

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

**RECEIVED**

**Mar 29 2021**

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

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

---

Appellate Case No. 2019-002031

---

Richard Ralph and Eugenia Ralph..... Respondents,

v.

Paul Dennis McLaughlin and Susan Rode McLaughlin..... Petitioners.

---

**PETITION FOR REHEARING**

---

Respondents Richard and Eugenia Ralph petition for rehearing of this case pursuant to Rule 221 of the South Carolina Appellate Court Rules, because this Court's Opinion No. 28015, filed March 17, 2021, (the "Opinion") misapprehends the law, overlooks applicable statutory provisions, and mistakes significant facts in the record.

This Court should withdraw the Opinion. It is legally erroneous, factually unsound, and procedurally unjust. The Opinion makes grave mistakes which will have resounding ramifications for future litigants. The Opinion's errors of law and misapprehension of fact are discussed in detail below. Most troubling, though, are the implications of the Opinion for lawyers in this State who endeavor to protect their clients' interests in fair compliance with the rules of court. The Opinion rules, wrongly, on issues

that were not before the Court for certiorari review, thereby depriving Mr. and Mrs. Ralph of a fair opportunity to brief the law correctly on those issues.

### ARGUMENT

This petition and the underlying appeal boil down to the fundamental principles of the trial and appellate court systems, as established by the Legislature and engrained in the common law. The court decides questions of law; the jury decides questions of fact. The appellate courts exist primarily to scrutinize errors of law by the lower court, and their purpose is to correct those errors – when properly raised. This is because, *inter alia*, **a factfinder's decision is corrupted if its foundation in the law is wrong**. In this case, the jury's decision on damages was materially tainted by the trial court's errors of law, discussed below.

Moreover, the appellate court system is an orderly kingdom. It has Rules – statutory, common law, and procedural – which mostly coexist in a logical fashion. The rules exist to give direction and predictability to the appellate bench and bar, and so that the parties and their attorneys know how legal decisions will be considered and made, and how to conduct themselves. Lawyers in this State, striving to represent their clients, rely on this framework in advising their clients, and in protecting their clients' interests. The Opinion disregards those rules, to the great detriment of the Ralphs.

**In the interest of equity and justice, and also because its Opinion makes breathtaking errors of law and fact as set forth below, this Court should grant this Petition and withdraw its faulty decision.**

Here are the Cliff Notes on the arguments that follow:

(1) The question of the Ralphs' appellate standing was abandoned by the McLaughlins. In ruling (wrongly) on aggrievement under one statutory section (S.C. Code § 18-1-30), this Court overlooked the subsequent section of the statute, which unambiguously permits the appellate court to "review any intermediate order involving the merits and necessarily affecting the judgment." S.C. Code § 18-1-130. **The Opinion's misapplication of the statute will profoundly and negatively affect the rights of litigants and the powers of appellate courts in this State, in a way the Legislature did not intend.**

(2) The Court of Appeals' decision to reverse the trial court on the Ralphs' New Trial motion – which had several prongs – was not before the Court for certiorari review, it was precluded from consideration by the two-issue rule,<sup>1</sup> and in any event the trial court's order was wholly controlled by error of law.

(3) This Court was precluded by the two-issue rule from reversing the Court of Appeals' decision on punitive damages, the Opinion applies the wrong standard, and

---

<sup>1</sup> Most simply, this Court should withdraw its Opinion and affirm the Court of Appeals' decision in its entirety on the two-issue rule, because counsel for the McLaughlins conceded the two-issue rule applies to them in this appeal. (*see infra*).

Alternatively, the Ralphs request remand to the Court of Appeals for it to decide whether the evidence supported the jury's nominal damages award, an issue not before this Court because it was never ruled on by the Court of Appeals: "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." *Ralph v. McLaughlin*, 428 S.C. 320, 834 S.E.2d 213, fn. 20 (Ct. App. 2019); *see Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018) ("However, we did overlook the procedural fact that the court of appeals found it unnecessary to address all issues raised before it, so we substitute the attached revised opinion remanding this case to the court of appeals to address the other issues.")

both this Court and the trial court wrongly dispossessed the Ralphs of their right to have the jury weigh the existing facts going to recklessness.

In addition to those core errors, the Opinion seriously misapprehends facts that are in the Record, and it creates some that are not; the Opinion interprets and criticizes Judge Cooper's order, which itself was not before this Court, was never appealed, *and which is still the law of the case*; and the Opinion does not rule on an issue (the law of the case), which would require affirmance of the Court of Appeals under the law. The Opinion should be withdrawn.

**I. The question of appellate standing was not preserved for review, it was not before this Court, and the Opinion's incorrect decision will have a profound and negative "ripple effect" on litigants and the appellate courts.**

The Court of Appeals reversed the trial court's erroneous ruling that the Ralphs had not established trespass as a matter of law, with no question of fact for jury determination. The McLaughlins did *not* appeal this decision by the Court of Appeals, and therefore this Court had no power to alter that determination, expressly or by implication. The Court of Appeals explicitly found that the trial court's legally incorrect decisions on trespass and abandonment were the erroneous basis on which the judgment and new trial orders depended.

But, in its opening sally, the Opinion holds (wrongly) that the Ralphs had no right to bring this appeal. This question was not before the Court. Because the issue was never raised by the McLaughlins, the Ralphs had no opportunity to brief its merits, nor to argue that they absolutely do have standing to appeal the trial court's erroneous decision of law on their directed verdict motions, which contaminated the jury's deliberations and the

ultimate outcome. The Opinion on the question violates this Court's own preservation rules, and it is wrong as a matter of law.

