THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5826 (S.C. Ct. App. Filed June 23, 2021)

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

Petitioners,

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.

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Sean K. Trundy
Sean Kevin Trundy, LLC
Post Office Box 1275
Charleston, SC 29402
Phone: (843) 323-9098
strundy@trundylawfirm.com
ATTORNEY FOR PETITIONERS

Other counsel of record:

Mary Lee Briggs, Esquire
3366 Rivers Avenue
North Charleston SC 29405

Nancy Bloodgood, Esquire
242 Mathis Ferry Road, Suite 201
Mt. Pleasant SC 29464

Daniel Carson Boles, Esquire
3870 Leeds Avenue, Suite 104
North Charleston SC 29405

Gregory Kenneth Voigt, Esquire
815 Savannah Hwy., Ste. 201B
Charleston SC 29407

Mallary Lauren Scheer, Esquire
50 Broad Street
Charleston SC 29401

Michael Ashley Whitsitt, Esquire
The Whitsitt Law Firm
1476 Ben Sawyer Boulevard, Suite 3
Mount Pleasant SC 29464

Stafford John McQuillin, III, Esquire
PO Box 340
Charleston SC 29402

Christopher L. Murphy, Esquire
146 Fairchild Street, Suite 130
Charleston SC 29492

David B. Marvel, Esquire
PO Box 22734
Charleston SC 29413

Beau and Cory O'Steen PRO SE
5362 Farmstead Drive
Aiken SC 29803

Allison Kreutzer PRO SE
11 Carondolet St.
Charleston SC 29403

Robert and Laurie Kramer PRO SE
11 Gadsden Street
Charleston SC 29401

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners hereby certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on August 4, 2021.

QUESTIONS PRESENTED

(1) Did the Court of Appeals err in failing to apply this Court's rulings regarding the "mere scintilla of evidence" and "light most favorable" standards?

(2) Did the Court of Appeals err in failing to apply this Court's rulings regarding a property owner's right to testify about damages and the standard for evaluating affidavits?

(3) Did the Court of Appeals err in failing to apply this Court's rulings regarding granting summary judgment before full and fair discovery has been had?

(4) Did the Court of Appeals err in failing to apply this Court's rulings regarding statutory standing and thus usurping the legislative authority of a South Carolina municipality?

STATEMENT OF THE CASE

The short-term rental industry ("STR") (think, AirBnB) is relatively new to South Carolina. On the Charleston peninsula, very, very few non-hotel / non-bed & breakfast property owners are allowed to legally rent out their properties (or portions thereof) for less than 30 days at a time. The Respondents in this case admit that they break the law by renting their properties out in violation of the City of Charleston's zoning ordinances.

> He argues that because -- and we'll admit, for purposes of summary judgment -- let me be very clear. We will admit the Respondents have violated a zoning ordinance of the city of Charleston. I think it's –
>
> THE COURT: There's no question they've done that.

MS. BLOODGOOD: So that's admitted, . . .
(R. p. 215, lines 7-13).

It is uncontested that the Petitioners rent their properties out in compliance with the City's zoning ordinances. The Respondents' illegal businesses have damaged the Petitioners because the Respondents compete unfairly (many of the Respondents have counterclaimed against the Petitioners for "interference of competition contrary to public policy," thus admitting that they are competitors of the Petitioners (R. p. 74, para. 82-83)), operating "under the radar" and avoiding expenses such as accommodations taxes and fire code compliance incurred by legal operators like the Petitioners. The Respondents' illegal businesses constitute a nuisance because they deprive the Petitioners of the full financial enjoyment of the Petitioners' properties.

There are four sources of evidence of the Petitioners' damages: (1) the Petitioners' revenue stream; (2) the Respondents' comparative revenue streams; (3) the diminution in value of the Petitioners' real property; and (4) data from the online short-term rental platforms that all the parties to this case use.

