THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

RECEIVED
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SC Court of Appeals

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2016-CP-26-06495

Cornell Patton, Melissa Patton, Chad Webb and Amy Webb................................ Appellants

vs.

Prestwick Land Limited Partnership; Prestwick Homeowners Association, Inc.; Jackson Companies; City of Myrtle Beach; South Carolina Department of Transportation; Horry County; Myrtle Beach Air Force Base Redevelopment Authority; Nelson L. Hardwick & Associates, Inc.; Bermuda Gardens Homeowners' Association d/b/a Homeowners of Ocean Walk Property Owners Association; Campgrounds, Inc.; and Prestwick Property Owners Association, Inc., Defendants

OF WHICH:
Prestwick Land Limited Partnership, Jackson Companies and
Campgrounds, Inc. are .... Respondents

City of Myrtle Beach, Third-Party Plaintiff,

vs.

Phil Eaves and Elizabeth Eaves, Third-Party Defendants,
Counterclaimants, Cross-Claimants.. Appellants

REPLY BRIEF OF APPELLANTS

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ARGUMENT

The Appellants would offer the following additional argument in Reply to Respondents' brief.

I. *RES JUDICATA* DOES NOT BAR THIS ACTION.

Respondents argue that Appellants' 2016 lawsuit against the Respondents is based upon the same subject matter as the prior 2000 litigation and as a result is barred by the doctrine of *res judicata*. Respondents are wrong in this assertion since this is a different flood on a different date. The doctrine of *res judicata* in South Carolina is not an ironclad bar to a later suit. See *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2001).

Most courts have consistently held that the doctrine of *res judicata* doesn't bar a claim for continuing conduct complained of in the second lawsuit that occurs after judgment is rendered in the first lawsuit. See *D'last Corp. v. Ugent*, 288 Ill App. 3d 216, 222, 681 N.E.2d 12 (1997).

In this case, Appellants suffered new damage from a wholly separate flood event from the 2000 event which flooded Appellants' property. Here, the wrong suffered by the Appellants is recurrent and of an ongoing nature and will be so in the future. Appellants cite to the Court RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982 and Supp. 2011) which provides in pertinent part an exception "to concurrent or continuing wrongs." It follows a new flood to Appellants' property is a new injury and a continuing wrong.

As has been stated previously, Appellants are subject to continuing floodwaters from the Defendants' acts and the failure to repair the problem. Appellants can't sell their property and must legally disclose the continual flooding and are virtually paralyzed in their homes because of the new recurrent flooding which occurs almost every hurricane season. This is, of course, all related to Respondents' defective artificial drainage system and the failure of Defendants to repair the system

which causes new damages. Our Supreme Court recognized this in *Lucas v. Rawl Family Ltd*, 359 S.C. 505, 598 S.E.2d 712 (S.C. 2004). In *Lucas*, heavy rains caused extensive flooding on Appellant's property and evidence was presented that the property floods every time there is a heavy rain. In *Lucas*, the Supreme Court reversed the Court of Appeals and stated:

> In the present case there was evidence that petitioner's fields now flood in every heavy rain ant that petitioner has been unable to grow crops on a portion of his land because of the standing water, silt and other debris that accompany the flooding. Accordingly, there existed a jury question as to whether the respondents' actions constituted a nuisance *per se* and were dangerous to the property at all times because of the continuing nature of the flooding and because of the diminished production of the Coastal Bermuda fields. *Deason v. Southern Ry. Co.*, 142 S.C. 328, 140 S.E.575 (1927) ("whether or not the nuisance 'had become dangerous at all times and under all circumstances to life, health, or property' was for the jury"); *Suddeth v. Knigh*t, *id.* at 545-546, 314 S.E.2d at 15 (it was peculiarly a question for the jury as to whether the flooding of plaintiff's property and its attendant problems was dangerous at all times and under all circumstances to life, health or property).

Appellants suggest that this case surely affects life, health and property as there was ample testimony from Cornell Patton and the other Plaintiffs about the floodwaters entering their homes on numerous occasions since 2000. (Patton had no new flooding until this case, so it is a continuing nuisance which is abatable.) This case is not unlike *Suddeth v. Knigh*t, 280 S.C. 540, 314 S.E.2d 11 (Ct. App. 1984) in which the Court of Appeals held it was a "jury issue where evidence that defendant's construction caused standing water 40 inches deep to accumulate and stagnate on plaintiff's property for 6-10 months a year." In reversing the case for a new trial, the Court in *Suddeth* noted:

> The liability and probability of the ponds overflowing at every rain, and of drying up and creating mosquitoes during every dry spell ,might, or might not, make the place a source or perpetual danger to life, health and property, as the jury might view the testimony and circumstances. That was peculiarly a question for the jury, and there was sufficient latitude in the pleadings and testimony to make a jury question on the matter of a continuing nuisance. 314 S.E.2d at 15.