**a. The question of appellate standing was not preserved for this Court's review.**

The question of the Ralphs' standing to bring this appeal was never raised by the McLaughlins. As such, it was abandoned and should not have been touched on by this Court. See *James v. Anne's Inc.*, 390 S.C. 188, 701 S.E.2d 730 (2010) (error preservation rules apply to question of appellate standing, precluding amici curiae from arguing lack of standing when not raised by respondent); *Kolle v. State*, 690 S.E.2d 73, 386 S.C. 578 (2010), *abrogated on other grounds by Smalls v. State*, 810 S.E.2d 836, 422 S.C. 174 (2018); see also Jean H. Toal *et al.*, *Appellate Practice in South Carolina*, 3rd ed., 125-126 ("in appeals where a party belatedly endeavors to raise issues concerning the justiciability of a controversy for the first time on appeal, the appellate courts have employed error preservation principles to find the matter unpreserved for purposes of appellate review"); see also *id.* at 131 ("Note that there are no material distinctions between the requirements of establishing standing under general standing principles and the requirements to appeal pursuant to Rule 201(b), SCACR."); see also *id.* at 432 ("**Note where a party fails to argue an issue in the brief, it is not preserved for appellate review.**") (emphasis added).

The McLaughlins failed—on numerous occasions—to raise the question of appellate standing. "Preserving issues for appellate review is a fundamental component of appellate practice . . . The appellants have the responsibility to identify errors on appeal, not the Court." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532-533, 564 S.E.2d 322 (2001) (internal citations omitted).

The Ralphs are mindful that issue preservation is not a “gotcha game.” In this case, however, the McLaughlins had at least four occasions to ask an appellate court to decide the question of appellate standing. The parallel harm to the Ralphs is – if only the issue had been properly raised – the Ralphs would have had a sporting chance to oppose it, and the Court of Appeals could have rendered a decision on the question, as well. Instead, without guidance from briefing, the Opinion dangerously misapprehended the law, as discussed in the next subsection.

Here is the sequential basis for the Ralphs’ preservation argument:

- (1) The McLaughlins’ brief to the Court of Appeals is silent on standing, in no way questioning the Ralphs’ right to ask the Court of Appeals to reverse the trial court’s errors of law on the issues of abandonment and trespass.
- (2) The Court of Appeals rendered a decision on the trial court’s errors, finding that the trial court erred as a matter of law as to trespass and abandonment. The Court of Appeals did not rule on the question of appellate standing, which was not before it.
- (3) The McLaughlins’ Petition for Rehearing to the Court of Appeals is silent on standing.
- (4) The McLaughlins’ Petition for Certiorari to this Court is silent on standing.
- (5) The McLaughlins’ brief to this Court is silent on standing.
- (6) The McLaughlins filed no reply brief with this Court.

As such, the issue is dead from an appellate perspective. It should not have been conjured from the beyond, after years of appeals – suddenly and unexpectedly, with no notice to the Ralphs. This Court should have deemed the question of appellate standing to have been abandoned, on each and every one of the above occasions where the McLaughlins failed to argue it.

Importantly, because the McLaughlins did not raise the issue of standing in the Court of Appeals, nor in their Petition for a Writ of Certiorari, the question was not before this Court. *See* Rule 242 (d), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”); Rule 242 (i) (“The petition may be granted or denied on any question presented.”); Rule 240 (c) (a petition “shall state the grounds thereof”); *see also* Jean H. Toal et al., *Appellate Practice in South Carolina*, 210 (“There are two prerequisites to preserving an issue for consideration by the Supreme Court on writ of certiorari: (1) the issue must have been raised in the initial arguments to the Court of Appeals, and (2) the issue must have been raised in the petition for rehearing before the Court of Appeals. Thus, an issue not raised to nor addressed by the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari.”).<sup>2</sup>

In accordance with its own precedent on issue preservation, and the procedural limits to certiorari review, this Court should change its decision to affirm the Court of Appeals’ decision in its entirety, including its finding that the trial court erred as a matter

---

<sup>2</sup> Moreover, in an interesting microcosm, this Court’s decision on the Ralph’s right to appeal was isolated to a single question **which the McLaughlins had also abandoned** (*i.e.* the Court of Appeals’ ruling on error of law by the trial court as to liability). The McLaughlins did not raise that issue in their petition for rehearing to the Court of Appeals, nor in their petition for certiorari to this Court, nor in their brief to this Court. Because this component of the Court of Appeals’ decision (and the Court of Appeals’ authority to decide it) was not appealed by the McLaughlins, **the issue was not before this Court at all for certiorari review**. The Court of Appeals’ decisions on trespass and abandonment should have been affirmed as the unquestioned law of the case, along with the corollary that the trial court’s decision denying a new trial was controlled by those errors of law. *Ralph v. McLaughlin*, 428 S.C. 320, 834 S.E.2d 213 (Ct. App. 2019), *reversed on other grounds, pending petition for rehearing* (collecting numerous cases that stand for the proposition that “an unappealed ruling is the law of the case and requires affirmance.”).

of law on the trespass and abandonment issues, and to reflect that the Ralphs had the unquestioned right to appeal.

For the sake of argument, the Ralphs will address this Court's decision on standing, which was wrong under the law and must be reheard and withdrawn.

**b. The Ralphs were aggrieved by the trial court's judgments, and they had the statutory right to appeal foundational rulings.**

The Opinion threatens litigants' statutory entitlement to appeal errors of law that corrupt the ultimate outcome. The Opinion wrongs the Ralphs, and it must be withdrawn before it become the basis to unjustly deprive others of their right to appellate review. The Opinion compounds this grave error by impliedly divesting the Court of Appeals of its statutory authority to review a trial court's foundational rulings.

The mistake germinates here:

Because the jury ruled in [the Ralphs'] favor on the matter of liability, [the Ralphs] were not aggrieved by the denial of their motion for a directed verdict as to liability, and, as a result, had no right to appeal that decision.

(Opinion, No. II). This conclusion is defective, because it improperly attempts to carve out from the broad right to appeal a discrete component of the final judgment. This construction is unequivocally **NOT** contemplated by the statute – instead, the Legislature clearly gives appellate courts the authority to review the underlying elements of a judgment on appeal.

