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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 15-CP-10-5415

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

Appellants,

v.

Younesse Alami, Simon M. Adell, Matthew Anderson, Matthew Asher, Daniel Baker, Marie Baker, Matthew and Christina Bare, Andre Bauer, Peter Bierce, Brandon Blount, Barbara Brass, Richard T. Brewer, Sigrid Anne Eilertson, Reginald P. Brown IV, Mary Cahill, Ryan Cockrell, Kevin and Virginia Conlon, Anne Marie Crevar, Christina Cross, Darryl J Damico, Labar Daniel, Stephen Darwak, Lindsay Davenport, Mary Dickerson, Maxwell Streeter, Kathleen Dougherty, David Dressman, Anna Dressman, Michael Elder, Christopher Scott Farley, Michele Ghastin, Timnah Giller, Virginia Geller, Ryan Gilreath, Sonya Gilreath, Kimberly Glenn, Shaun Halsor, Josephine Rex, Arthur Halvorson, Andrew Halvorson, Linda Hancock, Laura Hyatt, Mike Hartel, Nathan Herring, James Hicks Jr., Laurie Hicks, Preston G Hipp, Colin Jones, Matthew F. Jones, Robert C. Jones, Robin Joseph, Molly Keeler, John Kenny, Mandi Walters, Abigail King, Aaron Kless, Laurie Kramer, Robert Kramer, Allison Kreutzer, Benjamin Levitt, Richard Levitt, Jesse Lutz, Nikou Manouchehri, Thomas Naselaris, Zoe Naselaris, Beau O'Steen, Cori O'Steen, Lance Parr, Brandon Perdue, Amanda Lee Raymer, Hadassah Rothenberg, Daniel Ryan, Kimberly Bowlin, Kevin Schnittker, Ginger Scofield, Inderjit Singh, Avtar Singh, Alecia Stevens, Lee Stevens, Justin Swan, Merrick Teichman, John Van Vlack, Jr, William Waterhouse, Jennifer Waterhouse, Anne Wohlfeil, Bryan Young, AJB Trust, Anthony & Jacqueline Bradley, Trustees, Hartshorn Family Trust, Helene Kenny / Bridget Kenny Revocable Trust, Wilhelmina M. Wieters Life Estate Childrens Trust, 33 Bogard Street LLC, 249 Cumming, LLC, 253 Coming Street LLC, 259 East Bay LLC, 259 East Bay 10 B LLC, 272 D Coming St. LLC, Café International, Inc., Corner At Old Canton, LLC, Geer Interests LLC, Kit Properties LLC, Lambert-Weiss LLC, The Naws LLC, New Lease Capital LLC, One Henrietta LLC, Periwinkle Partners, LLC, Porch Properties LLC, Westbury Properties, LLC, and Westendorff Hardware LLC,

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Defendants,

Of whom

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Respondents.

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in granting summary judgment on the Plaintiffs' zoning violation cause of action, where:

   a. City of Charleston Ordinance 54-905 ("the Ordinance") (R. p. 238) grants the Plaintiffs statutory standing?

   b. The circuit court applied a statute, S.C. Code Ann. § 6–29–950, which the Plaintiffs do not rely upon and does not apply to this case, and relied upon the Carnival Corp. decision, even though the defendant in Carnival was acting legally and was permitted, whereas the Defendants here admit they are acting illegally and without permits?

   c. The circuit court held that the Plaintiffs lacked standing because they were claiming damages solely as a result of "decreased income," even though the Plaintiffs are also claiming damages for the diminution in value of their properties?

   d. The circuit court held that the Plaintiffs failed to exhaust administrative remedies, even though there was no governmental action from which to appeal, and the Ordinance gives the Plaintiffs the right to bring this suit?

   e. The circuit court held that irreparable harm must be shown in order to warrant injunctive relief under the Ordinance, which specifically provides for injunctive relief?

2. Did the circuit court err in holding that the Defendants are immune under the S.C. Unfair Trade Practices Act's ("UTPA") "regulatory exception," where the Defendants admit that their businesses are illegal, rather than permitted by law?

3. Did the circuit court err in granting summary judgment on the Plaintiffs' nuisance claim, where:

a. The circuit court essentially held that standing under a private nuisance claim requires the Plaintiffs to be the *only* entities in the world affected by the Defendants' actions?

b. The circuit court held that loss of rental income is not recoverable in a private nuisance claim, even though South Carolina law is precisely the opposite?

4. Did the circuit court err in granting summary judgment without first compelling the Defendants to produce the financial information which would enable the Plaintiffs to fully measure and calculate their damages?

STATEMENT OF THE CASE

On the Charleston peninsula, very, very few non-hotel / non-bed & breakfast property owners are allowed to legally rent out their properties (or portions thereof) for less than 30 days at a time. The Defendants in this case admit that they break the law by renting their properties out in violation of the City of Charleston's zoning ordinances. (R. p. 215, lines 7-13). The Plaintiffs, on the other hand, rent their properties out in compliance with the City's zoning ordinances. The Defendants' illegal businesses have damaged the Plaintiffs because the Defendants compete unfairly, operating "under the radar" and avoiding expenses such as accommodations taxes and fire code compliance incurred by legal operators. The Defendants' illegal businesses constitute a nuisance because they deprive the Plaintiffs of the full financial enjoyment of the Plaintiffs' properties.

On October 7, 2015, the Global Real Property Trust ("the Trust") brought suit against approximately 42 Defendants in Case No. 15-CP-10-5415, alleging that the Defendants' illegal short-term rental/AirBnB businesses in Charleston had damaged the Trust's legal short-term rental/AirBnB businesses. On November 2, 2015, the Trust sued an additional 22 Defendants in Case No. 15-CP-10-5900 and on March 4, 2016, the Trust sued an additional 51 Defendants in Case No. 16-CP-10-1118.

On March 3, 2016, Judge Hood denied multiple Defendants' motions to dismiss under various sections of Rule 12, SCRCP.

On June 21, 2016, the three cases were assigned under the Business Court program to the Honorable R. Markley Dennis, Jr.

After hearing the Defendants' first motion for summary judgment, the circuit court

granted the Trust's motion to amend, consolidated the three lawsuits, allowed the Plaintiffs to file an amended, comprehensive complaint, and took judicial notice of the City of Charleston's interactive zoning map. (R. pp. 41-43).

The net effect was that the three current Plaintiffs were substituted for the Trust and the cases were consolidated under Case No. 15-5415. The Plaintiffs' first amended complaint, which also added some new Defendants and eliminated Defendants who had settled, was filed on January 5, 2017. (R. pp. 45-63). The Plaintiffs' causes of action included (1) violation of zoning ordinances/relief under City Ordinance 54-905; (2) violation of the UTPA; and (3) common law nuisance.

Discovery ensued. The Plaintiffs filed a motion to compel complete discovery responses from the Defendants on January 12, 2018. (R. pp. 144-151). On January 22, 2018, the circuit court held that motion in abeyance. (R. p. 210, lines 8-17).

On May 17, 2018, after consultation with the Defendants, the Plaintiffs filed a motion to compel video-taped depositions of the Defendants. (R. pp. 152-157).

