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APR 15 2013

April 15, 2013

Via Hand Delivery

S.C. SUPREME COURT

Daniel E. Shearouse, Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29211

Re: *Perrin Babb, Debbie Babb, Wayne Elstrom, Sarah Elstrom, Alan Jackson and Kathy Jackson v. Lee County Landfill SC, LLC*
Appellate Case No.: 2012-212741

Dear Mr. Shearouse:

Please find enclosed an original and seven copies of Defendant Lee County Landfill SC, LLC's Response to *Amici Curiae* Brief of Coastal Conservation League, South Carolina Wildlife Federation, and Upstate Forever in Support of the Plaintiffs' Briefs in the above-referenced case. Please return a time-stamped copy to my courier.

Thank you for your attention to this matter.

Very truly yours,

Pamela A. Baker

PAB:dmc
Enclosures

cc: Gary W. Poliakoff, Esq. (w/enc.) – *via U.S. Mail*
William E. Hopkins, Jr., Esq. (w/enc.) – *via U.S. Mail*
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PPAB 2076866v1

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIFICATION FROM UNITED STATES DISTRICT COURT
District of South Carolina

Honorable Joseph F. Anderson, Jr., United States District Court Judge

Appellate Case No. 2012-212741

Perrin and Debbie Babb, Wayne and Sarah
Elstrom, Alan and Kathy Jackson,..... Plaintiffs,

v.

Lee County Landfill SC, LLC,..... Defendant.

**DEFENDANT'S RESPONSE TO AMICI CURIAE BRIEF OF COASTAL
CONSERVATION LEAGUE, SOUTH CAROLINA WILDLIFE
FEDERATION, AND UPSTATE FOREVER IN SUPPORT OF THE
PLAINTIFFS' BRIEFS**

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Pursuant to Rule 213, SCACR, the defendant Lee County Landfill SC, LLC respectfully submits this response to the *amici curiae* brief filed by the Coastal Conservation League, South Carolina Wildlife Federation and Upstate Forever (hereinafter CCL Parties).

On March 18, 2013, this Court granted the plaintiffs a ten day “extension of time to file a response to the amici curiae briefs” that had been filed on March 11 and March 18 in the above-captioned matter. The plaintiffs’ response to the amici curiae briefs was due on March 28, 2013. On March 28, 2013, rather than filing a response to the amici curiae briefs, the plaintiffs instead filed an amici curiae brief on behalf of the CCL Parties. On April 3, 2013, this Court accepted the CCL Parties’ amici curiae brief. The defendant respectfully submits this short response to the CCL Parties’ brief.

DISCUSSION

I. The CCL Parties’ reliance on physical invasion trespass cases is misplaced because the District Court’s certified question regarding trespass presupposes that invisible odors are not a physical invasion.

The CCL Parties miss the point regarding the invisible trespass question as framed by the District Court. The question the District Court certified to this Court is a narrow one: “Does South Carolina law recognize a cause of action for trespass solely from invisible odors rather than a physical invasion such as dust or water?” See S.C. Sup. Ct. Order filed October 17, 2012 (emphasis added). This question presupposes that invisible odors do not cause a physical invasion. Thus, the decisions cited by the CCL Parties (and the plaintiffs) regarding physical invasion trespasses such as chemicals in groundwater or dust particles are not relevant to the Court’s analysis of this certified question. The CCL Parties cite to three such physical invasion decisions in their brief,

two involving chemicals in groundwater physically entering the plaintiffs' property (*Ravan v. Greenville County*¹ and *AVX Corp. v. Horry Land*²) and one involving dust particles physically entering a plaintiff's property (*Martin v. Reynolds Metals Co.*³). These physical invasion cases are immaterial to the Court's analysis of whether an intangible, non-physical odor constitutes a trespass.

South Carolina has never recognized invisible, intangible odors as a trespass and doing so would unnecessarily expand the law of trespass in this state. A similar attempt to expand trespass to intangibles was made in Michigan in *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 219-20 (Mich. Ct. App. 1999). In *Adams*, landowners near an ore mine brought an action against the mine operator alleging that intangibles such as noise and vibrations constituted a trespass. *Id.* at 216-17. The court evaluated the majority rule limiting trespass to tangible, physical invasions and the minority rule allowing intangible trespasses only in cases of actual, substantial harm to property. *Id.* at 219-20. The court then categorically rejected the minority rule in favor of the majority rule, holding:

Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession. . . . We prefer to retain the traditional elements . . . because they serve as gatekeepers-safeguarding genuine claims of trespass and keeping the line between the torts of trespass and nuisance from fading into a "wavering and uncertain" ambiguity. Further, retaining the distinction between the two theories of recovery limits the possibilities for dual liability stemming from the same conduct and results.

¹ 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993).

² 686 F. Supp. 2d 621 (D.S.C. 2010).

³ 342 P.2d 790 (Ore. 1959), *cert. denied*, 362 U.S. 918 (1960).

Id. at 222-23 (emphasis added). The court concluded that noise, vibrations and other intangibles did not constitute an actionable trespass.⁴ *Id.* at 225. See *Brockman v. Barton Brands, Ltd.*, No. 3:06-cv-332-H, 2009 WL 4252914, at *5 (W.D. Ky. Nov. 25, 2009) (“The odors alleged in Plaintiffs’ Complaint, which are visibly undetectable and transient, are not sufficient to state a claim for trespass”); *Wendinger v. Forest Farms, Inc.*, 662 N.W.2d 546, 554 (Minn. Ct. App. 2003) (“Because odors do not interfere with the exclusive possession of land, an allegation that a confined-animal feeding operation emits invasive odors does not state a claim for trespass”); *San Diego Gas & Elec. Co. v. Superior Ct.*, 920 P.2d 669, 695 (Cal. 1996) (“Succinctly stated, the rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion”).