A threshold question on appeal – which may be abandoned as set forth above – is whether the person bringing the appeal has the right to do so. The right is controlled by statute. The law bestows, upon “any party aggrieved” in a civil action, the privilege to cross the appellate threshold. S.C. Code § 18-1-30 (“Who may appeal.”) (“Any party

aggrieved may appeal in the cases prescribed in this title.”). This is a very broad right. The statute uses expansive language (“any party”)<sup>3</sup>, and it expressly incorporates other sections of the statutory scheme (“in the cases prescribed in this title.”). *Id.* The Opinion misapprehends that, **once a party steps over the appellate threshold, the Legislature specifically vests the appellate court with the unequivocal power to review any error of law that underlies the judgment appealed from and affects the ultimate outcome:**

Upon an appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment.

S.C. Code § 18-1-130 (“Review of intermediate orders affecting judgment.”). In other words, when the two statutory provisions are read in conjunction – as they must be – it is clear that the Court of Appeals in this case had the power to review the trial court’s erroneous intermediate decisions on abandonment and trespass.

There is no question that the Ralphs had the right to appeal the trial court’s final judgment and its order denying a new trial. The caption of this case is *Ralph v. McLaughlin* – clearly the Ralphs meet the requirement of being a “party.” Moreover, the case is about trespass to the Ralphs’ property, and resulting damage to the Ralphs’ property. The Ralphs thus meet the statutory requirement of being “aggrieved,”<sup>4</sup> since

---

<sup>3</sup> The Legislature vests the right in “any party.” This means Justice Few could not appeal from an order in the case of *Kaye G. Hearn v. George C. James, Jr.*, because Justice Few is not a “party” to the case.

<sup>4</sup> The adjective “aggrieved” is intended to prevent a party from appealing a decision that does not have any bearing on his own person or property. For example, in the case of *Donald W. Beatty v. John W. Kittredge, John C. Few, and George C. James, Jr.*, Justice Kittredge could not appeal from an order granting Chief Justice Beatty a temporary injunction against Justice James, which would not adversely affect Kittredge’s interests (unless, however, the injunction was against Justice James to stop him from using Justice Kittredge’s iPhone to play relentless yacht rock music

the court's judgment and order directly and prejudicially bear on their interests.<sup>5</sup> See *Bivens v. Knight*, 254 S.C. 10, 173 S.E.2d 150 (1970) (examining whether complaining party was injured in substance). **In other words, the Ralphs crossed the statutory threshold because they had a substantial stake in the outcome of the appeal.**<sup>6</sup> Indeed, the case quoted by the Opinion analyzes the question of the right to appeal as **whether reversal of the lower court would have any identifiable benefit to the appealing party:**

We can find nothing in the record that would constitute the appellant a party aggrieved in the legal sense. . . . There can be no benefit or improvement in the appellant's position should we reverse the judgment of the lower court.

---

in chambers—at which point Justice Kittredge indeed would be much aggrieved by this burden on his property, and Justice Hearn might seek to intervene).

<sup>5</sup> This Court acknowledges that right by ruling on certain decisions by the trial court. There is no doubt that the trial court's denial of a new trial and its directed verdict on punitive damages gave the Ralphs appellate standing.

<sup>6</sup> The cases cited by the Court in its Opinion examine the phrase "aggrieved party" as whether the party has a tangible stake ("a substantial grievance") in the outcome of the appeal, because the judgment directly bears on his personal, property, or financial interest. *Cisson* at 178, 177 S.E.2d at 605 (bank that intervened to establish first priority lien was not aggrieved by the court's order as to another debtor because it in no way altered the bank's lien priority); *Bivens v. Knight*, 254 S.C. 10, 173 S.E.2d 150 (1970) (examining whether complaining party was injured in substance, and sagely recognizing that one definition of "aggrieved" is "damnified"); *Ex parte Whetstone*, 347 S.E.2d 881, 289 S.C. 580 (1986) (a non-party was not aggrieved because he suffered no legal injury). **Importantly, the law recognizes that despite having been a "winning" party below, a party can still be aggrieved by a judgment of the court.** See *Rhodes v. Lawrence*, 302 S.E.2d 343, 279 S.C. 96 (1983) (Plaintiffs won at trial but appealed because punitive damages were denied by directed verdict; Supreme Court remanded for new trial); *Cobb v. Benjamin*, 325 S.C. 573, 580, 482 S.E.2d 589, 592-93 (Ct. App. 1997) (holding party was aggrieved and appeal was proper despite judgment essentially granting the relief the party requested); *North American Rescue Prods. Inc. v. Richardson* 396 S.C. 124, 134, 720 S.E.2d 53, 59 (Ct. App. 2011), *reversed on other grounds*, 411 S.C. 371, 769 S.E.2d 237 (2015) (noting that, although Appellant "won" on liability, he did not receive the relief he sought and so was "aggrieved" under the rules).

*Cisson v. McWhorter*, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970) (emphasis added). In this case, every order and decision made by the court at trial directly pertained to the Ralphs' persons and operated on their property. In other words, the Ralphs had a tangible, substantial, very real and not simply academic interest in the rulings made at trial, from which they stood to benefit from reversal on appeal. *Id.* ("an aggrieved party is . . . [one on whom the judgment] operates on his rights of property or bears directly upon his interest . . .").

Significantly, once the Ralphs properly crossed the threshold into the appellate realm, the Court of Appeals had statutory authority to reverse errors of law affecting the judgment. S.C. Code § 18-1-130 ("Review of intermediate orders affecting judgment") ("Upon appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment."). The Ralphs were not asking the Court of Appeals to reverse the trial court's failure to direct verdict on liability for merely intellectual reasons, but because the trial court's errors of law influenced the jury's deliberations and prejudiced the Ralphs in the ultimate outcome.<sup>7</sup> The Court of Appeals had statutorily vested power to review those errors that occurred *in media res*.