After a hearing on June 7, 2018, the circuit court granted summary judgment to all Defendants, on all causes of action, without ruling on the Plaintiffs' motions to compel discovery responses and to compel the video-tape depositions of the Defendants. (R. p. 1, sometimes referred to as "the Order"). The circuit court denied the Plaintiffs' motion for reconsideration without a hearing. (R. p. 44).

On appeal, the Plaintiffs do not challenge the circuit court's summary judgment on the Plaintiffs' unjust enrichment claim.

STANDARD OF REVIEW

THE STANDARD OF REVIEW REQUIRES REVERSAL OF THE CIRCUIT COURT'S ORDER.

A. A mere scintilla of evidence.

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009); accord, Zurich American Ins. Co. v. Tolbert, 387 S.C. 280, 692 S.E.2d 523, 524 (2010) ("In our view, respondents presented a scintilla of evidence through Tolbert's affidavit, sufficient to withstand summary judgment, that there may be coverage under the SCUIM endorsement.")

Summary judgment is appropriate only "when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. If triable issues exist, those issues must go to the jury." Worsley Companies, Inc. v. Town of Mount Pleasant, 339 S.C. 51, 528 S.E.2d 657, 659-660 (2000) (citations omitted).

> Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. . . . All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant.
>
> The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. For summary judgment to be granted, it must be perfectly clear no issue of fact is involved. Because it is a drastic remedy, summary judgment should be cautiously invoked

so no person will be improperly deprived of a trial of the disputed factual issues. Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 511 S.E.2d 699, 702 (Ct. App. 1999), aff'd, 341 S.C. 320, 534 S.E.2d 672 (2000) (citations omitted).

The Plaintiffs here submitted far more than a mere scintilla of evidence supporting their causes of action. The circuit court erred in granting summary judgment.

B. Incomplete discovery supports reversal of the circuit court's summary judgment order.

In this case, which involves illegal and unfair business competition, there are four sources of evidence of the Plaintiffs' damages: (1) the Plaintiffs' revenue stream; (2) the Defendants' comparative revenue streams; (3) the diminution in value of the Plaintiffs' real property; and (4) data from the online short-term rental platforms (www.airbnb.com, www.homeaway.com, *et al.*) that all the parties to this case use.

The Plaintiffs issued discovery asking the Defendants, in essence, on what dates did they rent their properties out for less than 30 days (which they admit violates the City's zoning laws) and how much money they made. Most of the Defendants did not respond at all. Those who did respond offered paltry, incomplete responses. (R. pp. 158-161).

In contrast, the Plaintiffs produced to the Defendants exactly the information that the Plaintiffs sought from the Defendants: information about when the Plaintiffs' properties were rented, for what length of time, and how much money was made. (R. pp. 81-82). The online platforms allow a landlord to produce a revenue report with just a few keystrokes. The Plaintiffs have produced the easily retrieved AirBnB and Homeaway reports which specify when a property was rented, for how long and for how much money. The Defendants have refused to share their comparative reports. (R. pp. 81-83). That refusal prevented the Plaintiffs from showing the full measure of their damages to controvert the summary judgment motion. The

circuit court's failure to compel the Defendants to produce their financial data impaired the Plaintiffs' ability to show the entirety of their particularized losses.

"[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 544 (1990) (citations omitted). "Plaintiffs were not dilatory in seeking discovery on the issue of causation, but have been reasonably diligent in pursuit of a qualified expert to substantiate their claims." Id. at 544 (citations omitted). "[T]wo years into the litigation, Plaintiffs had not yet received satisfactory responses to their interrogatories regarding the substances emitted from the Nassau plant, information critical to their obtaining expert opinion evidence concerning causation." Id. at 544.

On January 23, 2018, the circuit court held in abeyance the Plaintiffs' motion to compel discovery responses from the Defendants. That motion has still not been ruled upon. As a result, the Defendants are now "tak[ing] advantage of the uncertainty created by [their] own wrongdoing." Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404, 407 (Ct. App. 1984).

Incomplete discovery is not the sole reason to reverse the circuit court's order, but it is an important one.

FACTS

I. THE PARTIES.

The three Plaintiffs are limited liability companies which own/operate short-term rental (sometimes referred to as "STR") businesses at eight separate properties on the peninsula of Charleston. (R. p. 163). Each of the Plaintiffs is owned by the Trust. (R. p. 2). Robert Holt is the Trustee of the Trust and the Chairman of each of the three Plaintiffs. (R. p. 2).

The Defendants do not contest that the Plaintiffs' properties are properly zoned and permitted to operate STR businesses.

The Defendants are entities and people who have operated, or do operate, STR businesses out of real property they own on the Charleston peninsula. The Defendants have admitted in open court that their businesses violate the zoning ordinances of the City of Charleston (sometimes referred to as "the City"). "[S]hort-term rentals is illegal use of property [sic]." (R. p. 206, line 22).

> He argues that because -- and we'll admit, for purposes of summary judgment -- let me be very clear. We will admit the defendants have violated a zoning ordinance of the city of Charleston. I think it's –
>
> THE COURT: There's no question they've done that.
>
> MS. BLOODGOOD: So that's admitted, . . .
>
> (R. p. 215, lines 7-13).

Many of the Defendants counterclaimed against the Plaintiffs for "interference of competition contrary to public policy," thus admitting that they are competitors of the Plaintiffs. (R. p. 74, para. 82-83).

II. CHARLESTON ZONING AND THE SHORT-TERM RENTAL INDUSTRY.

Prior to 2012, no non-hotel private property owners, with the exception of a few bed & breakfast operators, were allowed to rent out their property for less than 30 days at a time. A

thirty day or longer lease is not a short-term rental. (R. p. 3). In 2011, the Plaintiffs spearheaded a movement to bring the concept of STR, which was flourishing in other tourist-friendly cities, to Charleston. (R. pp. 109-110, 114-115). Internet websites such as www.airbnb.com and www.homeaway.com provide a platform for renters (also known as "guests") and owners (also known as "hosts") to arrange for the rental of real property. Rentals can be for any period of time agreed upon by the parties including periods of less than thirty days. Hosts can rent out a room in their house or rent an entire house to anyone seeking a rental unit. (R. pp. 1-2).

As a result of the Plaintiffs' lobbying, in 2012, the City created a special overlay zone district to allow STR, adopting a new land use classification, "Short Term Rental." Ordinance 54-120. (R. pp. 222-224). Most other areas of the City continued to prohibit short-term rentals. (R. p. 3). After Charleston adopted the STR overlay zone in 2012, property owners all around the peninsula, regardless of legality or being outside the STR overlay zone, surged into the market. (R. p. 170). The Plaintiffs' properties are properly permitted to allow STR; the Defendants admit that theirs are not.

In order to legally operate an STR business, a property must be properly zoned, and the owner must have a business license. A business license is issued after the zoning is confirmed and the property is inspected for fire safety and other safety issues.[1] Owners pay annually for business licenses. A business license is the necessary form of identification to pay monthly taxes. If an owner does not have a business license, the owner is unable to pay the required

[1]"No person shall occupy as owner-occupant, or shall let to another for occupancy, any dwelling, multi-family dwelling, dwelling unit, rooming house, rooming unit, lodging house or lodging unit which does not comply with the applicable provisions of the fire prevention ordinances of the municipality." City of Charleston Ordinance 7-122. (R. p. 221). The circuit court properly took judicial notice of the City's ordinances. (R. p. 43).

taxes. The required sales/use and accommodations taxes charged by the state and county amount to 14.5% in Charleston. "It is my belief based on experience that you cannot file accommodations tax returns without a license number. And if you do not file an accommodations tax return, you cannot pay accommodations tax." (R. p. 122, lines 18-22).

