have been on notice that the McLaughlins' downstream neighbors had property interests in the drainage easement. Thus, the jury could have reasonably found that the McLaughlins acted in conscious disregard of the rights of their downstream neighbors in removing the drainage pipe and building in the no-build area. *See Berberich*, 392 S.C. at 287, 709 S.E.2d at 612 ("'Recklessness implies *the doing of a negligent act knowingly*'; it is a 'conscious failure to exercise due care.'" (emphasis added) (quoting *Yaun*, 243 S.C. at 419, 134 S.E.2d at 251)); *id.* ("If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care.").

Second, even if the McLaughlins believed they had the right to remove the pipe, this would not preclude a jury from finding that they acted recklessly. *See Fairchild*, 385 S.C. at 353–54, 683 S.E.2d at 823 ("A jury may award punitive damages even 'when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights.'" (quoting *Camp*, 285 S.C. at 444, 330 S.E.2d at 316)). At trial, Mr. McLaughlin acknowledged that he was aware several of his neighbors had raised concerns about the removal of the pipe. Mr. McLaughlin also acknowledged that he attended the meeting where Mr. George gave his presentation and understood removing the pipe would have adverse effects on his neighbors' properties. Finally, Mr. McLaughlin testified that the McLaughlins could have sited their house on the front or back side of the oak tree in the middle of their lot. However, the McLaughlins never attempted or offered to site the house on the front side, which would have left the drainage easement intact. When taking these facts in the light most favorable to the Ralphs, we find the jury could have determined that a person of ordinary reason and prudence would have known that removing the drainage pipe would produce negative consequences for the downstream properties that relied on the drainage easement. Thus, the jury could have reasonably determined that the McLaughlins acted in reckless disregard of the rights of their downstream neighbors by removing the pipe and building in the no-build area. *See Berberich*, 392 S.C. at 287, 709 S.E.2d at 612 ("If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and

wanton, all of which have the same meaning—the conscious failure to exercise due care.").

In ruling that a directed verdict was justified, the circuit court indicated it did not think the McLaughlins were acting recklessly or intentionally because it found the McLaughlins reasonably believed they had the right to remove the pipe. The court stressed that it did not "think [the McLaughlins were] acting malevolently, *certainly not to the level of clear and convincing* . . . ." (emphasis added). In so ruling, we find the circuit court invaded the jury's province by improperly weighing the evidence. *See Fairchild*, 398 S.C. at 99, 727 S.E.2d at 411 ("It is not the duty of the [circuit] court to weigh the testimony in ruling on a motion for a directed verdict."). Because a reasonable juror could have found the McLaughlins acted recklessly in either 1) removing the pipe and building in the no-build area when they knew or should have known that their neighbors had property interests in the drainage easement or 2) removing the pipe with knowledge that it would adversely affect their neighbors' properties, the circuit court erred by not submitting punitive damages to the jury. *See Hollis*, 394 S.C. at 394, 714 S.E.2d at 910 ("The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." (quoting *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366)).

III. Directed Verdict on Trespass

The Ralphs argue the circuit court erred in failing to grant a directed verdict on the issues of abandonment and trespass because both were questions of law and not fact. The McLaughlins argue both issues were properly submitted to the jury, as they were both questions of fact. We agree with the Ralphs.

"When ruling on a directed verdict motion [], 'the circuit court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party.'" *Hollis*, 394 S.C. at 393–94, 714 S.E.2d at 909–10 (quoting *Mishoe*, 366 S.C. at 200, 621 S.E.2d at 366). "A case should be submitted to the jury when the evidence is susceptible of more than one reasonable inference." *Fairchild*, 398 S.C. at 99, 727 S.E.2d at 411. However, "[o]ur courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court." *Hurd*, 353 S.C. at 609, 579 S.E.2d at 143. Thus, "[w]hen the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Id.* at 609, 579 S.E.2d at 142.

