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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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,

Defendants,

Of whom

Younesse Alami, Simon M. Adell, Matthew Anderson, Matthew Asher, Andre Bauer, Peter Bierce, Brandon Blount, Reginald P. Brown IV, Mary Cahill, Ryan Cockrell, Kevin and Virginia Conlon, Anne Marie Crevar, Darryl J Damico, Stephen Darwak, Lindsay Davenport, Mary Dickerson, Maxwell Streeter, Kathleen Dougherty, David Dressman, Lindsay Davenport, Kathleen Dougherty, David Dressman, Anna Dressman, Michael Elder, Christopher Scott Farley, Michele Ghastin, Ryan Gilreath, Sonya Gilreath, Kimberly Glenn, Shaun Halsor, Josephine Rex, Laura Hyatt, Nathan Herring, James Hicks Jr., Laurie Hicks, Preston G Hipp, Colin Jones, Matthew F. Jones, Robert C. Jones, Robin Joseph, Molly Keeler, John Kenny, Abigail King, Aaron Kless, Laurie Kramer, Robert Kramer, Allison Kreutzer, Jesse Lutz, Thomas Naselaris, Zoe Naselaris, Beau O'Steen, Cori O'Steen, Lance Parr, Brandon Perdue, Hadassah Rothenberg, Daniel Ryan, Kimberly Bowlin, Kevin Schnittker, Ginger Scofield, Alecia Stevens, Justin Swan, Merrick Teichman, John Van Vlack, Jr, William Waterhouse, Jennifer Waterhouse, Anne Wohlfeil, Bryan Young, Helene Kenny / Bridget Kenny Revocable Trust, 259 East Bay LLC, 259 East Bay 10 B LLC, Corner At Old Canton, LLC, Kit Properties LLC, The Naws LLC, One Henrietta LLC, Periwinkle Partners, LLC, Porch Properties LLC, Westbury Properties, LLC, and Westendorff Hardware LLC are

Respondents.

APPELLANTS' PETITION FOR REHEARING

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CITATION OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION.

The Court of Appeals should grant a rehearing, withdraw its June 23, 2021 decision ("the Opinion"), and reverse the trial court, because several points have been overlooked or misapprehended by the Court and because the Opinion's holdings are in conflict with prior decisions of the South Carolina Supreme Court.

While the trial court listed numerous reasons for granting summary judgment, and this Court has extensively quoted the Order, the Opinion rests on only one ground: "Viewing the evidence in the light most favorable to Appellants, we find Appellants failed to present evidence of their damages." The Court has applied this erroneous conclusion to all three of the Plaintiffs' separate causes of action.

The Court's Opinion conflicts with Supreme Court precedent in the following ways:

(1) The Opinion misapprehends the standard of review by overlooking the "mere scintilla of evidence" rule and misapplying the "light most favorable" rule.

(2) The Opinion misapprehends a property owner's right to testify about damages and misapprehends the standard regarding affidavits.

(3) The Opinion overlooks the fact that the Plaintiffs' motion to compel discovery responses, pivotal to the Plaintiffs' ability to calculate the full extent of their damages, was never ruled upon.

(4) The Opinion overlooks or misapprehends the City of Charleston's decision to enact an ordinance which gives the Plaintiffs statutory standing.

The Opinion conflicts with clear and longstanding Supreme Court precedent, usurps the provinces of the jury and of the City of Charleston, and has the effect of sanctioning admittedly

illegal business activity.

II. THE OPINION CONFLICTS WITH SUPREME COURT RULINGS REGARDING THE STANDARD OF REVIEW.

At the hearing, the trial 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; emphasis added).

> 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; emphasis added).

The trial court's oral statement was accurate. Its written order and this Court's Opinion are in conflict with S.C. Supreme Court precedent.

A. The Opinion conflicts with the Supreme Court's rulings regarding a mere scintilla of evidence.

In both Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766 (2011) and Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009), the South Carolina Supreme Court reversed this Court's affirmance of summary judgment orders. In both cases, the Supreme Court held that "[i]n order to withstand a motion for summary judgment in cases

applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." 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." (Emphasis added.))

"Mere" and "scintilla" are words chosen by the Supreme Court. "Mere" means "being nothing more nor better than." Black's Law Dictionary defines "scintilla" as "[a] spark; a remaining particle; the least particle." The Opinion does not use the word "scintilla" even once.

The Record contains far more than a mere scintilla of evidence of the Plaintiffs' damages.