The Petitioners issued discovery asking the Respondents, 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 Respondents responded at all. Those who did offered paltry, incomplete responses. (R. pp. 158-161). The online platforms allow a landlord to produce a revenue report with just a few keystrokes. The Petitioners produced the easily retrieved AirBnB and Homeaway reports which specify when their properties were rented, for how long and for how much money. The Petitioners requested the Respondents to provide the same data, and most of the Respondents refused to do so. (R. pp. 81-83).

The Petitioners filed a motion to compel complete discovery responses from the

Respondents on January 12, 2018. (R. pp. 144-151). On January 22, 2018, the circuit court held that motion in abeyance. (R. p. 210, lines 8-17). Approximately 7 months later, the circuit court granted summary judgment to the Respondents without ever ruling on the motion to compel.

In opposition to the summary judgment motion, the Petitioners submitted all evidence that they control and possess. The total diminution in value to the Petitioners' properties as a result of the Respondents' activities is $2,200,000. (R. p. 173). After battling the recalcitrant websites for subpoena responses, the Petitioners were able to get some information about the Respondents' revenues. A sampling of approximately 59 Respondents (out of a total of over 125 Defendants), where the Petitioners have data provided by AirBnB, shows that the Respondents' illegal revenue exceeds $3,852,522. (R. p. 174).

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

Finally, the Respondents compete unfairly because they can price their rentals without having to incorporate the expenses of complying with the law. The Petitioners pay 6% in property taxes on their properties, as opposed to the 4% residential rate most of the Respondents pay. The business licenses cost money, and require that the Petitioners comply with fire and safety codes to protect their customers. (R. pp. 164-165, 221).

Even with the Respondents refusing to provide complete information regarding the revenue they have made by illegally renting short-term, the Petitioners submitted far more than a mere scintilla of evidence of their damages. Yet, the circuit court still granted summary judgment, without ever ruling on the motion to compel.

The Court of Appeals affirmed, holding that the Petitioners failed to present evidence of damages. While the trial court listed numerous reasons for granting summary judgment, and the Opinion of the Court of Appeals ("Opinion") quotes the Order extensively, 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 of Appeals applied this erroneous conclusion to all three of the Petitioners' separate causes of action.

ARGUMENTS

I. INTRODUCTION.

The Supreme Court should exercise its judicial discretion to grant a writ of certiorari because this case presents special and important issues. The STR industry is special and important, especially in South Carolina's coastal tourism communities. The Opinion is in direct conflict with Supreme Court precedent regarding what a litigant must present in response to a motion for summary judgment, usurps the provinces of the jury and of the City of Charleston, and has the effect of sanctioning admittedly illegal business activity.

In Preservation Society of Charleston vs. S.C. Dept. of Health and Environmental Control, 430 S.C. 200, 845 S.E.2d 481 (2020), 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 (2009), this Court reversed opinions from the Court of Appeals which erroneously affirmed summary

judgment orders. This case deserves the same result.

II. THE COURT OF APPEALS ERRED IN FAILING TO APPLY THIS COURT'S RULINGS REGARDING THE "MERE SCINTILLA OF EVIDENCE" AND "LIGHT MOST FAVORABLE" STANDARDS.

At the summary judgment hearing, the trial court correctly analyzed the damages issue at that procedural 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 statements were accurate and in accord with South Carolina law. Its written order and the Opinion are in conflict with this Court's precedents.

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

In both Turner and Hancock, this Court reversed the Court of Appeals's affirmance of summary judgment orders, emphasizing 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 this 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 Petitioners' damages.