"The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted." *Snow v. City of Columbia*, 305 S.C. 544, 552, 409 S.E.2d 797, 802 (Ct. App. 1991). "The entry itself is the wrong. Thus, for example, if one without license from the person in possession of land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass by the very act of breaking the enclosure." *Id.* "To constitute an actionable trespass, [] there must be an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion." *Id.* at 553, 409 S.E.2d at 802. "Intent is proved by showing that the defendant acted voluntarily and that he knew or should have known the result would follow from his act." *Id.* Accordingly, the owner of a servient estate commits trespass by intentionally destroying an easement without the consent of the easement holder. *See* Susan F. French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 Real Prop. Prob. & Tr. J. 1, 4–5 (2003) (noting the majority rule since the late 19th century has been that "the owner of the servient estate commits trespass by relocating [or destroying] an easement without the consent of the holder of the easement.").

At trial, Mr. McLaughlin conceded that he authorized his contractors to remove the pipe and build part of his home over the easement and no-build area. *See Snow*, 305 S.C. at 553, 409 S.E.2d at 802. ("To constitute an actionable trespass . . . the invasion of the land must be intentional . . . ."). Additionally, Mr. McLaughlin acknowledged that he did not obtain the Ralphs' permission before doing so. *See id.* at 552, 409 S.E.2d at 802 ([I]f one *without license from the person in possession of land* walks upon it . . . he commits a trespass by the very act of breaking the enclosure." (emphasis added)). Thus, upon establishing an ownership interest in the easement, the Ralphs would be entitled to judgment as a matter of law. *See* French, *supra*, at 4–5 ("[T]he owner of the servient estate commits trespass by [destroying] an easement *without the consent of the holder of the easement.*" (emphasis added)); *see also Hurd*, 353 S.C. at 609, 579 S.E.2d at 143 ("Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court."). As we will discuss below, ownership of the drainage easement at the time it was destroyed was a question of law. Therefore, we find the circuit court erred in submitting the issue of trespass to the jury.

The existence of the drainage easement was undisputed at trial. However, the McLaughlins argue any ownership interests in the drainage easement had been extinguished before they removed the pipe because SIPOA had unilaterally

abandoned the easement. Whether SIPOA could effectively abandon the drainage easement turns on the ownership interests in the easement before it was purportedly abandoned. Because determination of such ownership interests was a question of interpreting the Seabrook Plat and subsequent deeds, it was a question of law. *See Slear v. Hanna*, 329 S.C. 407, 410–11, 496 S.E.2d 633, 635 (1998) ("The determination of the existence of an easement is a question of fact . . . [, however, if] the action is viewed as interpreting a deed, *it is an equitable matter* . . . ." (emphasis added) (internal citation omitted)).

"[W]here a deed describes land as is shown on a certain plat, such plat becomes a part of the deed." *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 118, 145 S.E.2d 922, 924 (1965). "[T]he purchaser of lots with reference to the plat of the subdivision acquire[s] every easement, privilege[,] and advantage shown upon said plat . . . ." *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975); *see also Corbin v. Cherokee Realty Co.*, 229 S.C. 16, 24, 91 S.E.2d 542, 546 (1956) ("Such purchasers acquire[] every easement, privilege[,] and advantage [that] the plat represent[s] as belonging to them."). "It is generally held that when the owner of land has it subdivided and platted into lots and [easements,] and sells and conveys the lots with reference to the plat, he thereby dedicates said [easements] to the use of such lot owners [and] their successors in title . . . ." *Williamson*, 247 S.C. at 118, 145 S.E.2d at 924–25. "[A]s between the owner, who has conveyed lots according to a plat, and his grantee or grantees, the dedication is complete when the conveyance is made . . . ." *Outlaw v. Moise*, 222 S.C. 24, 30, 71 S.E.2d 509, 511 (1952) (citation omitted). "Such an easement is deemed a part of the property to which the grantee is entitled and of which he cannot be divested except by due process of law." *Bland*, 265 S.C. at 106, 217 S.E.2d at 20 (citation omitted). Accordingly, an easement dedicated by plat is an easement appurtenant. *See Tupper v. Dorchester Cty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("[A]n appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof."). Therefore, such easements pass with the dominant estate upon conveyance. *See id.* ("[An easement appurtenant] passes with the dominant estate upon conveyance.").