In addition, a number of the Defendants pay Charleston County's 4% residential property tax rate, rather than the 6% business rate, even though they are making money by renting out their property. (R. p. 123, lines 14-17)

It is undisputed that the eight properties owned and operated by the Plaintiffs are located in the STR overlay zone and are permitted by the City. The Plaintiffs offer products along the whole spectrum of STR, from single rooms to whole homes. The advertising sites allow users to compare properties. "And, in fact, the services will feed you comparable properties. They'll say, Here's what you put in and here are the properties that are comparable to each other. Pick." (R. p. 98, lines 6-9).

III. THE PLAINTIFFS' DAMAGES.

A. The evidence the Plaintiffs submitted.

As set forth in the Standard of Review section, there are four sources of evidence of the Plaintiffs' damages: (1) the Plaintiffs' revenue stream; (2) the Defendants' comparative revenue streams; (3) the diminution in value of the Plaintiffs' real property; and (4) data from the online short-term rental platforms that all the parties to this case use.

The Plaintiffs have submitted all evidence that they control and possess. The total diminution in value to the Plaintiffs' properties as a result of the Defendants' activities is $2,200,000. (R. p. 173). After battling the recalcitrant websites for subpoena responses, the

Plaintiffs were able to get some information about the Defendants' revenues. A sampling of approximately 59 Defendants, where the Plaintiffs have data provided by AirBnB, shows that the Defendants' illegal revenue exceeds $3,852,522. (R. p. 174).

The Plaintiffs have submitted evidence that the Defendants' illegal use of their properties has negatively affected the Plaintiffs' legal rental income. The Defendants' illegal STR businesses have greatly enlarged the pool of properties available to AirBnB-type customers, thus expanding the supply and diluting competitive rental rates. (R. pp. 86-87, 96-97, 120-121, 168-170). "[S]upply and demand. That's an economic theory. How did the X demand affect rates in general. I -- I don't have that data." (R. p. 85, lines 19-22). The Plaintiffs have had to reduce their rental rates in order to compete with the Defendants' illegal businesses. (R. pp. 116-117).

Finally, the Defendants compete unfairly because they can price their rentals without having to consider the expenses of being legal. The Plaintiffs pay 6% in property taxes on their properties. The business licenses cost money, and require that the Plaintiffs comply with fire and safety codes to protect their customers. (R. pp. 164-165, 221).

As set forth above, the Defendants have refused to provide complete information regarding the revenue they have made by illegally renting short-term. The circuit court failed to order the Defendants to do so. Even without the benefit of the Defendants' comparative revenue data, the Plaintiffs submitted far more than a mere scintilla of evidence of their damages.

B. Some of the circuit court's factual errors.

The circuit court found: "Mr. Holt testified there is no sum certain amount of money owed to Plaintiffs as damages for their South Carolina Unfair Trade Practices Act (SCUTPA). (Id. at 140.)" (R. p. 3). There is no support for that finding on Page 140 of Mr. Holt's

deposition. (R. p. 103). It is true that the Plaintiffs cannot calculate their exact damages because the circuit court did not compel the Defendants to disclose their revenue information, but it is a gross mischaracterization to find that Mr. Holt asserts that the Defendants are not liable for any amount of money.

The circuit court found: "Mr. Holt testified none of the properties Plaintiffs own have decreased in value because they are all located in downtown Charleston. (Id. at 220-221.)" (R. p. 3). What Mr. Holt actually testified to is that the Plaintiffs' properties are worth less than they should be, due to the Defendants' illegal businesses:

> Q All right. So none of the properties went down in value at all?
> A No. It's downtown Charleston. No.
> Q So in your Complaint where you allege the 16 properties have depreciated in value, that's not true?
> A I did not -- I have -- I did not allege that, to the best of my knowledge. There's a diminution in value from what the -- that property should be worth 1.5 because it should be generating more money.
> (R. p. 119, lines 12-22).

C. The circuit court's proper acknowledgement that there are questions of fact regarding damages.

At the hearing, the circuit court correctly analyzed the damages issue at the summary judgment stage:

> And, also, the deponent testified -- and I think this is the most important, and I would just like to go quickly through it, that he didn't know -- in his deposition, he testified he did not know what his damages were, but this affidavit then goes into detail about what he thinks his affidavit -- his damages are, and it goes from zero to 3.8 million, and I will leave this with you.
>
> THE COURT: You don't need to. I have -- I cannot believe how many times this has come up in my career as a judge. Quite frankly, you just stated an issue of fact, . . .
> (R. p. 213, lines 15-25).

The Supreme Court -- and I'll never forget, Randy Bell was still alive because he asked me, he said, why do you get to decide whether that's true or not? And therein lies the problem, so thank you. I don't need –

MS. BLOODGOOD: You don't want to hear the damages?

THE COURT: I don't want to hear the damages. That's an issue of fact.

MS. BLOODGOOD: Just for the record, I do believe it's a sham affidavit.

THE COURT: Again, Ms. Bloodgood, you're wasting your breath. That has not a thing in the world to do with the summary judgment. I appreciate it. That's a great jury argument, but it doesn't impress me, okay?
(R. p. 214, lines 7-21).

Unfortunately, the circuit court's written order does not embody these correct holdings.

ARGUMENTS

I. OVERVIEW: WHY THE CIRCUIT COURT'S ORDER SHOULD BE REVERSED.

The circuit court's order suffers from all of the infirmities which lead to the reversal of orders granting summary judgment: (1) It ignores the existence of factual evidence which supports the Plaintiffs' four separate, independent causes of action; (2) it views inferences which could be drawn from the Plaintiffs' evidence in the light most *favorable to the Defendants*; (3) it construes all ambiguities, conclusions, and inferences arising from the evidence most strongly *against the Plaintiffs*; (4) it applies the wrong law to the Plaintiffs' causes of action; and (5) when it does identify the accurate law, it misinterprets it.

The circuit court stated: "This is a very interesting, very complex situation that needs to be addressed, folks." (R. p. 208, lines 4-5). This interesting situation has a number of similarities to Johnson v. Collins Entertainment Co., Inc., 88 F.Supp.2d 499 (D.S.C. 1999), a video poker lawsuit in which Judge Joe Anderson was presented "with a hotly-contested controversy involving not only a federal racketeering claim, but also several thorny state law issues." Id. at 503. This case presents a hotly-contested controversy, important to our State's tourist communities, but no "thorny state law issues."

The Defendants in this case have taken an approach similar to that taken by the video poker defendants in Johnson:

> In responding to the motion for summary judgment, defendants challenged few if any of plaintiffs' factual assertions as to defendants' behavior. Rather, they challenged the legal conclusions, jurisdiction, available grounds for equitable relief and the standing of the particular plaintiffs to challenge these defendants' behavior.
> Id. at 506, n. 16.

Similarly, the Defendants here have *admitted* in open court that they violate the law.

> He argues that because -- and we'll admit, for purposes of summary judgment -- let me be very clear. We will admit the defendants have violated a zoning ordinance of the city of Charleston. I think it's –
> THE COURT: There's no question they've done that.
> MS. BLOODGOOD: So that's admitted, . . .
> (R. p. 215, lines 7-13).