> The total diminution in value to the Plaintiffs' properties as a result of the Defendants' activities is $2,200,000. (R. p. 173).
>
> A sampling of approximately 59 Defendants (out of _), where the Plaintiffs have data provided by AirBnB, shows that the Defendants' illegal revenue exceeds $3,852,522. (R. p. 174).
>
> 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). The Plaintiffs have had to reduce their rental rates in order to compete with the Defendants' illegal businesses. (R. pp. 116-117).
>
> The illegally-operating Defendants compete unfairly because they can price their rentals without incurring the expenses of being legal. The Plaintiffs pay 6% in property taxes on their commercially-zoned properties, which are more expensive than the Defendants' residentially-zoned properties, which are taxed at 4%. 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).

The Opinion overlooks or misapprehends all of this evidence.

B. The Opinion conflicts with the Supreme Court's rulings regarding the light most favorable standard.

"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; emphasis added).

> 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).

Although the Opinion repeatedly states that it is applying the standard of "in the light most favorable to the non-moving party," it actually does the opposite. The Opinion states: "Appellants admitted they were asking the court to enforce the short-term rental ordinance because the City was not enforcing it." The Record tells a different story:

> Q. Do you contend that you have authority to enforce a city ordinance or that -- when I say "you," I mean the Plaintiffs.
> A. 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. It is not all of the causes of action, it is one. But yes.
> Q. Okay. My question was, Do you contend that the Plaintiffs can enforce a city ordinance?
> A. I contend that my reading of the zoning ordinance provides that the Plaintiffs can seek an injunction against people violating the zone ordinance, yes. (R. p. 90, ll. 12-25).
>
> Q. Do you have -- when you say you have a right to have people not illegally compete with you, isn't that the City's job to enforce its laws?

A. I -- I think the City is one party. I think in the zoning ordinance the City has said they are not the exclusive party. So I think the City does have a responsibility but not the sole responsibility.
(R. pp. 93, l.18 - 94, l. 1).

The Opinion states:

Appellants' attorney asked Holt, 'Sitting here today, you cannot give me a number as to the diminution of the value of any of [Appellants'] property due to the alleged actions of [Respondents], correct?' Holt responded, 'The number is greater than zero and I do not know the precise number greater than zero.' Appellants' attorney then asked Holt, 'And you also cannot give me the lost profits that [Appellants] have suffered?' Holt answered, 'The lost profits would be — would closely approximate whatever that number is above zero that I cannot give you definitively. So that is correct.'[1]

The Opinion does not quote the *very next* exchange in the Record:

Q. And the same with the amount of illegal income that each Defendant that has allegedly received, you don't know that amount?
A. Defendants have not provided us with full discovery.
Q. Some of the Defendants have and I have checked and I did provide you with the Airbnb information a long time ago, or my predecessor did.
A. Well, we received some discovery through, I think, 2015 for some Defendants. It's obviously 2018.
Q. Right.
A. So a lot has transpired. And I don't believe that was updated. I don't believe we've received that. But also we have -- I don't believe we received any tax returns showing this income on anyone's --
(R. p. 269).

The Opinion overlooks several other pieces of testimony:

A. So absolutely the number's more than zero. Those Plaintiffs have all caused damage – those Defendants have all caused damage to the Plaintiff or I would not have named them in the suit.
Q. And --

[1] Appellants' attorney did not ask either of these questions, and there is nothing in the Record to suggest he did. The Certificate of Counsel (R. p. 279) shows that the parties disagreed about the construction of the Record. Rather than involve this Court over a relatively minor issue, Appellants agreed to add the matters Respondents requested, in the order Respondents requested them. Respondents insisted on using an expedited draft of the Holt deposition, out of order. For example, page 277 of the Record has the numbers "100" and "101" and "Page 89."

A. I simply don't know the specific number and I need -- so an expert will tell me to a reasonable degree of certainty what he believes that that number is with regard to every Defendant. But we need full information in order to give him for the analysis. It is an analysis. It's an analysis that God knows how much money an expert charges for this; but, presumably, they are thorough.
Q. Okay. Again, I'm going to ask you this question in a particular way --
A. More than zero, but I don't know.
Q. Okay. You can't articulate any actual damages, other than you believe it's more than zero, as to any of the five Defendants that I represent?
A. Correct. I cannot give you a sum certain.
(R. p. 272).