II. THE COURT ERRED IN REFUSING TO CONSIDER THE CONTINUING VIOLATION DOCTRINE.

It is well known in American jurisprudence that nuisance and trespass claims represent the touchstone for modified continuing violations. See RESTATEMENT (SECOND) OF TORTS, § 161 cmt. c, § 899 (1979). Decisions dating back to the 1500s have recognized that a nuisance or trespass claim does not arise once and for all when the offensive activity at issue first manifests itself. Instead each day's maintenance of, or failure to remove, an existing nuisance or trespass will give rise to a new and separate cause of action. Blackstone regarded this "well established" rule as axiomatic in his Commentaries, stating that "every continuance of a nuisance is [considered] a fresh one." See William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. Fla. L. Rev. 27, 37 (1948). See *McCurley v. South Carolina Highway Department*, 256 S.C. 332, 182 S.E.2d 202 (1971) (If injury to adjoining lands is abatable then there arises a continuing cause of action). In this case, the engineering report of Horry County shows the flooding is abatable and the flooding will continue unless repaired. (R. ___); *Sutton v. Catawba Power Co.*, 104 S.C. 405, 89 S.E. 353 (1916); See also *Silvester v. Spring Valley Country Club*, 543 S.E.2d 563 (S.C. Ct. App. 2001) (every continuance of a nuisance is a new nuisance).

III. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING SUMMARY JUDGMENT.

As this Court is aware, the trial court granted summary judgment over the objections of Appellants' counsel despite an affidavit from him pursuant to SCRCP 56(f) stating that the deposition of Appellants' expert, Robert Taylor, had been started but could not be completed in one day. There were also multiple days of depositions of the Plaintiffs which preceded Taylor's deposition. Appellants were not dilatory in bringing this case. The discovery simply had not been completed and there was not a full and fair opportunity to complete discovery.

Appellants' counsel complied with SCRCP 56(f) and there are many cases which support Appellants' position that the trial court abused its discretion in granting summary judgment. In *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 104, 410 S.E.2d 537 (1991), the Supreme Court said partial summary judgment was premature and reversed the trial court. Appellants' counsel in that case presented to the court a letter from an expert which indicated that further testing was necessary. *See* 410 S.E.2d at 544. The Supreme Court found the case was complex and proof of causation was difficult. 410 S.E. 2d at 545. The Court further held that the parties must have free and full opportunity to complete discovery. 410 S.E. 2d at 545. In this case, all relevant parties' depositions and Appellants' expert deposition were not completed. The *Baughman* Court further observed that it is premature to grant summary judgment prior to the record being fully developed including all parties being deposed.

Here, the record is not fully developed. In fact, Appellants' expert's deposition was not completed and many of the Defendants had not had any opportunity to cross examine him, nor had Appellants been given an opportunity to ask questions.

In another case which shows the trial court abused its discretion, the plaintiff appeared at a motion hearing and informed the court that depositions were scheduled for the following week. The trial court granted summary judgment and this Court found it was abuse of discretion because the plaintiff had not been dilatory in his prosecution of the case. See *Doe, Ex. Rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (S.C. 2001). See also, *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (we find it extremely troubling this case was resolved on summary judgment especially considering the injury to Schmidt and the novel issue in the case).

Appellants respectfully assert that SCRCP 56(f) required the trial judge to give additional time before the summary judgment motion was heard. *In re Estate of Smith*, 419 S.C. 111, 796

S.E.2d 158, 162-63 (Ct. App. 2016) (rehearing denied Feb. 24, 2017), this Court held that Rule 56 of the South Carolina Rules of Civil Procedure provides parties an easy mechanism for notifying the Court in advance of a scheduled hearing of the party's need for additional time in which to complete discovery before defending a motion to summary judgment. Rule 56 also allows and permits an attorney to file an affidavit averring that "he cannot for reasons stated present by affidavit facts essential to justify his opposition." This construction is consonant with the expressed intent of the rule to provide a procedure when affidavits are unavailable. See *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003). Further, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. See *Middleborough v. Montedison*, 320 S.C. 470, 465 S.E.2d 765, 771 (Ct. App. 1995).