Unable to deny their illegal conduct, the Defendants challenge the Plaintiffs' standing and assert that the Plaintiffs have not been damaged by the Defendants' unpermitted businesses. The circuit court erred in agreeing with the Defendants' positions.

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST THE PLAINTIFFS' CLAIM UNDER CITY OF CHARLESTON ORDINANCE 54-905.

A. The circuit court erred in failing to hold that the Plaintiffs have statutory standing under the Ordinance.

"Standing may be acquired: (1) through the rubric of 'constitutional standing'; (2) under the 'public importance' exception; or (3) by statute." Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40, 43 (2012). "The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." Id., at 44 (plaintiffs lacked constitutional standing but were given statutory standing by the FOIA: "Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases...."); see also, Taylor v. Aiken County Assessor, 402 S.C. 559, 741 S.E.2d 31 (Ct. App. 2013) (plaintiff had statutory standing as a property taxpayer to challenge appraisal and tax assessment); Bevivino v. Town of Mount Pleasant Zoning Appeals, 402 S.C. 57, 737 S.E.2d 863 (Ct. App. 2013) (plaintiffs had statutory standing to sue over the town's approval of a communications tower).

The Ordinance provides the Plaintiffs with statutory standing.

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

The Plaintiffs satisfy the three necessary elements that allow them to seek an injunction and other remedies.

First, the Defendants admitted in open court that they are using their property in violation of the City's zoning ordinances. (R. p. 215, lines 7-13).

Second, the Defendants admitted that the Plaintiffs are property owners -- it was the Defendants who persuaded the circuit court that the Plaintiffs, rather than the Trust, own the affected properties. (R. pp. 26, 31, 32).

Third, the Plaintiffs have submitted voluminous evidence that they would be, have been, are being, and will be damaged by the Defendants' illegal businesses.

Thus, elements (1) and (2) are admitted by the Defendants. Element (3) is, at the very least, a genuine issue of material fact. "Would be damaged" is a curious choice of language, but an intentional choice by the City. The City chose to not use the words "has been damaged" or "special damages." Robert Holt's affidavits and deposition, the production from www.airbnb.com and www.homeaway.com, and the scant financial information provided by a few of the Defendants constitute evidence of the Plaintiffs' damages, which include loss of rental revenue and diminished property values, caused by the Defendants' use of their properties in violation of the zoning ordinances. (R. pp. 164-165, 168-170, 172-174). At a bare minimum,

the Defendants' competitive pricing advantages, due to not paying the correct amount of taxes or the expenses of fire code compliance and business licenses, establish damage to the Plaintiffs. (R. pp. 164-165).

The circuit court erred in refusing to consider Robert Holt's June 4, 2018 affidavit. (R. p. 3, fn.1). Because he is chairman of each of the Plaintiffs, his testimony about the value of the Plaintiffs' properties and the damages they have sustained is admissible. Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135, 146 (2010); Barton v. Superior Motors, Inc., 309 S.C. 491, 424 S.E.2d 524, 526 (Ct. App. 1992); Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875, 881 (Ct. App. 1997); Whisenant v. James Island Corp., 277 S.C. 10, 281 S.E.2d 794, 796 (1981); Abercrombie v. Abercrombie, 372 S.C. 643, 643 S.E.2d 697, 699 (Ct. App. 2007). This is true regardless of whether Mr. Holt was listed as an "expert." The circuit court acknowledged this at the hearing. "[P]roperty owners are qualified to testify to the loss of the value of their property. They don't have to be experts." (R. p. 216, lines 5-7). However, the circuit court's written Order states the opposite.

The first two elements of statutory standing under the Ordinance are admitted by the Defendants. The Plaintiffs submitted far more than a scintilla of evidence regarding the third element, whether they would be damaged. The circuit court erred in failing to hold that the Plaintiffs have statutory standing under the Ordinance.

B. The circuit court erroneously applied S.C. Code Ann. § 6–29–950, an inapplicable law which was not relied upon by the Plaintiffs, and erred in relying upon the Carnival Corp. decision.

Because the Ordinance grants them statutory standing, the Plaintiffs' amended complaint does not mention S.C. Code. Ann. § 6-29-950. That statute does not supersede or trump any municipal ordinances, and is not exclusive. The General Assembly did not provide that 6-29-950

is the only vehicle for one citizen to sue another when there is an illegal business being conducted in violation of zoning ordinances. The circuit court erred in relying upon § 6-29-950.

Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 753 S.E.2d 846 (2014), where § 6-29-950 was at issue, is not on point because in Carnival (1) the defendant's activity was permitted and allowed by the City; (2) the plaintiffs sued the City, asking that it be forced to rescind the permission it had granted; and (3) City Ordinance 54-905 was not raised or even mentioned.

Here, (1) the Defendants admit that their activity is forbidden by the City; (2) the Plaintiffs have not sued the City, and take no issue with the zoning of the Defendants' properties; and (3) Plaintiffs rely upon the Ordinance and do not invoke § 6-29-950. The circuit court erred in relying upon Carnival Corp.

These errors by the circuit court led it to address irrelevant issues.[2] The circuit court erred in importing the words "neighboring" and "adjacent" into a law (the Ordinance) where they don't exist. Because those words are not defined anywhere in South Carolina law, the circuit court further erred by ruling on them as a matter of law.

Having been granted statutory standing by the Ordinance, it is not necessary for the Plaintiffs to undergo the traditional analysis of constitutional standing. Freemantle, 728 S.E.2d at 44. Thus, the circuit court erred in conducting that analysis. Even if the analysis had been appropriate, the circuit court also erred in concluding that the Plaintiffs have not suffered

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[2]The circuit court erred in offering an advisory opinion on an issue which was not raised – standing because of "public importance." (R. pp. 9-11). "[T]his lawsuit is not being brought in the public interest. So if -- if this helps the public, that's great. If it helps society, that's great. This lawsuit was brought because the Plaintiffs have been damaged. Specifically the Plaintiffs have been damaged." (R. p. 95, lines 6-11).

"special" or "particularized" damages.

> [i]n order for an injury to be particularized, it must affect the Plaintiffs in a personal and individual way. While arising from the different context of a challenge to government action, in Lujan the United States Supreme Court distinguished generalized injuries from those injuries sufficiently particularized as to create standing, writing: '[A] Plaintiff raising only a **generally available grievance about government**—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not' possess standing.
>
> Carnival Corp. 753 S.E.2d at 850 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n. 1 (1992)) (emphasis added).

The Plaintiffs are not suing the government and their grievances are not generally available. Robert Holt's affidavits and testimony establish that the Plaintiffs have been damaged in several ways: (1) reduced bookings; (2) reduced profits due to the Defendants' pricing advantages; and (3) diminished property values. These damages are particular to the Plaintiffs, concrete and individualized. The universe of possibly damaged persons (owners in the short-term overlay district with commercial zoning) is minute compared to all of Charleston or even all of the peninsula. And even within that tiny universe of possibly damaged persons, the Plaintiffs' damages are its own, unique numbers. Only the Plaintiffs own their properties.