The Opinion states that Mr. Holt "testified he had not yet hired an expert to determine the damages" but does not address the reason -- the trial court did not rule on the Plaintiffs' motion to compel production of data showing the massive amount of illegal revenue the Defendants have made.

A. I'm not an expert, but you -- but we have half the story. We know what has occurred at our property and we have an idea of what has occurred at the Defendants' properties, but we do not know as a matter of certainty. And that is absolutely necessary for us in order to calculate and determine our damages.
Q. But how are you going to calculate and determine your damages?
A. Well, I'm not. An economist, a forensic accountant, an expert is. I know that I have been damaged. I do not know the extent of the damage. I have half the information.
(R. p. 83, ll. 11-23).

It is true that the Plaintiffs cannot calculate their exact damages because the trial 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.

Using the same language as the trial court's order, the Opinion states, "Holt testified none of the Appellants' properties have decreased in value because they are all located in downtown Charleston." The Record shows that 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).

By cherry-picking incomplete portions of Mr. Holt's testimony and then reading them out of context, the Opinion viewed the evidence in the light most favorable to the moving parties, the Defendants. This is in conflict with the Supreme Court's clear admonitions.

III. THE OPINION CONFLICTS WITH SUPREME COURT RULINGS REGARDING THE SUFFICIENCY OF AFFIDAVITS AND AN OWNER'S RIGHT TO TESTIFY ABOUT DAMAGES TO PROPERTY.

The South Carolina Supreme Court has held that an owner's testimony regarding the value of damaged property is sufficient to sentence a person to prison.

> The foregoing authority is clear that a property owner is competent to testify regarding the value of damaged or stolen property. To the extent there is confusion, we take this opportunity to clarify that a property owner's testimony alone is sufficient to support a conviction for grand larceny.
> State v. Brown, 402 S.C. 119, 740 S.E.2d 493 (2013).

This Court has now held in a published opinion that a property owner's testimony regarding the value of damaged property, sufficient to deprive South Carolinians of their liberty, is not sufficient to reach the "mere scintilla of evidence" standard to avoid summary judgment in a civil case between businesses. The trial court got it right at the summary judgment 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). This Court's Opinion misapprehends this principle of South Carolina law.

The South Carolina Rules of Civil Procedure set forth what an affidavit must contain in order to establish an issue of fact sufficient to defeat a motion for summary judgment. Rule 56(e), SCRCP provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein."

Mr. Holt's affidavits and his deposition show that his declarations are made on personal knowledge. South Carolina law establishes that his testimony is admissible in evidence and that that he is competent to testify as to the matters therein.

In very, very rare circumstances, a property owner's[2] testimony regarding value and damages may be inadmissible. This case does not present those circumstances.

> Both of the landowners testified in their behalf, and each gave his opinion of the value of the land taken and special damages to the remaining property. Seaboard contends that it was error to allow either of them to do so because it was conclusively shown that neither was familiar with the property or its value and that each opinion was founded upon hearsay.
>
> Ours is in accord with the general rule that a landowner, who is familiar with his property and its value, is allowed to give his estimate as to the value of the land and damages thereto, even though he is not an expert. South Carolina State Highway Dept. v. Wilson, 254 S.C. 360, 175 S.E. (2d) 391 (1970). Where it appears that the owner does not know the value of the property, there is a division in the authorities. Some courts hold that his opinion as to value is not admissible, while others have concluded that such lack of knowledge goes to the weight, but not to the competency, of his testimony. 32 C.J.S. Evidence § 546 (116) (1964).

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[2] The Opinion quotes a case which addresses testimony of "people other than the owner of real property." Each of the Plaintiffs is owned by the Global Real Property Trust. (R. p. 2). Robert Holt is the Trustee of the Trust and the Chairman of each of the three Plaintiffs. (R. p. 2). Corporate entities must speak through human beings. Barfield v. Dillon Motor Sales, Inc., 233 S.C. 26, 103 S.E.2d 416 (1958) ("A corporation must speak and act through its officers"; citation omitted). If Mr. Holt cannot testify to the Plaintiffs' damages, then nobody can and any tortfeasor or law-breaker may harm the Plaintiffs without consequence.