The Seabrook Plat included the easement and no-build area across lots 21-28. Therefore, the easement was dedicated to the property owners upon conveyance of the lots in question. *See Williamson*, 247 S.C. at 118, 145 S.E.2d at 924–25 ("It is generally held that when the owner of land has it subdivided and platted into lots and [easements,] and sells and conveys the lots with reference to the plat, he thereby dedicates said [easements] to the use of such lot owners [and] their successors in

title . . . ."). As such, we find the Ralphs (as owners of lot 23)—as well as the owners of lots 21, 24, 25, 26, 27, and 28—acquired ownership interests in the drainage easement and no-build area across lot 22 as a matter of law.

Consequently, because the lot owners had property interests in the drainage easement, the question of whether SIPOA's unilateral abandonment was effective was a question of law. "It is [a] well-settled principle that an *owner* of an easement may relinquish that easement by abandonment, express or implied." *Immanuel Baptist Church of N. Augusta v. Barnes*, 274 S.C. 125, 131, 264 S.E.2d 142, 144 (1980) (emphasis added). "The pivotal issue in determining whether there has been an abandonment is the *intention of the owner*." *Id.* (emphasis added). "[Intent to abandon an easement] may be inferred from the acts and conduct of *the owner* and the nature and situation of the property . . . ." *Bland*, 265 S.C. at 109, 217 S.E.2d at 21 (emphasis added). Thus, a third-party cannot unilaterally affect the rights of the easement holder or unilaterally abandon an owner's easement by recording a new plat. *See Corbin*, 229 S.C. at 24, 91 S.E.2d at 546 ("The Florenza Company could not *without the consent of [the owner]* change the location or width of [the easement]." (emphasis added)); *Bland*, 265 S.C. at 107, 217 S.E.2d at 20 ("The fact that a new plat of the property in question was made did not destroy the easement created on the [original] plat.").

Under South Carolina law, it is clear that an easement may only be abandoned by its owner. *See Barnes*, 274 S.C. at 131, 264 S.E.2d at 144 ("It is [a] well-settled principle that an *owner* of an easement may relinquish that easement by abandonment, express or implied." (emphasis added)). As such, SIPOA's purported abandonment of the drainage easement could not affect the Ralphs' interest as a matter of law. *See Bland*, 265 S.C. at 106, 217 S.E.2d at 20 ("Such an easement is deemed a part of the property to which the grantee is entitled and of which he cannot be divested except by due process of law." (citation omitted)). Similarly, the recording of the Forsberg Plat could not affect the Ralphs' interest as a matter of law. *See id.* at 107, 217 S.E.2d at 20 ("The fact that a new plat of the property in question was made did not destroy the easement created on the [original] plat."). Rather, Mr. Yates correctly testified that abandonment of the drainage easement would not be effective unless all of the lot owners with an interest in the easement agreed to the abandonment. *See Barnes*, 274 S.C. at 131, 264 S.E.2d at 144 ("The pivotal issue in determining whether there has been an abandonment is the *intention of the owner*." (emphasis added)). Therefore, we find the circuit court erred in submitting the issue of abandonment to the jury.

Accordingly, because the Ralphs established ownership of the easement as a matter of law and the ineffectiveness of SIPOA's abandonment as a matter of law,

we find the Ralphs were entitled to enforce the easement as a matter of law. Therefore, because Mr. McLaughlin admitted authorizing his contractors to remove the pipe and build over the no-build area, the issue of trespass is susceptible to only one inference and should not have been submitted to the jury. *See Hurd*, 353 S.C. at 609, 579 S.E.2d at 142 ("When the evidence yields only one inference, a directed verdict in favor of the moving party is proper."). As such, we find the circuit court erred in refusing to grant a directed verdict on trespass.

IV. New Trial Motions

The Ralphs argue the circuit court erred in denying their motion for a new trial absolute, a new trial on damages, or a new trial *nisi additur* because its judgment and order denying a new trial were characterized by errors of law and the damages award was wholly unsupported by the evidence. As indicated above, the circuit court committed several errors of law, particularly 1) failing to apply Judge Cooper's ruling as the law of the case; 2) granting a directed verdict on punitive damages; and 3) submitting the issues of trespass and abandonment to the jury. As a result of these errors, we agree that the Ralphs are entitled to a new trial.[20]

A new trial is an appropriate remedy when "the verdict is inconsistent and reflects the jury's confusion." *Vinson*, 324 S.C. at 404, 477 S.E.2d at 722. As such, a circuit court must take certain steps to prevent juror confusion. In crafting a jury charge, "[o]nly law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). Similarly, "it [is] the duty of the [circuit court] to eliminate from the proceedings the questions of law[] and to submit to the jury only questions of fact . . . ." *Duren v. Kee*, 41 S.C. 171, 176, 19 S.E. 492, 494 (1894). Accordingly, when a jury charge consists of irrelevant and inapplicable principles that confuse the jury in a manner affecting the outcome of the trial, it constitutes reversible error. *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). Likewise, "it is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial." *Dunsil v. E.M. Jones Chevrolet Co., Inc.*, 268 S.C. 291, 295, 233 S.E.2d 101, 103 (1977).