The Plaintiffs submitted far more than a "scintilla" of evidence regarding a particularized, special injury-in-fact. It is the circuit court's failure to rule on the Plaintiffs' motion to compel that prevents the Plaintiffs from calculating the full measure of their damages. "Where the wrongful act of the defendant is of such nature as to prevent determination of the exact amount of damages, the defendant is not allowed to insist on absolute certainty, but only that the evidence show lost profits by reasonable inference." Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67, 70 (Ct. App. 1996) (citations omitted). "Where the wrongdoer creates the situation

that makes proof of the exact amount of damages difficult, he must realize that in such cases 'juries are allowed to act upon probable and inferential as well as direct and positive proof.'" Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638, 644 (1950).

C. The circuit court erred in holding that the Plaintiffs lacked standing due to claiming damages *solely* as a result of decreased income because the Plaintiffs are also claiming damages for the diminution in value of their properties.

The circuit court's reliance on Connor Holdings, LLC v. Cousins, 373 S.C. 81, 644 S.E.2d 58 (2007) is erroneous. In that case, a business sued the Town of Hilton Head Island, not just a competitor, and sought mandamus relief to compel the Town to fulfill its duty under an ordinance. This case does not present the same issues.

In addition, the ordinance at issue in Connor Holdings was nearly identical to S.C. Code Ann. § 6-29-950, using the terms "adjacent" and "neighbor," words which do not appear in Charleston's Ordinance. Finally, the plaintiff in Connor Holdings failed to show that its property value had been affected by the competitor's zoning violations. Id. at 60 (citing, *inter alia*, Momeier v. John McAlister, Inc., 203 S.C. 353, 27 S.E.2d 504, 511 (1943) (finding a material depreciation in the value of the plaintiff's property constituted special damages in a zoning violation case)). In this case, the Plaintiffs have shown that their property values are less than they should be because of the Defendants' illegal businesses. (R. p. 173). As argued above, the circuit court erred in not considering Mr. Holt's testimony on this point, and in relying upon Connor Holdings.

D. The circuit court erred in holding that Charleston Ordinance 54-904, rather than Ordinance 54-905, governs this case.

The circuit court cited City Ordinance 54-904 (R. p. 237) and put in italics that "*all questions* arising in connection with the enforcement *or interpretation* of this Chapter, except as

otherwise expressly provided, shall be presented to the Board of Zoning Appeals." (R. p. 8; emphasis in original). The circuit court erred in not italicizing "*except as otherwise expressly provided*" and not construing 54-904 together with 54-905, which gives the Plaintiffs statutory standing and establishes that the Plaintiffs were not required to pursue a non-existent administrative remedy.

In interpreting and applying a law, "words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand" the law's application. Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649, 650 (1996). "In construing statutory language the statute must be read as a whole." Busby v. State Farm Mut. Auto. Ins. Co., 280 S.C. 330, 312 S.E.2d 716 (Ct. App. 1984). "Statutes in *pari materia* ... have to be construed together and reconciled, if possible, so as to render both operative." Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970). "The sections here are part of the same statute, thereby presenting an even stronger case that they be construed together and reconciled." Busby, 312 S.E.2d at 719.

"The court will reject an interpretation of a statute which leads to absurd result[s] that could not have been intended. The court must also presume [that the Legislature] did not intend the statute to be futile." Johnson, 88 F.Supp.2d at 508, citing State ex rel McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964) and Windham v. Pace, 192 S.C. 271, 6 S.E.2d 270 (1939) (language of statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose and object).

The only reasonable way to read and reconcile these two laws is that 54-904's primary thrust is to enable citizens to challenge government action:

> It is the intent of this Chapter that all questions arising in connection with the enforcement or interpretation of this Chapter, except as otherwise provided, shall

> be presented to the Board of Zoning Appeals, and, that from decisions of the Board of Zoning Appeals, recourse shall be to the courts as provided by law. (R. p. 237).

In this case, interpretation is not an issue. The Plaintiffs do not take issue with or challenge any governmental action. The Defendants' properties are properly zoned, that zoning prohibits short-term rentals, and the Defendants admit that they are violating the law.

Enforcement or the lack thereof is not an issue. "The fact that the City has taken no action cannot affect the plaintiff's rights, since the same act may furnish the basis for both criminal and civil redress." Momeier, 27 S.E.2d at 508, citing Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419 (1938); see also, Hewlett v. Squaw Valley Ski Corp., 54 Cal.App.4th 499 (Cal. Ct. App. 1997) (superseded by statute on other grounds) ("In a variation of a theme discussed previously, Squaw Valley suggests the trial court should not have deemed these violations to be unlawful because the county did not seek to revoke its permit. The county's action or inaction is immaterial.")

What the City's zoning ordinances "otherwise provide" (Ordinance 54-904) is that "any property owner, who would be damaged" by another's use in violation of the zoning ordinances, may bring suit. Ordinance 54-905. The circuit court's interpretation of these two ordinances is erroneous. (R. p. 13, fn. 4). In holding that "other remedies" is subject to the phrase "prevent the violation," which is prospective, the circuit court ignored the past verb tense used in "[w]henever a building or structure is demolished, erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this Chapter."

The Ordinance is not restricted to situations where a property owner announces its intention to violate the zoning laws. That happens rarely, and in this case, none of the Defendants called the Plaintiffs to announce that they planned to break the law by renting out short-term.

The circuit court's interpretation of these zoning ordinances is erroneous, would lead to absurd results and should be reversed.

E. The circuit court erred in holding that the Plaintiffs failed to exhaust administrative remedies, where there was no governmental action from which to appeal, the Plaintiffs do not contest the zoning of the Defendants' properties, there are no administrative remedies which give the Plaintiffs the relief they are entitled to, and the Ordinance gives the Plaintiffs the right to bring this suit.

The circuit court held that the Plaintiffs failed to exhaust administrative remedies pursuant to S.C. Code Ann. § 6-29-800 and the Zoning Ordinance of the City of Charleston Article 9. (R. p. 11). This holding is erroneous.

This is an action by one group of property owners against several other property owners. It is not an action against the City, challenging a zoning decision or ordinance or seeking a variance. The laws that the circuit court relied upon are not applicable to this case.

Again, because the Plaintiffs do not take issue with the zoning of the Defendants' properties,[6] there is no administrative remedy for them to pursue. The City does not possess the power to award damages to the Plaintiffs resulting from the Defendants' violation of the law. The Ordinance expressly grants the Plaintiffs the right to come to the courts seeking injunctive relief (in addition to other remedies), without first going to any administrative body.

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[6]The circuit court properly took judicial notice of the zoning of the Defendants' properties, which forbids short-term rentals. (R. p. 43).

The General Assembly granted boards of zoning appeals specific powers: (1) hear appeals from the decisions of the zoning administrator; (2) decide appeals for a variance from the strict application of the zoning ordinance; and (3) permit uses by special exceptions. S.C. Code Ann. § 6-29-800. Variances and special exceptions are not at issue here. Neither is a decision of the zoning administrator: the Charleston zoning department never made any decisions which were in favor of or adverse to the Plaintiffs – the zoning administrator has never refused to enforce the STR laws or decided that the Defendants are actually allowed to engage in STR despite the language of the ordinances.

In this case, there was no municipal decision or action to appeal from. There is and was no administrative remedy for the Plaintiffs to pursue.