> Any exception to the general rule of admissibility should be, and apparently has been, applied only in extreme cases. **Unless the landowner's want of qualification is so complete that his testimony is entirely worthless, it is for the jury to assess the value of his opinion.** As stated in 3 Wigmore, Evidence § 716 (Chadbourn Rev. 1970). '**The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth**; the weight of his testimony (which often would be trifling) may be left for the jury; and courts have usually made no objections to this policy.'
>
> While it is true, as pointed out by Seaboard, that neither of the Harrelsons was cognizant of the purchase price of other property in the vicinity, each testified that he had been familiar with the land in question, which they had inherited from their father, all of his life. While it is also true that their estimate of value and damages was the same as that of R.E. Wilder, a realtor who testified in their behalf, this fact, standing alone, does not demonstrate that they merely parrotted the opinion of Wilder, especially in view of the additional fact that each expressed that his opinion was his own.
> Seaboard Coast Line Railroad v. Harrelson, 262 S.C. 43, 202 S.E.2d 4 (1974) (some citations omitted; emphasis added; affirming a jury verdict for the property owner).

The Opinion, without saying it directly, holds that Mr. Holt's "want of qualification is so complete that his testimony is entirely worthless." The Opinion reaches this erroneous conclusion by overlooking voluminous evidence.

Mr. Holt made his affidavit on his own personal knowledge. (R. pp. 168, 172). Before giving his property valuations, he swore:

> Based on my experience as a real estate investor in downtown Charleston and my experience in short-term rentals, I have opinions about the values of properties owned by the Plaintiffs, and how those values have been affected by the illegal competition presented by the Defendants in this case.
> (R. p. 172).

Robert Holt's affidavit is sufficient on its own, but is bolstered by other testimony in the Record.

> And so the -- the lady who owned it and opened the hostel wanted to sell it to someone who would maintain it as a hostel. And I said, you know, this is a beautiful development property. I'm not an innkeeper; however, I will tell you

that if this hostel makes money, I will keep it open. If it stops making money, I'm going to develop this land as something else.
Q All right. Let me ask you this: If you said you would not have bought those properties --
A Correct.
Q -- if you paid fair market value for the properties --
A Yes.
Q -- then what would be your loss? How would you -- how would you lose not getting them?
A Right. So I don't invest at 5 percent cap rates. I develop properties.
Page 220, ll. 1-18.

Robert Holt, in addition to being the chairman of the three Plaintiff landowners, is a property developer. He is competent to opine on his own properties' values.

The Opinion completely overlooks Mr. Holt's May 9, 2017 affidavit. In that document, he testified at length about "ways that the Defendants' illegal businesses have damaged the Plaintiffs." (R. p. 168). He testified:

> 5. I have been buying, selling and investing in real estate on the Charleston peninsula for approximately 33 years. I have participated in over 69 real estate transactions on the Charleston peninsula. Those transactions have included many different types of properties, including residential, commercial, and properties legally zoned to permit short-term rentals.
> 6. I stay abreast of the current state of the real estate market on the peninsula. On the basis of my background, experience and research, it is my opinion, to a reasonable degree of certainty, that the Defendants' illegal short-term rental businesses have negatively impacted the value of the Plaintiffs' legal short-term rental properties.
> (R. p. 169-171).

By overlooking the Record, the Opinion is in irreconcilable conflict with Supreme Court precedent and the Rules of Civil Procedure. The Opinion usurps the province of a South Carolina jury. "Unless the property owner's lack of knowledge of the value of his property is so complete so as to render it worthless, it is for a jury to assess the probative value of his testimony." Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010)

(citations omitted; appeal from a jury verdict). "[T]he jury is the tribunal to determine the weight to be accorded the testimony of the witnesses and accept or reject the valuations placed thereupon." S.C. State Highway Dep't v. Grant, 265 S.C. 28, 216 S.E.2d 758, 759-60 (1975).

The Opinion cites Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 463 S.E.2d 636, 640 (Ct. App. 1995) for the principle that "[t]he fact finder must determine the weight to be accorded the testimony of the witnesses, and accept or reject their valuations." Absolutely correct. But the trial court in this case was not sitting as a fact finder; it was sitting as a court considering whether there was a mere scintilla of evidence to defeat summary judgment. In Dixon, the court was sitting as a fact finder, determining damages in a default case.

A jury will have the right to reject Mr. Holt's testimony that the Plaintiffs' property values have been damaged. But neither this Court nor the trial court has that right. Both courts have usurped the jury's authority and weighed the evidence rather than acknowledging the existence of evidence.

In Whisenant v. James Island Corp., 277 S.C. 10, 281 S.E.2d 794 (1981), the Supreme Court reversed a directed verdict in favor of the defendants.