That the trial court's intermediate rulings necessarily affected the judgment was the crux of the Court of Appeals' decision, which found that the trial court's numerous

---

<sup>7</sup> See *Ralph v. McLaughlin*, 428 S.C. 320, 834 S.E.2d 213 (Ct. App. 2019), reversed, citing *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) ("The Ralphs argue the circuit court erred in denying their motion for a new trial . . . because its judgment and order denying a new trial were characterized by error of law . . . the circuit court committed several errors of law, particularly . . . submitting the issues of trespass and abandonment to the jury."). The McLaughlins did not raise nor argue any error in the Court of Appeals finding on the trespass/abandonment issues – neither in their petition for rehearing to the Court of Appeals, nor in their petition for certiorari, nor in their brief to this Court.

errors of law overburdened and confused the jury and corrupted their finding on damages. *Ralph v. McLaughlin*, at 355-357, 834 S.E.2d at 232-233. In addition, the Court of Appeals found that the trial court's numerous errors of law on directed verdict rendered its denial of a new trial controlled by error of law. *Id.*

The Court of Appeals' decisions on trespass and abandonment are the law of the case, because the McLaughlins did not appeal them to this Court, and because the Court of Appeals had the authority to decide them. This Court should therefore grant this Petition for Rehearing and affirm the Court of Appeals' decision in its entirety.<sup>8</sup> **Just as importantly, this Court should withdraw its Opinion and the perilously flawed analysis on appellate standing that it contains.**<sup>9</sup> Alternatively, the Ralphs move for briefing and oral argument on the question of their right to appeal.

---

<sup>8</sup> Because the McLaughlins' liability was established as a matter of law, the Court of Appeals correctly remanded for a hearing on damages only, pursuant to S.C. Code § 15-33-125 and the common law. *Ralph v. McLaughlin* at 357, 834 S.E.2d at 233 (citing precedential caselaw).

<sup>9</sup> Similarly-concerning error exists in the Opinion's footnote 5, where this Court ruminates on whether the Ralphs had an ownership interest in the drainage easement and No Build Areas depicted on their subdivision plat. The Court of Appeals' decision on the question should be affirmed because it was not appealed. Moreover, the Court of Appeals' decision should be affirmed because it is categorically, absolutely, and undeniably correct.

To answer and assuage the Court's concern about the Court of Appeals putting in brackets the word "easement" when it quotes from the *Williamson* case, as well as the questions asked by Justices James, Few, Beatty and Kittredge at oral argument about ownership interest by virtue of a plat: *Williamson* exists within a body of established caselaw that unequivocally gives to a buyer of property with reference to a recorded plat an ownership interest in the appurtenances that appear on the plat. This is, and has been, the law of this State (and virtually every other state in this nation) since before the Ralphs and the McLaughlins were born. (Lengthy citations to follow).

The Ralphs and the McLaughlins own lots within a planned development. Their ownership stems from a common grantor. (A. pp. 43-45). Originally, the developer of Seabrook Island owned a large tract of land, which it subdivided into lots (as reflected on the deeds and plats at issue). In the course of subdividing its land, the developer came up with a deliberate engineering plan to address the dune/trough morphology on Seabrook Island. The plan of

---

development involved a series of drainage easements and no build areas that were intentionally designed to lower the overall water table. The developer imposed this common scheme on the lot owners, subjecting them to the reciprocal servitudes (drainage easements and No Build Areas, *e.g.*) depicted on the subdivision plats, for the mutual benefit of all the lot owners.

**This Court gravely misapprehended the fact that the plats do not state that the depicted servitudes are “owned by the Seabrook Island Property Owners Association (SIPOA).”** (Opinion, p. 2). Instead, the plats are clear that the easements “are to be maintained by Seabrook Island Company and its successors or assigns.” (A. p. 380) (SIPOA was assigned the developer’s maintenance obligations on turnover) (the plats also do not state that the No Build Areas, nor the drainage easements, have anything whatsoever to do with “drainage from the street”). **This is a misunderstanding by the Court of a critical dichotomy.** Although SIPOA had the duty to *maintain* the servitudes, they actually *belonged* to and were intended to *benefit* those who bought in to the common scheme, from the common grantor, including the Ralphs, the McLaughlins, and every owner taking title pursuant to the plan of development as reflected on the subdivision plats.

The Ralphs have a vested interest in their property and appurtenant rights and obligations described in their deed, which stemmed from the common grantor. (A. pp. 375-377) (“together with, all and singular, the Rights, Members, Hereditaments, and Appurtenances” that run with the land) (*See* S.C. Code § 27-7-10). Their deed’s property description includes the Seabrook Plat “which is specifically incorporated by reference herein,” and the “conveyance [was] subject to the Covenants, Conditions, Restrictions, Limitations, Affirmative Obligations, and Easements of record.” (A. p. 375-377). The McLaughlins’ deed has similar language, and their chain of title reflects that it stems from the common grantor. (A. pp. 381-384). The Ralphs and McLaughlins took title to lots in a common scheme of development subject to reciprocal servitudes intended to benefit the community of which their lots were a part.

A reciprocal servitude (such as a designated No Build Area and drainage easement) is a real property interest. A reciprocal servitude (such as No Build Areas and drainage easements) cannot be unilaterally abandoned without consent of those who own it. The Ralphs did not ever relinquish their interest in the easement – and there is no recorded instrument in their chain of title reflecting its abandonment. The McLaughlin’s twofold destruction of the No Build Area and drainage easement ruined the intentional design of the common engineering scheme (in which the Ralphs had a beneficial interest by virtue of the plat and their ownership of a lot in a subdivision subject to a common scheme), which worked together as a system to lower the water table.