F. The circuit court erred in holding that the Plaintiffs asked the court to make zoning decisions.

The circuit court held "that Plaintiffs contend this Court can on its own initiative make zoning enforcement decisions." (R. p. 17). The Plaintiffs make no such contention. The circuit court wrote: "Plaintiffs admit that in their zoning cause of action they are asking a court to enforce the short term rental ordinance because the City is not enforcing it." (R. p. 12, citing R. pp. 94-95, 101, 113). There is nothing on those four deposition pages to support that statement.

It is undisputed that the Defendants' properties were not zoned to allow short-term rentals. The Ordinance gives the Plaintiffs the statutory right to bring suit. "I contend that the Plaintiffs have a remedy under the zoning ordinance and that is one of the causes of action brought by the Plaintiffs." (R. p. 90, lines 15-17).

G. The circuit court erred in holding that irreparable harm must be shown in order to warrant injunctive relief under Ordinance 54-905, which specifically provides for injunctive relief.

The circuit court orally acknowledged that the Plaintiffs seek an injunction provided to them by law, the Ordinance, rather than a preliminary injunction under Rule 65, SCRCP. (R. p. 211). Nevertheless, the circuit court imposed the requirement of irreparable harm. This was error.

Because the Defendants admit they are breaking the law, the Plaintiffs are entitled to statutory injunctive relief without having to show irreparable harm. In Momeier v. John McAlister, Inc., downtown Charleston residents complained that a funeral home violated the zoning of its location. Without even mentioning irreparable harm, the Supreme Court affirmed a permanent injunction forbidding the defendant from continuing to operate the funeral home. "It is clear that one who sustains special damages by reason of the violation of a zoning ordinance has a right to invoke the aid of the Court of equity, and to ask for injunctive relief." 27 S.E.2d at 507.

When he concluded that video poker operators were continually and flagrantly violating the law, Judge Anderson issued a permanent injunction.

> Furthermore, equitable relief is appropriate if a plaintiff can demonstrate that effective legal relief can be secured only by a multiplicity of actions, as, for example, when the injury is of a continuing nature, so that plaintiff would be required to pursue damages each time he was injured. An adequate remedy at law may be unavailable when defendant repeatedly commits allegedly harmful acts.
>
> . . .
>
> In this case, there is minimal legal hardship on defendants. They are simply being required to comply with the law. : . . A plaintiff asking an injunction because of the defendant's violation of a statute is not required to show that otherwise rigor mortis will set in forthwith; all that 'irreparable injury' means in this context is

> that unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired. . . . Furthermore, equitable relief is appropriate if a plaintiff can demonstrate that effective legal relief can be secured only by a multiplicity of actions, as, for example, when the injury is of a continuing nature, so that plaintiff would be required to pursue damages each time he was injured. An adequate remedy at law may be unavailable when defendant repeatedly commits allegedly harmful acts.
>
> Johnson, 88 F.Supp.2d at 522 (citations omitted).

The common law recognizes that where conduct violates a statute or ordinance, "an injunction may be issued without a further showing of irreparable harm." Joint School Dist. No. 1, City of Wisconsin Rapids v. Wisconsin Rapids Education Ass'n, 234 N.W.2d 289, 310 (Wis. 1975) (footnote omitted). "The express basis for such holdings is that the fact that the activity has been declared unlawful reflects a legislative or judicial determination that it would result in harm which cannot be countenanced by the public." Id. "It is not necessary to show irreparable injury . . . when the act complained of is unlawful." Camp, Dresser & McKee, Inc. v. Steimle and Assoc., Inc., 652 So.2d 44, 47 (La. Ct. App. 1995), citing, *inter alia*, Miller v. Knorr, 553 So.2d 1043 (La. Ct. App. 1989). "[A] showing of irreparable injury is a prerequisite to injunctive relief only where the actions to be enjoined are lawful. The violation of a zoning ordinance is unlawful. Thus, irreparable injury need not be proven." Miller, 553 So.2d at 1045, citing City of New Orleans v. National Polyfab Corp., 420 So.2d 727 (La. Ct. App. 1982) and Bossier v. Lovell, 410 So.2d 821 (La. Ct. App. 1982).

In addition to Momeier, South Carolina's restrictive covenant caselaw supports the Plaintiffs' right to an injunction here. "Generally, a restrictive covenant will be enforced regardless of the amount of damage that will result from the breach and even though there is no substantial monetary damage to the complainant by reason of the violation. . . . The *mere breach alone is grounds for injunctive relief*." AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674

S.E.2d 505, 509 (Ct. App. 2009), *modified on other grounds by* Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010) (emphasis added), quoting Siau v. Kassel, 369 S.C. 631, 632 S.E.2d 888, 893 (Ct. App. 2006); Houck v. Rivers, 316 S.C. 414, 450 S.E.2d 106, 109-110 (Ct. App. 1994).

Cases involving restrictive covenants are instructive here because like zoning ordinances, restrictive covenants circumscribe the use of private property. "Brown also argues that the trial judge erred in drawing an analogy between restrictive covenants and zoning ordinances. While the legal principles on restrictive covenants and zoning ordinances are not entirely analogous, the judge's analogy was limited, and the legal reasoning he applied does not require reversal." Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985); accord, Welborn v. Page, 247 S.C. 554, 148 S.E.2d 375 (1966) ("There is no zoning ordinance applicable to any of the property here involved and there are no restrictive covenants of any kind applicable to the lands of the respondents . . ."); Strong v. Winn-Dixie Stores, Inc., 240 S.C. 244, 125 S.E.2d 628 (1962) ("It is undisputed that there are no restrictive covenants in the deeds to the property in question or zoning ordinances of the Town of York, which prohibit the use of the property of the defendant Howard for commercial purposes. . . . The defendants are not prohibited from operating it on their property either by restrictive covenants or zoning ordinances . . ."); Inabinet v. Booe, 262 S.C. 81, 202 S.E.2d 643 (1974) ("When restrictive covenants and zoning ordinances are in conflict the more restrictive of the two prevails."); The Spur at Williams-Brice Owners Ass'n, Inc. v. Lalla., 415 S.C. 72, 781 S.E.2d 115 (2015) (zoning case cited in a restrictive covenant case).

The circuit court erred in holding that the Plaintiffs are required to show irreparable harm in order to warrant an injunction under the Ordinance.

III. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST THE PLAINTIFFS' CLAIM FOR VIOLATION OF THE UTPA, RELYING UPON THE "REGULATORY EXCEPTION," BECAUSE THE DEFENDANTS ADMIT THEY ARE BREAKING THE LAW.

The circuit court's ruling regarding the regulatory exception is erroneous. The circuit court misstated the law by holding that Section "39-5-40(a) exempts conduct already regulated by law." (R. p. 13). By its very terms, the regulatory exemption applies to only "[a]ctions or transactions **permitted** under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law." S.C. Code § 39-5-40(a) (emphasis added).