In this case, Appellants were litigating a complex property damage claim which required engineering and hydrology analysis. Appellants had allowed their depositions to be taken the same week that the deposition of Appellants' expert, Robert Taylor, was taken. Appellants' expert, Robert Taylor's, deposition had not been completed and multiple parties had not had an opportunity to question Taylor. Appellants' counsel put forth an affidavit explaining that discovery was not yet complete but further Appellants' counsel provided the evidence he did have including a comprehensive report detailing the problems with flooding at Appellants' property that was prepared by Horry County. Appellants respectfully suggest that the trial court abused its discretion and did not allow Appellants a full and fair opportunity to litigate a case in which Appellants continue to have ongoing damages to their property from constant flooding. Accordingly, the trial court abused its discretion in granting summary judgment under these facts.

IV. THE RELEASE IN THIS CASE DOES NOT BAR FUTURE CLAIMS.

Respondents argue in their brief that Appellants waived any future claims for flooding. However, the clear language and terms of the Settlement Agreement and Release in the 2000 cases do not mention or address future claims or even use those words. In fact, the Settlement Agreement and Release itself only discusses a release up to the date, minute and hour of the signing of the release. (R. ___). Under those circumstances, Appellants' future trespass and nuisance claims for flooding to their property are not barred as this issue is not specifically outlined in the release language. In fact, the Release language specifically fails to reference future flooding claims after execution of the Release. See *Thomas-McCain v. Siler*, 268 S.C. 193, 232 S.E.2d 728 (1977) (parties' intent must be gathered from the contents of the entire agreement).

Our courts have held that a release is a contract and in construing a contract the primary objective is to ascertain and give effect to the intention of the parties. See *Southern Atl. Fin. Servs. Inc. v. Middleton*, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002). Further, the parties' intentions in the release must be gathered from the contents of the agreement and such intentions are to be gathered from the whole scope and effect of the language used. See *Barnacle Broad, Inc. v. Baker Broad, Inc.*, 343 S.C. 140, 538 S.E.2d 675 (Ct. App. 2000). Further if a contract is ambiguous or capable of more than one meaning or when its meaning is unclear it becomes a question of fact and thus a question for a jury to determine. See *South Carolina Dep't. of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001).

In this case, the Release language does not state "future damages or claims" and thus the trial judge erred in dismissing this case. Further, the Affidavit of Cornell Patton indicates his understanding of the Settlement Agreement and Release was not to release future claims for flooding. (R. ___). Patton's Affidavit is of course backed up by the Release language itself which

fails to mention the word "future" damages and also specifically references a release of the claims in the original 2000 case <u>only</u>. Finally, the Respondents offer no affidavit that the intent of the release was to include future claims which precluded the Judge from granting summary judgment.

CONCLUSION

Accordingly, it is for these reasons that the trial court erred in granting summary judgment to the Respondents.

Respectfully submitted,

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vs.

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Counterclaimants, Cross-Claimants.. Appellants

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of the **Reply Brief of Appellants** on the Respondents, on the 5th day of March, 2020, by depositing a copy of same in the United States Mail, postage prepaid, to:

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Douglas C. Baxter, Esquire.
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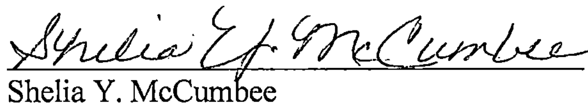
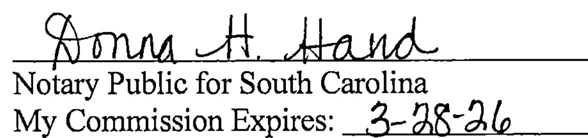

Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 5th day of March, 2020.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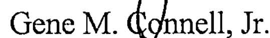
Re: *Cornell Patton, et al. v. Prestwick Land Limited Partnership, et al.*
Appellate Case No. 2019-000964
C/A No. 2016-CP-26-06495
Our File No. 2015-0293C

Dear Ms. Kitchings:

Enclosed please find an original and one copy of the Reply Brief of Appellants and Proof of Service in the above-captioned matter. Please return a filed copy to me in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter, we hereby serve a copy of the above-stated documents on Respondents through counsel of record.

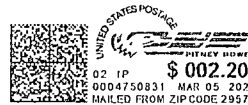
Sincerely yours,



Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc: Carmen V. Ganjehsani, Esquire
Douglas C. Baxter, Esquire



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