Here is a string of citation to long-established property law, which counsel for the McLaughlins at oral argument conceded controlled, and which the McLaughlins have not argued against or distinguished in any way in their appellate filings: *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 145 S.E.2d 922 (1965) (“[W]here a deed describes land as is shown on a certain plat, such plat becomes a part of the deed”), *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 105, 217 S.E.2d 16, 19-20 (1975) (“[T]he purchaser of lots with reference to the plat of the subdivision **acquire[s] every easement, privilege, and advantage shown upon said plat . . .**”) (emphasis added) (“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;”) (“A homeowner is charged with constructive notice of any restriction properly recorded within the chain of title.”); *see also See Newton v. Batson*,

---

223 S.C. 545, 77 S.E.2d 212 (1953) (owner of a lot in a subdivision adjoining a small triangular lot, which evidence showed had been intended by the developer as a part of a beautified area, had a special property interest in the latter entitling him to preserve its use for the intended purpose); *Epps v. Freeman*, 261 S.C. 375, 200 S.E.2d 235 (1973) (Explaining – after reading appellants’ 176 page-long brief with 47 headings – “This open area was an integral part of the plan under which the subdivision was opened up and the lots offered for sale.” and “[T]his case is governed by the following principle: ‘Generally, where property sold is described in the conveyance with reference to a plat or map on which streets, alleys, parks, **and other open areas** are shown, an easement therein is created in favor of the grantee. 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.’”) (emphasis added because the No Build Area is an open area); *see also: Sprouse v. Winston*, 212 S.C. 176, 46 S.E.2d 874 (1948) (“It is clear that when appellant purchased his property, he relied upon a general building scheme and restrictions.”); *Queen's Grant v. Greenwood Development*, 628 S.E.2d 902, 368 S.C. 342 (S.C. App. 2006) (citing 17 S.C. Jur. Covenants § 60) (“There are several ways in which restrictive covenants may be created. The most common means are: (1) by deed; (2) by declaration; and (3) by implication from a general plan or scheme of development.”); *see also Restatement of Law- Property Restatement (Third) of Property, Chapter 2. Creation of Servitudes.*

This footnote in reply to the Court’s footnote could continue on this important point of law, and counsel for the Ralphs moves for leave to brief this issue more thoroughly if this Court still vacillates. **In sum, this Court’s speculative footnote threatens established real property law in South Carolina and upsets the ownership interests of those in this State living in planned subdivisions** – which is basically everyone in the once-rural, now rapidly developing Lowcountry.

Moreover, counsel for the McLaughlins repeatedly *conceded* at oral argument that the Ralphs had an interest in the easements: <http://media.sccourts.org/videos/2019-002031.mp4>

- “Because the SIPOA had an interest in the easement, and the folks up and down Baywood Drive because it drained their lots.” (at minute 6:57-7:06);
- Justice James: “But [you] never [made] an argument that there was no easement in the first place?” Mr. O’Kelley: “Correct.” (at minute 12:24);
- “The plat is incorporated as part of your deed.” (at minute 38:25);
- “Yes sir, *because the trespass is really a question of law.*” (at minute 11:16).

Those concessions are binding on the McLaughlins. (*see infra*).

**II. The McLaughlins did not preserve for this Court’s review the issue of the Court of Appeals’ reversal of the trial court’s denial of the new trial motion, and – in any event – the trial court’s decision was controlled by error of law.**

The Court of Appeals correctly found that the trial court’s denial of the Ralphs’ new trial motions was controlled by error of law. As an initial matter, this Court was precluded by the two-issue rule and the law of the case doctrine from considering this, or any other issue – **and it should have affirmed the Court of Appeals decision in its entirety on this basis alone.** This is especially true because the McLaughlins *conceded* that the two-issue rule applies to them under this Court’s precedent, and they offered no substantive or legal argument whatsoever against it.<sup>10</sup> It is well-established that points conceded by counsel at oral argument are binding on that party. *See, e.g., Delaney v. First Fin. of Charleston, Inc.*, 426 S.C. 607, 613, 829 S.E.2d 249, 252 (2019) (“At oral argument before this Court, counsel for First Financial conceded the three-year limitations period applied, and we agree.”); *Loflin v. BMP Dev., LP*, 427 S.C. 580, 593, 832 S.E.2d 294, 301 (Ct. App. 2019), *aff’d. as modified*, (“Again, Chicago Title conceded this point at oral argument.”); *Timms v. Timms*, 333 S.E.2d 74, 75, 286 S.C. 291, 293 (Ct. App. 1985) (“During oral argument the respondent conceded that *Elam v. Elam*, *Walton v. Stewart* and *Brooks v. Winecoff* are dispositive of the issues briefed on appeal, . . . .”); *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993) (“Failure to argue is an abandonment of the issue.”). Further,

---

<sup>10</sup> In their brief, the Ralphs argued that this Court is bound by the two-issue rule and the law of the case doctrine to affirm the Court of Appeals decision in its entirety. The McLaughlins did not file a Reply brief (although they certainly could have) to refute the Ralphs’ arguments, and nor did they come prepared to oral argument to oppose the principle. In fact, counsel for the McLaughlins **conceded** that the rule applies: “Well, I don’t think that I would be able to argue that [the two-issue rule] doesn’t apply under the precedent of this Court.” <http://media.sccourts.org/videos/2019-002031.mp4>, minutes 1:27-3:56, at minute 3:37.

because the unappealed law of this case is that the trial court erred as a matter of law on the questions of abandonment and trespass, this Court is required to affirm the Court of Appeals' related determination that the trial court's decision on the new trial motion was controlled by this error of law.<sup>11</sup>

As an additional preservation matter, the McLaughlins did not ask this Court to review the Court of Appeals' multi-pronged decision on the trial court's erroneous denial of the Ralphs' new trial motion. The McLaughlins petitioned to this Court for certiorari on two issues only: punitive damages and the law of the case. It is fundamentally unjust for this Court to disregard the procedural confines of its certiorari review, particularly since the Appellate Court Rules required the Ralphs to brief and argue the questions presented. Rule 242, SCACR ("The Return shall include an argument on each question."); Rule 208(b), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Rule 208(b) ("The [Petitioner's] brief shall be divided into as many parts as there are issues to be argued.") (the McLaughlins' brief had two parts); *see also Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002) (an issue must be raised with particularity in a petition for rehearing), *Doe ex re. Roe v. Orangeburg County Sch. Dist. No. 2*, 335 S.C. 556, 518 S.E.2d 259 (1999) (finding issue not raised in petition for rehearing to the Court of Appeals was not preserved for review by the Supreme Court).