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[20] Because we find the Ralphs are entitled to a new trial based on several errors of law, we decline to address their argument that the evidence in the record does not support the jury's nominal damages award. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address appellant's remaining issues when its determination of a prior issue is dispositive).

When taken together, we find the failure to apply Judge Cooper's order as the law of the case and the failure to grant a directed verdict on trespass likely overburdened and confused the jury, affecting its damages award. The circuit court should have instructed the jury on the law of the case and precluded the McLaughlins from arguing reliance on SIPOA to the jury. Furthermore, because trespass was established as a matter of law, the jury should have only been responsible for determining damages and punitive damages. Instead, the circuit court allowed the McLaughlins to argue reliance to the jury; did not instruct the jury that the McLaughlins could not rely on SIPOA as a matter of law; and submitted the issues of trespass, abandonment, and damages to the jury. *See Blurton*, 352 S.C. at 208, 573 S.E.2d at 804 ("Only law applicable to the case should be charged to the jury."). As such, the jury's role expanded from simply determining damages to ruling on complex questions of law.[21] *See Duren*, 41 S.C. at 175, 19 S.E. at 494 ("[Q]uestions of law do not go to the jury . . . .").

Moreover, by allowing the jury to hear evidence of reliance and rule on the issue of abandonment, the circuit court gave credence to the McLaughlins' theories that 1) the easement could have been abandoned by SIPOA and 2) they justifiably relied on SIPOA's representations that the easement had been abandoned. In turn these theories supported the overall theme of the McLaughlins' case: that they were not responsible for damaging the Ralphs' property because they did not know the easement existed. However, both of these theories are misleading, as SIPOA could not have abandoned the easement as a matter of law and any purported reliance on SIPOA was irrelevant in determining damages.[22] Accordingly, we find the combined effect of these errors likely confused and overburdened the jury in a manner prejudicial to the Ralphs. *See Cole*, 378 S.C. at 404, 663 S.E.2d at 33 ("A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury[']s confusion affects the outcome of the trial."); *Dunsil*, 268 S.C. at 295, 233 S.E.2d at 103 ("[I]t is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial."); *see, e.g.*, *C. I. T. Corp. v. Corley*, 196 S.C. 339,

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[21] As indicated above, the issues of abandonment and trespass were both questions of law rather than fact. *See supra* Section III.

[22] Moreover, even though the issue of trespass should not have been submitted to the jury, we note that any purported reliance on SIPOA's representations by the McLaughlins would have also been irrelevant in determining trespass. *See Snow*, 305 S.C. at 553, 409 S.E.2d at 802 ("Although neither deliberation, purpose, motive, nor malice are necessary elements of intent, the defendant must intend the act which in law constitutes [trespass].").

342–43, 13 S.E.2d 440, 441–42 (1941) (reversing a circuit court's order that conflicted with a previous unappealed order constituting the law of the case).

Second, we find the failure to submit the issue of punitive damages to the jury also constitutes reversible error. *See Zinn*, 415 S.C. at 108–09, 780 S.E.2d at 619 ("The appellate court will reverse the [circuit] court's ruling on a [directed verdict] motion [] when there is no evidence to support the ruling or where the ruling is controlled by an error of law." (second alteration in original) (quoting *Law*, 368 S.C. at 434–35, 629 S.E.2d at 648)); *see, e.g.*, *Rhodes v. Lawrence*, 279 S.C. 96, 97–98, 302 S.E.2d 343, 344 (1983) (remanding for a new trial after determining the circuit court erred in granting a directed verdict on punitive damages).