The Defendants admit that their businesses violate the law. Businesses which violate the law cannot, by definition, be permitted by the law. The analysis of the regulatory exception to the UTPA does not need to go any further. See, Beattie v. Nations Credit Fin. Servs. Corp., 69 Fed.App'x 585, 588 (4th Cir. 2003) ("There is no indication that a statute or agency regulation requires or permits NationsCredit to pursue collection and foreclosure activities on accounts purportedly satisfied by an LMS affidavit. Therefore, NationsCredit is not exempt from liability under the SCUTPA."); Dema vs. Tenet Physician Services-Hilton Head, Inc., 383 S.C. 115, 678 S.E.2d 430, fn 6 (2009) ("[T]he trial court . . . erroneously dismissed the claim pursuant to the regulatory exception, which provides that SCUTPA does not apply to: 'actions or transactions permitted under laws administered by any regulatory body.' . . . This provision lends no support to HHRMC because Appellants alleged HHRMC performed unauthorized TCCs."); see also, Trident Neuro-Imaging Laboratory v. Blue Cross and Blue Shield of South Carolina, Inc., 568

F.Supp. 1474 (D.S.C. 1983) (insurer's policy exclusion was exempt from unfair trade practice claims because the exclusion was specifically *approved* by the South Carolina Commission on Insurance); Carr v. United Van Lines, Inc., 289 S.C. 194, 345 S.E.2d 734 (Ct. App. 1986) (transaction which was specifically *permitted* under regulations and tariffs administered by the Interstate Commerce Commission was exempt from UTPA).

In Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc., 294 S.C. 169, 363 S.E.2d 390 (Ct. App. 1987), *overruled on other grounds by* O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993), this Court "reasoned that the Highway Advertising Control Act is designed to regulate the size and location of the signs--not competition between competitors and therefore did not fall within the exemption." Ward v. Dick Dyer & Associates, Inc., 304 S.C. 152, 403 S.E.2d 310, 312 (1991) (summarizing Bocook).

The Ward court adopted the reasoning of a Tennessee case:

> The purpose of the exemption is to insure that a business is not subjected to a lawsuit under the Act when it does something **required** by law, or does something that would otherwise be a violation of the Act, but which is **allowed** under other statutes or regulations. It is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency. Virtually every activity is regulated to some degree. The defendant's interpretation of the exemption would deprive consumers of a meaningful remedy in many situations.
> 403 S.E.2d at 312, quoting Skinner v. Steele, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987) (emphasis added).

Far from being "required" or "allowed" by law, the Defendants' short-term rental businesses are **forbidden** by law. Unless a business activity is *required* or *permitted* by some governmental or regulatory body, it is not insulated by the "regulatory exception" to the UTPA. See, Johnson, 88 F.Supp.2d at 518 ("there is no showing that any relevant state agency or authority has done anything to suggest that the law means anything other than what this court has

concluded it means. Defendants cannot, therefore, find protection in the 'regulated activity' exemption to the SCUTPA.").

The circuit court's reliance on Inmed Diagnostic Services, LLC v. Medquest Associates, Inc., 358 S.C. 270, 594 S.E.2d 552 (Ct. App. 2004) is misplaced. In that case, the defendant had submitted information to the regulatory agency, DHEC, regarding whether a Certificate of Need ("CON") was required. The parties battled at the DHEC level and then in front of the Administrative Law Judge Division before the plaintiff resorted to its UTPA lawsuit. The defendants in Inmed had actually applied for permission for what they were doing. Like the defendant in Carnival Corp., and *unlike* the Defendants in this case, the Inmed defendant was operating with the government's *permission.*

The court in Inmed was interpreting South Carolina's CON Act, S.C. Code Ann. §§ 44-7-110 to -370 (2002). Importantly, the CON Act provides only DHEC with the power to bring suit for a violation.

> The department, in accordance with the laws of this State governing injunctions and other processes, may maintain an action in the name of the State against any person or facility for violation of this article and regulations promulgated under this article. In charging any defendant in a complaint in an action, it is sufficient to charge that the defendant, upon a certain day and in a certain county, did violate any provision of this article or of the regulations promulgated without the necessity for showing irreparable harm.
> S.C. Code Ann. § 44-7-330.

In stark contrast, there is no equivalent to the CON Act which forecloses the Plaintiffs' UTPA claim. The Defendants here did not apply for or receive permission for their businesses' activities. They admit those activities violate the law.

The circuit court erred in granting summary judgment on the basis of the regulatory exception.

IV. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST THE PLAINTIFFS' NUISANCE CLAIM.

Although it is not perfectly clear, it appears as though the circuit court's order holds that the Plaintiffs have not provided even a scintilla of evidence in support of their claim for a private nuisance, and that if the Plaintiffs are suing for a public nuisance, they fail as well. There was no reason for confusion about whether the Plaintiffs were suing for a private or a public nuisance. At a hearing more than three years ago, the Defendants themselves referenced the "private causes of action for nuisance, . . ." (R. p. 204, line 16).

A. A private nuisance claim does not require the Plaintiffs to be the *only* entities affected by the Defendants' actions.

The law of standing and private nuisances does not require that the three Plaintiffs be the only affected entities in this world of 7 billion people. "[A] private nuisance affects one *or a limited number* of individuals only." (R. p. 19, fn. 5, emphasis added, citation omitted). There is no legal requirement that a plaintiff be the *sole* damaged entity in order to pursue a private nuisance claim.

> [A]n injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause.
> Brown v. Hendricks, 211 S.C. 395, 45 S.E.2d 603, 606 (1947) (citation omitted, affirming a trial court order "to abate and enjoin a public and private nuisance.")

> While the owner of a lot on a public street has the same right to the use of the street that rests in the public, he at the same time has other rights which are special and peculiar to him; and the right of ingress and egress is one of them. This right of access is appurtenant to his lot, and is private property. To destroy that right is to damage that property.
> Id. at 606; Huggin v. Gaffney Dev. Co., 229 S.C. 340, 92 S.E.2d 883, 885 (1956).

The Plaintiffs here are three of a very limited number of people/entities who own property and legally operate short-term rental businesses in Charleston. The "general public" encompasses everybody. Not everybody lives on the Charleston peninsula. Not all Charlestonians own property. Very, very few Charleston property owners operate short-term rental businesses. Far fewer do so legally. (R. pp. 164-165).

Only three of the Charleston property owners who operate legal STR businesses can claim damages to the *Plaintiffs'* properties. Those three owners, the Plaintiffs, have provided far more than a scintilla of evidence of damage to their properties, in the form of diminution of value of their properties.

B. The circuit court erred in holding that lost rental income is not recoverable in a private nuisance claim.

The circuit court held: "Loss of income is not the type of damage encompassed in a private nuisance claim. . . . Plaintiffs' private nuisance claim fails as Plaintiffs allege the injury they have suffered is their ability to make income, not any injury to their land." (R. pp. 20-21). South Carolina law is exactly the opposite.

"A nuisance, trespass's counterpart, provides a remedy for invasions of a property owner's right to the use and enjoyment of his property." Babb v. Lee County Landfill SC, LLC, 405 S.C. 129, 747 S.E.2d 468, 473 (2013). In a nuisance case, the available damages include lost rental value, Id. at 475 (citations omitted), and diminution in the market value of the property. Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296, 307 (Ct. App. 1993).

The Plaintiffs proffered substantial evidence that the Defendants' illegal use of their property has negatively affected the Plaintiffs' rights to maximize the market value and rental value of the Plaintiffs' properties. The ability to earn income is an enjoyment of property and the

Defendants have negatively affected the income of the Plaintiffs. (R. pp. 168-170, 173).

The circuit court erred in granting summary judgment on the basis of a misreading of South Carolina law.