> The total diminution in value to the Petitioners' properties as a result of the Respondents' activities is $2,200,000. (R. p. 173).
>
> A sampling of approximately 59 Respondents (out of more than 125 Defendants), where the Petitioners have data provided by AirBnB, shows that the Respondents' cumulative illegal revenue exceeds $3,852,522. (R. p. 174).
>
> The Respondents' 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 Petitioners have had to reduce their rental rates in order to compete with the Respondents' illegal businesses. (R. pp. 116-117).
>
> The illegally-operating Respondents compete unfairly because they can price their rentals without incurring the expenses of being legal. The Petitioners pay 6% in property taxes on their commercially-zoned properties, which are more expensive than the Respondents' residentially-zoned properties, which are taxed at 4%. The business licenses cost money, and require that the Petitioners comply with fire and safety codes to protect their customers. (R. pp. 164-165, 221).

The Opinion overlooks or misapprehends all of this evidence, thus violating the "mere scintilla" standard established by this Court.

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.
>
> . . .
>
> 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:

[1] Petitioners' attorney is not the lawyer who asked either of these questions, and there is nothing in the Record to suggest he was. The Certificate of Counsel (R. p. 279) shows that the parties disagreed about the construction of the Record. Rather than involve the Court of Appeals in a relatively minor issue, Petitioners 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. So absolutely the number's more than zero. Those [Defendants] have all caused damage – those [Defendants] have all caused damage to the [Plaintiffs] or I would not have named them in the suit.
Q. And --
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 Petitioners' motion to compel production of data showing the massive amount of illegal revenue the Respondents 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 Petitioners cannot calculate their exact damages because the trial court did not compel the Respondents to disclose their revenue information, but it is a gross mischaracterization to find that Mr. Holt asserts that the Respondents 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 Petitioners' properties are worth less than they should be, due to the Respondents' 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 Respondents. This is in conflict with this Court's clear admonitions.

III. THE COURT OF APPEALS ERRED IN FAILING TO APPLY THIS COURT'S RULINGS REGARDING THE SUFFICIENCY OF AFFIDAVITS AND AN OWNER'S RIGHT TO TESTIFY ABOUT DAMAGES TO PROPERTY.

This 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).

The Court of Appeals 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). The trial court's order and the Opinion misapprehend 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 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. 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

[2] The Opinion quotes a case which addresses testimony of "people other than the owner of real property." Each of the Petitioners 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 Petitioners. (R. p. 2). Corporate entities can speak only 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 Petitioners' damages, then nobody can and any tortfeasor or law-breaker may harm the Petitioners without consequence.

> others have concluded that such lack of knowledge goes to the weight, but not to the competency, of his testimony.
>
> 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 Petitioners, and how those values have been affected by the illegal competition presented by the Respondents 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 Petitioner 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 Respondents' illegal businesses have damaged the Petitioners." (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 Respondents' illegal short-term rental businesses have negatively impacted the value of the Petitioners' legal short-term rental properties.
> (R. p. 169-171).

By overlooking the Record, the Opinion is in irreconcilable conflict with this Court's precedents 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) (appeal from a jury verdict).

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, if it so chooses, will have the right to reject Mr. Holt's testimony that the Petitioners' property values have been damaged. But the trial court, the Court of Appeals and even this Court do not have that right. The trial court and the Court of Appeals 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), this Court reversed a directed verdict in favor of the Respondents.

> 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)).

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, this Court reversed the Court of Appeals's holding that the Petitioners did not have standing to seek a contested case hearing regarding a 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.
> 845 S.E.2d at 488.

Here, the Court of Appeals 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 this Court's decision in Preservation Society is erroneous, or the Opinion of the Court of Appeals in this case is erroneous. They cannot be reconciled.

If the Opinion here is correct, then this Court erred in Preservation Society by not requiring an "explanation" from the affiants regarding 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?

This Court did not err in not requiring the Preservation Society affiants to make any of

these explanations. Instead, it reversed the Court of Appeals 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 COURT OF APPEALS ERRED IN FAILING TO APPLY THIS COURT'S 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 Petitioners' 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 Petitioners' damages: (1) the Petitioners' revenue stream; (2) the Respondents' comparative revenue streams; (3) the diminution in value of the Petitioners' 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 Petitioners issued discovery asking the Respondents, 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 Respondents responded at all. Those who did respond offered paltry, incomplete responses. (R. pp. 158-161).