As such, we agree that the Ralphs are entitled to a new trial. However, we find the scope of the new trial can be limited on remand. "The law in South Carolina is clear that when a verdict in favor of a plaintiff is fully supported by the evidence on the issue of liability but the damages awarded are inadequate, a new trial *may* be ordered on the issue of damages alone." *Cartin v. Keller Bldg. Prods. of Charleston*, 299 S.C. 152, 153, 382 S.E.2d 922, 923 (1989). In other words, "[a] new trial on damages alone is not warranted unless the evidence presented indicated that a directed verdict on the issue of liability would have been proper." *Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993); *see also* S.C. Code Ann. § 15-33-125 (2005) ("Unless the plaintiff is entitled to a directed verdict on the issue of liability, any new trial must include both issues of liability and damages.").

As discussed above,[23] we find the Ralphs were entitled to a directed verdict on trespass. Therefore, as the issue of liability has already been established as a matter of law, it is not necessary to remand the case for a new trial absolute. *See* § 15-33-125 ("Unless the plaintiff is entitled to a directed verdict on the issue of liability, any new trial must include both issues of liability and damages."). Accordingly, we remand the case for a new trial on compensatory damages and punitive damages only.

CONCLUSION

Based on the foregoing, we find the circuit court erred in failing to apply Judge Cooper's ruling as the law of the case, granting a directed verdict on the issue of punitive damages, and submitting the issues of trespass and abandonment to the jury. Accordingly, we reverse the judgment and remand the case for a new trial on

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[23] *See supra* Section III.

compensatory damages and punitive damages. Furthermore, on remand, Judge Cooper's determination that the McLaughlins could not reasonably rely on SIPOA's representations shall be applied as the law of the case.

REVERSED AND REMANDED.

WILLIAMS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC 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).

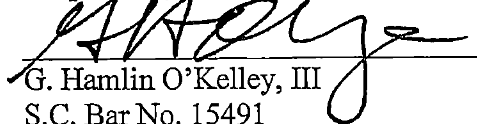
As the Opinion now stands, this Court has tried the case again in favor of the Ralphs so that only a damages hearing will take place, which is not substantial deference to the jury's verdict in any way shape or form. *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003). It further goes against 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 STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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The Honorable Roger M. Young, Sr., Circuit Court Judge

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

Appellate Case No. 2017-00866

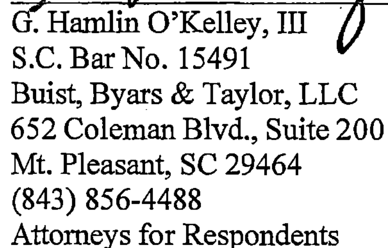
Richard Ralph and Eugenia Ralph...Appellants,

v.

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

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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November 15, 2019

Mr. George Hamlin O'Kelley, III, Esquire
652 Coleman Blvd., Ste.200
Mt. Pleasant SC 29464

Re: Richard Ralph v. Paul D. McLaughlin
Appellate Case No. 2017-000866

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Ainsley Fisher Tillman, Esquire
G. Dana Sinkler, Esquire

The South Carolina Court of Appeals

Richard Ralph and Eugenia Ralph, Appellants,

v.

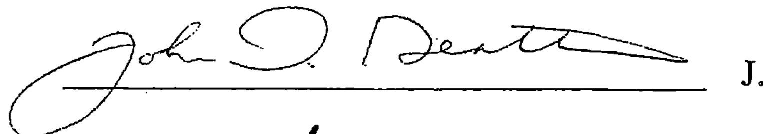
Paul Dennis McLaughlin and Susan Rode McLaughlin, Respondents.

Appellate Case No. 2017-000866

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.


J.

J.

Columbia, South Carolina

cc:
Ainsley Fisher Tillman, Esquire
G. Dana Sinkler, Esquire
George Hamlin O'Kelley, III, Esquire
The Honorable Roger M. Young, Sr.

FILED
November 15, 2019

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

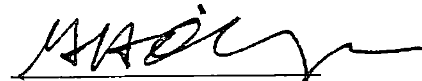
Richard Ralph and Eugenia Ralph..Appellants,

v.

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

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 15, 2019.



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Attorneys for Respondents

December 5, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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The Honorable Roger M. Young, Sr., Circuit Court Judge

Trial Court Case No.
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December 5, 2019