Without the benefit of briefing on the question of the trial court's errors on the new trial motions, this Court erred in the Opinion. If this Court is inclined to hear (for the first

---

<sup>11</sup> In oral argument, the McLaughlins **conceded** that the matter of the McLaughlins' trespass was a question of law. <http://media.sccourts.org/videos/2019-002031.mp4> at minute 11:16 ("Yes sir, because the trespass is really a question of law.")

time, on rehearing) the merits of this unpreserved issue, the Ralphs hereby move for the opportunity to fully brief and argue the question to this Court. The trial court's denial of the new trial motion was controlled by error of **law** in the numerous, independent ways that are discussed and decided correctly by the Court of Appeals, and about which the McLaughlins' brief to this Court was devoid of citation or argument. *See Ralph v. McLaughlin* at 354-358, 834 S.E.2d at 231-233, *reversed, petition for rehearing pending*.

In short, the Opinion wrongly finds "no evidence the trial court abused its discretion" in denying a new trial. But a trial court abuses its discretion when its decision is controlled by error of law.<sup>12</sup> **This is because a judge does not have "discretion" to disregard the law.** The very purpose of the appellate courts is to correct errors of law, which are reviewed without deference to the trial court – **because the trial court deserves no deference if its decision is wrong on the law.** In this case, the same errors of law that grounded the circuit court's decision to deny a new trial were made by the court in the midst of the trial.<sup>13</sup> Those legal errors profoundly prejudiced the jury's deliberations and resulted in a corrupted damages verdict. *See Ralph v. McLaughlin* at 354-358, 834 S.E.2d

---

<sup>12</sup> The Opinion looks at the facts, but it must regard the factual outcome in conjunction with the errors of law that controlled it. Moreover, the question of the adequacy of the damages (which the Opinion decides) was irrefutably not before the Court since (1) it was not preserved, and (2) the Court of Appeals did not decide it. *See supra, fn. 1.*

<sup>13</sup> For example, (1) the trial court's decision was controlled by its error of law as to SIPOA's legal inability to abandon the Ralphs' easement as a matter of law (a decision by the Court of Appeals that became the law of the case when the McLaughlins failed to appeal it to this court); (2) the trial court's decision was controlled by error of law as to trespass (an unappealed decision that is the law of the case, and also because counsel for the McLaughlins **conceded** that the trespass was "a question of law"); (3) the trial court erred as a matter of law in applying the wrong standard to the McLaughlins' motion for directed verdict on punitive damages and in reiterating this decision when it denied a new trial; and (4) the trial court erred as a matter of law in ignoring the findings of Judge Cooper's order. Each of these errors controlled and corrupted the trial court's decision to deny the Ralphs a new trial, as well as the trial itself.

at 231-233, *reversed; petition for rehearing pending*. The Court of Appeals thus correctly reversed the trial court's errors of law, which compromised the jury's decisions on the facts, and correctly granted a new trial.

This Court should withdraw its erroneous Opinion on this unpreserved issue which was not before it and affirm the Court of Appeals.

**III. The Opinion wrongly deprives the Ralphs of their right to have a jury decide the questions of fact going to punitive damages, when evidence of the McLaughlins' recklessness existed.**

The Court of Appeals found punitive damages should have gone to the jury because evidence existed—for the factfinder to weigh—tending to show that the McLaughlins deliberately destroyed the No Build Area and drainage system with knowledge that doing so could cause harm to the Ralphs.

As an initial matter, this Court was precluded by the two-issue rule and the law of the case doctrine from considering this, or any other issue—and it should have affirmed the Court of Appeals decision in its entirety. This is especially true because the McLaughlins *conceded* that the two-issue rule applies to them under this Court's precedent, and they offered no substantive or legal argument whatsoever against it.<sup>14</sup>

**In addition, the Opinion's section on punitive damages is startlingly incorrect, and its misstatements of law should be withdrawn before they pollute the ether of this State's common law.** The Opinion disregards the fundamental dichotomy between

---

<sup>14</sup> "Well, I don't think that I would be able to argue that [the two-issue rule] doesn't apply under the precedent of this Court." <http://media.sccourts.org/videos/2019-002031.mp4>, minutes 1:27-3:56, at minute 3:37.

judge and factfinder, overlooks this Court's own prior decisions, and appears to confuse the law here with that of a defamation case. The Opinion erroneously concludes:

The suggestion that removing the drainage pipe under these circumstances *established clear and convincing evidence* of Petitioners' *malicious intent* to invade Respondents' rights was not merely speculation, but absurd.

Op. at 9 (emphasis added).

First, by deciding whether the evidence was "clear and convincing," this Court, like the trial court, was improperly weighing the evidence, which is a function expressly reserved for the factfinder. *Jones v. Gen. Elec. Co.*, 331 S.C. 351, 356, 503 S.E.2d 173, 176 (1998) ("The circuit court should be 'concerned only with the existence or nonexistence of evidence,' not its credibility or weight."). This is a fundamental principle of trial practice. A party has the responsibility to submit evidence to meet his burden of proof; the jury then "weighs" the evidence to determine whether it meets the burden. The burden of proof for punitive damages is clear and convincing evidence of recklessness. If there is *any* evidence from which recklessness can be inferred, then the question must go to the jury **for the jury to weigh** whether that evidence meets the burden. *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411 (2012) ("It is not the duty of the court to weigh the testimony in ruling on a motion for a directed verdict."); *see also Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984) (discussing court's inability to weigh evidence and axiomatic necessity of submitting all fact questions to the jury – including punitive damages). The Opinion improperly veers into the province of the jury, which in this case should have been given the opportunity on its own to deliberate whether the evidence was "convincing" or, as this Court apparently would weigh it, "absurd."