> We believe that *an implication may reasonably be* drawn from the testimony that the building in question was worth about $20,000 when the sublease was acquired, this amount being the difference between the two franchises purchased by the appellants at roughly the same time in the same area. The major distinction between the two leases assumed was that the one at issue provided for ownership of the premises. The *testimony of the building mover at trial suggests* that the ownership of the store implied more than ownership of mere salvage. *The jury thus could find that the appellants suffered destruction of a valuable property and from the evidence determine a reasonable value* for the building at the time of its destruction.
> Id. (emphasis added; citing, generally, 22 Am.Jur.2d, Damages § 139 (1965)).

Whisenant also illustrates how the Opinion misapprehends the standard of review.

The Opinion is in irreconcilable conflict with a recent Supreme Court ruling which also deals with property issues in downtown Charleston. In Preservation Society of Charleston vs. S.C. Dept. of Health and Environmental Control, 430 S.C. 200, 845 S.E.2d 481 (2020), the Supreme Court reversed this Court's holding that the plaintiffs did not have standing to seek a contested case hearing regarding Carnival's passenger cruise facility at the Union Pier Terminal in downtown Charleston.

> [T]he court of appeals acknowledged Petitioners presented affidavits from individual members expressing concern over their reduced quality of life arising from the effects upon them individually, such as pollution and health effects, traffic congestion, property values, effects on their businesses in the area, and effects on the historical integrity of the area where they resided. For example, a member of the Coastal Conservation League stated in her affidavit that smoke emitting from cruise ships already physically impacted her and required her to retreat indoors when the ships were in town and that a larger facility, which would be much closer to her home, would only increase this adverse effect. Others attested to soot on and in their homes. Nevertheless, the court of appeals, relying on Carnival Corp., agreed with the ALC that the claims of possible environmental and personal harm were purely speculative or were merely generalized grievances equally affecting the public as a whole.
> Id. at 488.

Here, this Court has held: "Viewing the evidence in the light most favorable to Appellants, we find Appellants failed to present evidence of their damages. Although Holt may testify to the value of property, he provided no explanation for how he determined what the approximate value of the property would be if there was no illegal competition." Either the Supreme Court's decision in Preservation Society is erroneous, or this Court's opinion in this case is erroneous. They cannot be reconciled.

If the Supreme Court had applied this Court's standard in Preservation Society, the Supreme Court would have required an "explanation" for many questions:

How has your life suffered a "reduced quality"?

Where is a physician's opinion that you have suffered "health effects"?

Where is your traffic study to support your claim of "traffic congestion"?

What are the "effects" on your "businesses in the area"?

What analyses have you conducted to support your claim regarding "property values"?

How exactly has a cruise ship affected "the historical integrity of the area where" you reside?

How has an effect "on the historical integrity of the area where" you reside damaged you?

How did a member of the Coastal Conservation League explain that it was "smoke emitting from cruise ships" that "physically impacted her"?

How did that same member of the Coastal Conservation League explain that it was "smoke emitting from cruise ships" that "required her to retreat indoors" rather than smoke from any other source?

How was that same member of the Coastal Conservation League qualified to opine "that a larger facility, which would be much closer to her home, would only increase this adverse effect"?

How did "others" explain that "soot on and in their homes" come from a cruise ship?

How did those same others explain that "soot on and in their homes" actually damaged them?

Where are the affidavits from environmental, industrial, or other air quality experts opining that the smoke and soot the residents complain of came from the terminal?

Where are the affidavits from pulmonologists along with medical bills?

Where are the affidavits from professional cleaners testifying about how they cleaned the "soot" and how much they charged?

The Supreme Court did not require the Preservation Society plaintiffs to make any of

these explanations. Instead, it reversed this Court and held that the affidavits were sufficient to overcome a summary judgment motion challenging whether the plaintiffs had shown they were "affected persons" entitled to seek a contested case hearing. It is for a jury, not the courts, to weigh Mr. Holt's testimony.

Robert Holt's testimony, via deposition and affidavits, is far more than sufficient to reach the "mere scintilla" of evidence standard.

IV. THE OPINION CONFLICTS WITH SUPREME COURT RULINGS REGARDING PREMATURELY GRANTING SUMMARY JUDGMENT.

"Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.' This means, among other things, that summary 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).

The Opinion completely overlooks the importance of the trial court granting summary judgment without first addressing the Plaintiffs' Motion to Compel Discovery Responses. (R. pp. 144-151).