In contrast, the Petitioners produced to the Respondents exactly the information that the Petitioners sought from the Respondents: information about when the Petitioners' 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 Petitioners produced the easily retrieved AirBnB and Homeaway reports which specify when a property was rented, for how long and for how much money. The Respondents refused to share their comparable reports. (R. pp. 81-83). That refusal prevented the Petitioners 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 Respondents to produce their financial data impaired the Petitioners' ability to show the entirety of their particularized losses. The Opinion overlooks this important issue.

"Petitioners 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, Petitioners 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 Petitioners 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 Respondents' 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 Petitioners their right to a jury trial and allows the Respondents 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).

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 Petitioners made a timely motion asking the trial court to require the Respondents to produce exactly the same data that the Petitioners produced, but the trial court declined to even address that motion and instead gave the Respondents a victory at the summary judgment stage. We know what will be produced when the trial court grants the motion to compel;[3] a sampling of fewer than half of the Respondents' financial data shows they received more than three million dollars in illegal revenue.

V. THE COURT OF APPEALS ERRED IN FAILING TO APPLY THIS COURT'S RULINGS REGARDING STATUTORY STANDING AND THUS USURPING THE LEGISLATIVE AUTHORITY OF A SOUTH CAROLINA MUNICIPALITY.

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,

[3] The motion must be granted. Several of the Respondents have already produced incomplete evidence of their ill-gotten gains. There is no privilege involved and the information is highly relevant.

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 (appellant 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 Petitioners have not provided even a mere scintilla of evidence of damages. The Opinion's conclusion regarding damages is erroneous, and 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 Petitioners are property owners and the Respondents 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. The Court of Appeals substituted its judgment for that of the City of Charleston and held that the City's law has no effect. The Court of Appeals overlooked the fact that there is far more than a mere scintilla of evidence that the Petitioners' legal businesses "would be damaged" by the Respondents' 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 Respondents constitute evidence of the Petitioners' damages, which include loss of rental revenue and diminished property values, caused by the Respondents' use of their properties in violation of the zoning ordinances. (R. pp. 164-165, 168-170, 172-174). At a bare minimum, the Respondents' 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 Petitioners. (R. pp. 164-165).

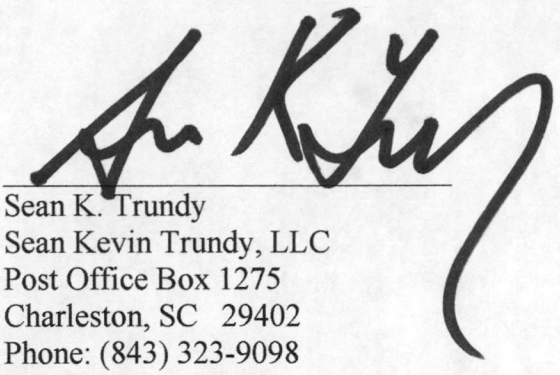
Having been granted statutory standing by the Ordinance, it was not necessary for the Petitioners to undergo the traditional analysis of constitutional standing. Freemantle, 728 S.E.2d at 44.

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 Petitioners' damages. Applying the Baughman rule regarding discovery shows that summary judgment was premature. Application of this Court's admonitions about the sufficiency of affidavits shows that Mr. Holt is eminently qualified to testify about damages.

In Preservation Society of Charleston, Turner and Hancock, this Court reversed opinions from the Court of Appeals which erroneously affirmed summary judgment orders. This case deserves the same result.

For the reasons stated above, this Court should grant a writ of certiorari, reverse the Court of Appeals, and remit this case to the trial court.



Sean K. Trundy
Sean Kevin Trundy, LLC
Post Office Box 1275
Charleston, SC 29402
Phone: (843) 323-9098
strundy@trundylawfirm.com
ATTORNEY FOR PETITIONERS

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