Moreover, “**malicious intent**” is not the standard for punitive damages (except perhaps in a defamation case). Instead, “[i]f 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) (emphasis added). The reasonable person standard is especially important in this case, where the McLaughlins were claiming that they subjectively believed they had the right to do what they wanted, despite actually knowing it would cause harm.

The following evidence in the Record does exist, and it **raises the reasonable inference** that the McLaughlins acted with reckless disregard for the Ralphs’ property rights—**which is all the law requires for a question to go to the jury to weigh the evidence:**<sup>15</sup>

- Judge Cooper’s order, which still remains the law of this case because it was never appealed, unquestionably raises the reasonable inference that the McLaughlins had actual knowledge destroying the easement would harm their neighbors.<sup>16</sup> The order finds, *inter alia*:

---

<sup>15</sup> There is, admittedly, a lot of emphasis added on this page, and in this petition. Honestly, it was either italics, bolding, underlining . . . or expletives to keep the reader awake, because while this brief is long, it is also so very important.

<sup>16</sup> At oral argument, the Justices of this Court seemed interested in Monday-morning quarterbacking the way that the McLaughlins defended this case (and its appeal). But, the reality is, at the football game on Sunday, **the McLaughlins made the decision not to appeal Judge Cooper’s order, which was also the decision to be bound by Judge Cooper’s findings**—right or wrong. This Court apparently finds the order to have been eminently appeal-able. (*See Op.* p. 5) (“Given the standard for granting summary judgment, [Judge Cooper]’s decision is troubling.”). Be that as it may, Judge Cooper’s order is the law of this case—and its findings without question raise the reasonable inference that the McLaughlins acted recklessly.

- “SIPOA expressly put the McLaughlins on notice that they bore all responsibility for their actions related to the pipe.”
- “The McLaughlins reject[ed] SIPOA’s final effort to reach agreement on the eve of construction in late 2008.”
- “It was the [McLaughlins’] responsibility to negotiate with the club about the easement out to the pipe out in the golf course . . . the McLaughlins rejected this proposal as unacceptable.”
- “By their own admission . . . [the McLaughlins] rejected SIPOA’s proposals to resolve the matter prior to the McLaughlins’ unilateral decision to remove the pipe, and . . . were defendants in a lawsuit filed by SIPOA to stop them from removing the pipe.”<sup>17</sup>

---

**The Opinion errs as a matter of law in failing to give credence to Judge Cooper’s order, which has the weight of precedent in this appeal, regardless of whether this Court thinks it was right or wrong.** *Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000), citing *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 489 S.E.2d 470, 327 S.C. 238 (1997) (“[An] unappealed ruling is the law of the case.”), citing *In re: Morrison*, 468 S.E.2d 651, 321 S.C. 370 (1996); *Ralph v. McLaughlin*, 428 S.C. 320, 834 S.E.2d 213 (Ct. App. 2019), reversed on other grounds (“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 [is] the law of the case.”).

<sup>17</sup> Another thing this Court asked McLaughlins’ counsel about at oral argument was the question of reliance: *when exactly* were the McLaughlins relying on SIPOA – was it when they purchased the property, or when they destroyed the easements? This is a distinction without a legal difference, and this Court erred by analyzing it incorrectly. If the McLaughlins were relying on SIPOA (or anyone else) *when they bought* their house, then as a matter of law their reliance would not affect the Ralphs’ ownership nor magically make the McLaughlins able to unilaterally abolish a reciprocal servitude. See *Bland*, 265 S.C. 98, 217 S.E.2d 16 (A homeowner is charged with constructive notice of any restriction properly recorded within the chain of title.). If the McLaughlins were relying on SIPOA *when they destroyed the easements*, then they should have appealed Judge Cooper’s order, which is now the law of the case. By disregarding Judge Cooper’s order – and actively finding facts that were contrary to it – this Court shoved the Ralphs into the middle of what should have remained a dispute between the McLaughlins and SIPOA. **Whether SIPOA approved of the McLaughlins’ plans, or refused to work with them toward a solution, or messed around for 6 months, is immaterial to the Ralphs, except insofar as it indicates that (1) the McLaughlins \*knew\* they did not have the right to destroy the drainage system; and (2)**

- Engineer Robert George’s report—which the McLaughlins admitted they knew about prior to construction—warned of the dangers of flooding from the McLaughlins’ planned action: “Removal of conduit within Lots 21 through 28 will exacerbate high ground water table concerns and surface water ponding.” “Removal of culverts within lots 22 [McLaughlins] and 24 may contribute to an elevated shallow ground water table and increase surface ponding.” “Removing any portion of the existing system within Lots 21 through 28 will increase the likelihood of . . . area flooding for storm events exceeding a ten-year frequency.”<sup>18</sup> A. pp. 401-402. **A reasonable person receiving these warnings would have been conscious of the possibility of injury in his destruction of the drainage systems.**

---

**the McLaughlins \*knew\* that by destroying the easements and no build area, they would harm the Ralph’s property.**

<sup>18</sup> Justice James seemed interested in the engineering rationale behind why the McLaughlins’ construction caused poor drainage and ponding on the Ralphs’ property. The answer is in the Record, and Mr. McLaughlin testified at trial that he was aware of those engineering conclusions prior to commencing construction. (See, the testimony of Robert George, e.g. A. p. 664, line 8-p. 666, line 7; p. 693, line 17-p. 694, line 3; 719-725). Mr. George also testified there was **no fix** to the problems to the Ralphs’ lot caused by the McLaughlins’ construction, because (1) the golf course would not permit the McLaughlins to tie-in to its drainage system, and (2) the SIPOA could not bring in equipment to maintain the pipe on the Ralphs’ lot, due to the ultimate location of the McLaughlins’ house in the No Build Area. (See A. pp. 8-10; see also pp. 395-399, A. pp. 594-595, A. pp. 631-633, A. pp. 647-649, A. pp. 689-693, A. p. 852).