This case involves illegal and unfair business competition and 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. Very few of the Defendants responded 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 oppose the summary judgment motion.

On January 22, 2018, the trial court held the motion to compel discovery responses in abeyance. (R. p. 210, lines 8-17). That motion has still not been ruled upon. The trial court's failure to compel the Defendants to produce their financial data impaired the Plaintiffs' ability to show the entirety of their particularized losses. The Opinion overlooks this important issue.

"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." Baughman, 410 S.E.2d 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. The Plaintiffs here are in the same position: "I'm not an expert, but you -- but we have half the story. We know what has occurred at our property and we have an idea of what has occurred at the Defendants' properties, but we do not know as a matter of certainty. And that is

absolutely necessary for us in order to calculate and determine our damages." (R. p. 83, ll. 11-17).

"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). The Opinion denies the Plaintiffs their right to a jury trial and allows the Defendants to "take 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). "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).

This is not a case where a party claims, "Given more time, who knows what I could have discovered?!" This is a case where the Plaintiffs made a timely motion asking the trial court to require the Defendants to produce exactly the same data that the Plaintiffs produced, but the trial court declined to even address that motion and instead gave the Defendants a victory at the summary judgment stage. We know what would be produced when the trial court grants the motion to compel;[3] the Record in this case shows that with a sampling of approximately one-third of the Defendants received more than three million dollars in illegal revenue.

[3] The motion must be granted. Several of the Defendants have already produced the evidence of their ill-gotten gains (although not completely). There is no privilege involved and the information is highly relevant.

V. THE OPINION CONFLICTS WITH SUPREME COURT RULINGS REGARDING STATUTORY STANDING.

The Opinion does not mention the principle of statutory standing. It does parrot the trial court's references to Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 753 S.E.2d 846 (2014), S.C. Code Ann. § 6-29-950 and standing based on public importance, none of which has any applicability to this case.

> Q. There's a state statute that talks about enforcement of zoning ordinances, which is South Carolina Code section 6-29-950. And it states that an adjacent or neighboring property owner can – can get an injunction. We've established you're not an adjacent property owner, none of the Plaintiffs are, correct?
> A. No. We haven't established that. I've told you I do not believe that's the case. But I don't believe that we pled a state statute. I believe that my remedy is from a City ordinance that specifically provides for that remedy. So I don't -- I'm not aware of the state statute. I have not attempted to avail -- the Plaintiffs have not attempted to avail themselves of a state statute. It wasn't pled --
> (R. p. 99, ll. 6-21).

The Opinion states that "Appellants asserted they were relying on § 54-905, which permits persons damaged by another person's use of their property to seek injunctive relief." The Opinion misapprehends the Ordinance, which actually allows any owner "who would be damaged" to seek injunctive relief "in addition to other remedies."

> 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.)

"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 trial 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 Opinion does not acknowledge the Ordinance's choice of language: "Would be damaged." Instead, the Opinion conflates this cause of action with the nuisance and UTPA claims and holds that the Plaintiffs have not provided even a mere scintilla of evidence of damages. The Opinion's conclusion regarding damages is erroneous, but is especially so in light of the language of the Ordinance.

The City of Charleston has chosen to open the courthouse doors to "any property owner" who "would be damaged" by another citizen's illegal use of his or her property. The Plaintiffs are property owners and the Defendants admit they are using their properties illegally. There is no proximity requirement and there is actually no requirement that there be existing damage. "Would be damaged" will suffice. The Opinion misapprehends the Ordinance by importing principles from a state statute which was not pled and has no application to this case.

The Opinion emasculates the Ordinance, rendering it meaningless. This Court has substituted its judgment for that of the City of Charleston and held that the City's law has no effect. This Court has overlooked the fact that there is far more than a mere scintilla of evidence

that the Plaintiffs' legal businesses "would be damaged" by the Defendants' illegal businesses.

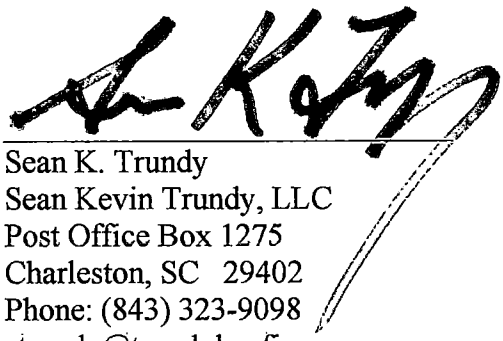
Robert Holt's affidavits and deposition, the production from www.airbnb.com and www.homeaway.com, and the scant financial information provided by a few of the Defendants constitute evidence of the Plaintiffs' damages, which include loss of rental revenue and diminished property values, caused by the 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).