C. The circuit court erred in not recognizing the significance of the Defendants' admission of illegality.

"Generally, a private nuisance is that class of wrongs that arises from the unreasonable, unwarrantable, or *unlawful* use by a person of his own property, personal or real. Nuisance law is based on the premise that every citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property." O'Cain v. O'Cain, 322 S.C. 551, 473 S.E.2d 460, 466 (Ct. App. 1996) (citations omitted; emphasis added).

The Defendants admit that they are violating the law. (R. p. 215, lines 7-13). No case holds that a court should protect the right of a defendant to use its property illegally. The nuisance cases which go to jury verdict largely involve *legal* uses of property, which, depending upon the facts, can still be nuisances, and require courts to balance the equities of the parties.

> The courts have encountered great difficulty in undertaking to harmonize these rights. Necessarily there must be some element of compromise. Then, too, regard must be had to the interest of the public. In the evolution of the law of nuisance, elements are now considered which were not recognized at common law. Many things now uniformly held to be nuisances would not have been so classified under the definition given by Blackstone. The older authorities emphasized the right of the property owner to use his property for any *lawful purpose* but the trend of modern authority is to give more consideration than formerly to the right of the owner to the reasonable and comfortable enjoyment of his property. And comfortable enjoyment means mental as well as physical comfort. Nuisance is a question of degree depending upon varying circumstances.
>
> Young v. Brown, 212 S.C. 156, 46 S.E.2d 673, 679 (1948) (emphasis added).

In Young, the court overruled a demurrer, allowing a nuisance suit against the owner of a

cemetery, even though the cemetery was "not detrimental to the health or offensive to the physical senses of those living nearby." Id. at 679.

The Defendants here admit that they are using their properties illegally. Summary judgment was inappropriate.

D. The circuit court erred in ruling as a matter of law on nuisance, which is a fact-intensive claim.

"The finding that a business operation constitutes a nuisance is one of fact." Neal v. Darby, 282 S.C. 277, 318 S.E.2d 18, 23 (Ct. App. 1984). "It is generally recognized that it would be difficult, if not impossible, for the courts to state *any fixed or arbitrary rule* governing cases of this kind. Each case must be determined by the facts and circumstances developed therein." Young, 46 S.E.2d at 680 (emphasis added). "We hold the nuisance issue was for the jury. In South Carolina 'anything' working inconvenience or damage, or interfering with the enjoyment of life or property is a nuisance." Lever v. Wilder Mobile Homes, Inc., 283 S.C. 452, 322 S.E.2d 692, 693 (Ct. App. 1984) (citation omitted).

"The degree of annoyance or inconvenience which must be produced to constitute an actionable nuisance cannot be definitely stated; *no fixed rule* can be given that will be applicable to all cases. Each case must therefore depend largely on its own facts." Home Sales, Inc. v. City of North Myrtle Beach, 299 S.C. 70, 382 S.E.2d 463, 470 (Ct. App. 1988) (citations omitted; emphasis added). "Whether a particular use of property is reasonable and whether such use constitutes a nuisance depends largely upon the facts of each case. What is a reasonable use and whether a particular use is a nuisance *cannot be determined by fixed general rules*, but depends upon such facts as location, character of the neighborhood, nature of the use, extent and frequency of the injury, the effect upon the enjoyment of life, health, and property, and the like."

O'Cain, 473 S.E.2d at 466 (citations omitted; emphasis added).

In 1926, the United States Supreme Court's seminal zoning opinion spoke to the fact-intensive nature of a civil nuisance claim: "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

Because the Defendants admit using their properties illegally, and because the Plaintiffs have proffered evidence that the Defendants' violations of the law detrimentally affect the Plaintiffs, the circuit court erred in granting summary judgment as to nuisance.

Although it is not explicitly stated, the circuit court's order seems to impose § 6-29-950's irrelevant "neighboring or adjacent" language onto the common law nuisance claim. This was error. Like the Ordinance, South Carolina common law applies no blanket proximity requirement on nuisance claims, which are intensely fact-specific and not subject to any fixed rules. See, Young, 46 S.E.2d at 679 (court overruled a demurrer, allowing a nuisance suit against the owner of a cemetery in "proximity" to the plaintiffs); Carter v. Lake City Baseball Club, 218 S.C. 255, 62 S.E.2d 470 (1950) (injunction against nighttime baseball games due in part to noise, no mention of distance); Neal, 318 S.E.2d at 20 (noxious smells from a landfill, injunction affirmed; "The county called as witnesses numerous residents of the area who lived within one-half to three miles from the landfill").

The Plaintiffs have presented evidence that the Defendants' illegal use of their property has negatively affected the Plaintiffs' rights to maximize the market value and rental value of the Plaintiffs' properties. The circuit court erred in granting summary judgment against the Plaintiffs' nuisance claim.

V. THE PLAINTIFFS ARE ENTITLED TO VIDEO-TAPE THE DEPOSITIONS OF THE DEFENDANTS.

The Plaintiffs moved the circuit court for an order allowing the Plaintiffs to video tape the depositions of the Defendants. (R. pp. 152-157). It was proper for the circuit court to not rule on that motion once it had decided to grant summary judgment against the Plaintiffs. However, the transcript of the hearing shows clearly that if this Court reverses the circuit court's order, this video-tape deposition issue will arise again. (R. pp. 217-220).

In furtherance of judicial economy, the Plaintiffs respectfully request that this Court rule that the Plaintiffs are entitled to take video-taped depositions of the Defendants. See, American Security Ins. Co. v. Howard, 315 S.C. 47, 431 S.E.2d 604, 609 (Ct. App. 1993) ("because the issue will arise again on remand, we address it for the guidance of the circuit court.")

Depositions may be video-taped in cases where "the prayer for relief involves an amount of one hundred thousand dollars or more" or "the court has granted permission for the use of videotape by court order." Rule 32(h), SCRCP. The Plaintiffs did not pray for ANY certain amount in their First Amended Complaint. Had they simply written that they believe they are entitled to more than $100,000, they would be automatically entitled to video-tape the Defendants' depositions. Under the rule, no proof or evidence of their damages would be necessary. Even if some evidence of damages was necessary, this record has evidence of millions of dollars of damages suffered by the Plaintiffs. (R. p. 173).

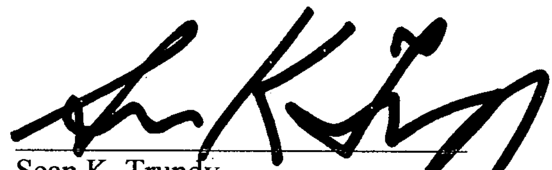
This Court should give guidance to the circuit court regarding the Plaintiffs' right to video-tape the Defendants' depositions.

CONCLUSION

The circuit court accurately identified this case as an interesting situation but erred in viewing it as complex. (R. p. 208, lines 4-5). Application of the proper standard of review to the factual evidence, and proper application of the substantive law, should yield a jury trial, not summary judgment.

The circuit court's order (1) ignores the existence of factual evidence which supports the Plaintiffs' four separate, independent causes of action; (2) views inferences which could be drawn from the Plaintiffs' evidence in the light most *favorable to the Defendants*; (3) construes all ambiguities, conclusions, and inferences arising from the evidence most strongly *against the Plaintiffs*; (4) applies the wrong law to the Plaintiffs' causes of action; and (5) when it does identify the accurate law, it misinterprets it.

For the reasons stated above, this Court should reverse the circuit court's order.



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