The Opinion wrongly surmises that the “parallel drainage system of high-density plastic piping . . . installed on the neighboring golf course . . . rendered obsolete the existing corrugated-metal pipe running through Lots 22 to 28.” (Op. at 3). This factual conclusion is not supported by the Record. Instead, what the testimony shows is that the existing drainage system continued to function, lowering the overall water table as it was designed to do, until it was interrupted by the McLaughlins. When that occurred, the drainage of water from the street was disrupted, which resulted in a raised water table and ponding on the Ralphs’ lot.

Moreover, to the extent that water was going into the pipe on the Ralphs’ lot, and “on its merry way to the golf course,” this was also ruined because **the pipe** (formerly routinely cleaned by the POA) **could no longer be maintained due to lack of access for maintenance equipment via the No Build Zone, now occupied by the McLaughlins’ house**. Thus, the severed pipe on the Ralphs’ lot has filled with sediment, decreasing its ability to channel water off the lot. (A. pp. 690-691).

- SIPOA’s statement that the McLaughlins “and/or their building contractor have indicated to SIPOA the plan and intent to destroy and remove the drainage pipe within the abandoned Drainage Easement without first installing a relocated or substitute drainage system. [The McLaughlins] have refused to acknowledge any duty or obligation on their part to re-work the drainage in a manner that maintains the existing system for related downstream lots.” (A. p. 461).
- Mr. McLaughlin’s testimony at trial. (cited in prior briefs and incorporated herein) (testifying, *inter alia*, that he got frustrated after “**Six months** we were trying to work with the community to address the issues” and “**after six months of messing around** and getting, really, no direction or satisfactory response to move forward,”<sup>19</sup> that he proceeded with his construction even though he knew there was no viable solution<sup>20</sup> for the drainage problems that he was fully aware that his construction would create) (A. pp. 352-356).
- The Ralphs’ testimony at trial.

Egregiously, the Opinion contains several key credibility determinations, which was an invasion of the province of the jury. For example, Opinion believes that the McLaughlins’ dealings with SIPOA were “in good faith,” and that the McLaughlins did “everything they could” to resolve the issues. (Op. p. 9). But it was *the certainty of resultant harm to the Ralphs* that would have rendered a reasonable person reckless under the law, and

---

<sup>19</sup> The Opinion massively overestimates this time to be “Six years,” when Mr. McLaughlin himself testified that it was actually only six months. See Op. p. 2 (wrongly stating “After six years of meetings and consultation with SIPOA and their neighbors . . .”); p. 4 (“they had already delayed construction of their home for six years waiting for the dispute to play out . . .”); and at p. 9 (“It is undisputed that over the course of six years, [McLaughlin] took a series of good-faith steps in dealing with SIPOA and their neighbors in an attempt to resolve the drainage pipe dispute.”) (whether the steps were good faith or not was a question for the jury).

<sup>20</sup> See A. pp. 8-10; A. pp. 594-595, A. pp. 631-633, A. pp. 647-649, A. pp. 689-693, A. p. 852.

the McLaughlins' subjective beliefs (or this Court's perceptions of them and their credibility) did not matter.

Finally, the trial court itself acknowledged that evidence of recklessness existed:

And, you know, that's where I come in with the problem of whether or not this is a punitive damages case. Again, [McLaughlin] 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 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.

(A. pp. 798-799). This holding unquestionably indicates that the trial court, having heard the evidence, was struggling with a “problem” that should have been for the jury to solve. The trial court's “problem” was that it did not personally think that the evidence (which it acknowledged existed) rose “to the level of clear and convincing.” That analysis was wrong under the law: “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*, 394 S.C. 383, 393-394, 714 S.E.2d 904, 909-910 (Ct. App. 2011); *Jones* at 356, 503 S.E.2d 173, 176 (“The circuit court should be ‘concerned only with the existence or nonexistence of evidence,’ not its credibility or weight.”). Importantly, “[a]n act may be willful 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 reason and prudence would say it was in reckless disregard of another's rights.” *Leppard v. Southern Ry. Co.*, 174 S.C. 237, 177 S.E. 129, 133 (1934).

This Court's own precedent compels remand for a new trial due to the trial judge's improper decision. An error excluding punitive damages from the jury's consideration

is grounds for a new trial. *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, even though the plaintiffs “won” on liability).

Because it was procedurally barred by the two-issue rule from considering the Court of Appeals’ decision on punitive damages, this Court should have affirmed. Instead, it improperly issued an Opinion on the question that ignores or creates facts in the Record, disregards the law of the case, weighs the evidence, makes credibility determinations that cut against the light most favorable to the non-moving party, employs a defamation analysis, and discounts the applicable standard of review for a grant of directed verdict. The Opinion should be withdrawn.

### CONCLUSION

For the reasons set forth above – and particularly because of the flawed precedent it would set on the issue of appellate standing, coupled with the injustice that it works to the Ralphs – this Court must withdraw the Opinion and affirm the Court of Appeals’ decision in its entirety.

Respectfully submitted,

FORD WALLACE THOMSON LLC



---

Ainsley F. Tillman, S.C. Bar 70551  
Ian S. Ford, S.C. Bar No. 12463  
715 King St., Charleston, South Carolina 29403  
(843) 277-2011  
*Attorneys for Richard and Eugenia Ralph*

March 29, 2021  
Charleston, South Carolina