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.

VI. CONCLUSION.

The points overlooked and misapprehended in the Opinion are linked and overlap. When the evidence is taken in the light most favorable to the non-moving parties, Robert Holt's testimony provides far more than "a mere scintilla" of evidence of the Plaintiffs' damages. Applying the Baughman rule regarding discovery shows that summary judgment was premature. Application of the Supreme Court's admonitions about the sufficiency of affidavits shows that Mr. Holt is eminently qualified to testify about damages.

For the reasons stated above, this Court should grant this Petition for Rehearing, withdraw its Opinion, and reverse the trial court's order.



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July 6, 2021

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the 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,

Defendants,

Of whom

Younesse Alami, Simon M. Adell, Matthew Anderson, Matthew Asher, Andre Bauer, Peter Bierce, Brandon Blount, Reginald P. Brown IV, Mary Cahill, Ryan Cockrell, Kevin and Virginia Conlon, Anne Marie Crevar, Darryl J Damico, Stephen Darwak, Lindsay Davenport, Mary Dickerson, Maxwell Streeter, Kathleen Dougherty, David Dressman, Lindsay Davenport, Kathleen Dougherty, David Dressman, Anna Dressman, Michael Elder, Christopher Scott Farley, Michele Ghastin, Ryan Gilreath, Sonya Gilreath, Kimberly Glenn, Shaun Halsor, Josephine Rex, Laura Hyatt, Nathan Herring, James Hicks Jr., Laurie Hicks, Preston G Hipp, Colin Jones, Matthew F. Jones, Robert C. Jones, Robin Joseph, Molly Keeler, John Kenny, Abigail King, Aaron Kless, Laurie Kramer, Robert Kramer, Allison Kreutzer, Jesse Lutz, Thomas Naselaris, Zoe Naselaris, Beau O'Steen, Cori O'Steen, Lance Parr, Brandon Perdue, Hadassah Rothenberg, Daniel Ryan, Kimberly Bowlin, Kevin Schnittker, Ginger Scofield, Alecia Stevens, Justin Swan, Merrick Teichman, John Van Vlack, Jr, William Waterhouse, Jennifer Waterhouse, Anne Wohlfeil, Bryan Young, Helene Kenny / Bridget Kenny Revocable Trust, 259 East Bay LLC, 259 East Bay 10 B LLC, Corner At Old Canton, LLC, Kit Properties LLC, The Naws LLC, One Henrietta LLC, Periwinkle Partners, LLC, Porch Properties LLC, Westbury Properties, LLC, and Westendorff Hardware LLC are

Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the **Appellants' Petition for Rehearing** were served this 6th of July, 2021, via U.S. Mail, postage prepaid, upon:

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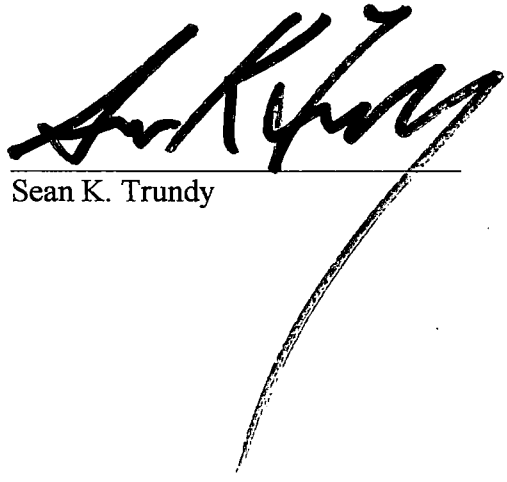

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July 6, 2021

V. Claire Allen
Chief Deputy Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, S.C. 29201

Re: ***Charleston Development Company, LLC, et. al. v. Younesse Alami, et al..***
Appellate Case No.: 2018-001766

Dear Ms. Allen:

Enclosed please find the original and six copies of the Appellants' Petition for Rehearing, along with the original Certificate of Service showing service on the Respondents

Sincerely,

SEAN KEVIN TRUNDY, LLC

Sean K. Trundy

Enclosures
C: Respondents