Even in the small minority of courts that recognize intangibles as a trespass, those courts have held that substantial physical injury to property must accompany the intangible entry to be actionable. See Def.’s Br. at pp. 33-37; *Darney v. Dragon Prod. Co.*, 771 F. Supp. 2d 91, 107 (D. Me. 2011), *amended by* No. 2:08-cv-47-GZS, 2011 WL 2007300 (D. Me. May 23, 2011) (citing *John Larkin, Inc. v. Marceau*, 959 A.2d 551, 554 (Vt. 2008) (“invasions of intangible matter are actionable in trespass *only* if they cause substantial damage to the plaintiff’s property . . .”) (emphasis in original)).

Even this minority position would not help the plaintiffs in this case because the plaintiffs specifically abandoned all property damage claims and conceded that the odors caused no physical harm of any kind to their properties. The law of trespass in South Carolina should not be expanded to encompass invisible, non-physical intrusions of odors that cause no damage to a plaintiff’s property.

⁴ The *Adams* court further held that dust must generally be considered intangible and thus not actionable in trespass. 602 N.W.2d at 223.

II. The CCL Parties retread the same ground as the plaintiffs regarding nuisance damages by relying on the 1897 *Threatt* case and the Restatement of Torts, neither of which is applicable in this case.

The CCL Parties' arguments regarding nuisance damages mirror those of the plaintiffs and bring nothing new to this Court. The CCL Parties rely heavily on the same 116-year old case that the plaintiffs brought to the Court's attention for the first time at oral argument, *Threatt v. Brewer Min. Co.*, 49 S.C. 95, 26 S.E. 970 (1897). The defendant has addressed the *Threatt* case in a brief filed with this Court on April 2, 2013. See Def.'s Resp. to Authority First Cited During Oral Argument at pp. 1-3. Like the plaintiffs, the CCL Parties have not cited the Court to any case that allows recovery for annoyance-type damages in the absence of any physical property damage or diminished property value.

Also like the plaintiffs, the CCL Parties rely on Section 929, subsection (1)(c) and Comment e of the Restatement (Second) of Torts. The plaintiffs did not reference the Restatement in their opening or reply briefs, but only mentioned it for the first time in a response to the United States Chamber of Commerce's *amicus curiae* brief on March 18, and then a day later at oral argument. The CCL Parties argue that the Restatement provides that one may recover for annoyance-type damages in the absence of any physical property damage. This Restatement section, however, contemplates a very different situation – one where physical harm to property has occurred. Section 929 of the Restatement provides:

§ 929. Harm to Land from Past Invasions

- (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for
 - (a) the difference between the value of the land before

- the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,
- (b) the loss of use of the land, and
 - (c) discomfort and annoyance to him as an occupant.

Restatement (Second) of Torts § 929 (1979) (emphasis added).

The title of Section 929, “**Harm to Land** from Past Invasions” itself makes the point. This Restatement Section only concerns cases where “harm to land” has occurred. Here, the plaintiffs concede that no harm to their land has occurred and unequivocally abandoned all property damage claims. Because the plaintiffs readily admit that they are not “entitled to a judgment for harm to land,” Section 929(1) of the Restatement does not apply.

Just as Section 929 has no bearing on this case, Comment (e) to Section 929 similarly does not apply. Comment e reads in part:

e. Discomfort and other bodily and mental harms. Discomfort and annoyance to an occupant of the land and to the members of the household are distinct grounds of compensation for which in ordinary cases the person in possession is allowed to recover in addition to the harm to his proprietary interests.

Id. at § 929 cmt. e (emphasis added). Again, Comment e to Section 929 contemplates that the plaintiff has suffered harm to property, which is not the case here.

Finally, the CCL Parties argue that Restatement Section 929 does not limit nuisance damages to the full market value of real property. This is of no consequence. Restatement Section 929 only concerns harm to land and does not contemplate a maximum recovery of damages. Furthermore, as discussed more fully in the defendant’s brief at page 33, the South Carolina case of *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 484, 623 S.E.2d 373, 378 (2005), concludes that the absolute maximum a plaintiff

can recover in environmental cases such as this is the full market value of the property.. See *Smith v. Carbide & Chem. Corp.*, 507 F.3d 372, 379 (6th Cir. 2007) (citing Ky. Rev. Stat. Ann. § 411.560(1)) (concluding that the measure of compensatory damages could not exceed the fair market value of the property). Six weeks ago, Maryland's highest court affirmed that damages in environmental cases cannot exceed the full market value of a plaintiff's property. *Exxon Mobil Corp. v. Albright*, No. 15 Sept. Term 2012, 2013 WL 673738, at *41 (Md. Feb. 26, 2013) (holding "[i]n the context of damages for loss of use and enjoyment of real property, we determine that loss of use and enjoyment of real property cannot exceed the fair market, unimpaired value of the property at issue.")

III. Contrary to the CCL Parties' assertion, an independent negligence claim actually harms the public interest because it does not take into account the balance of property owners' and business rights inherent in a nuisance action.

The CCL Parties only discuss Certified Question 4 (independent negligence) in passing and do not discuss Certified Question 5 (standard of care) at all. Regarding Certified Question 4, the CCL Parties merely state that maintaining an independent negligence action in an odor lawsuit is in the public interest and then point to a very general statement from a publication regarding negligence claims in environmental litigation. In reality, however, an independent negligence claim in an odor lawsuit such as this actually harms the public interest because it upsets the societal balance of property rights and business interest which is the essence of a nuisance action. Rather than restating the argument in full here, the defendant respectfully refers this Court to the detailed discussion of the independent negligence issue set forth at pages 5-17 of the United States Chamber of Commerce's *amicus curiae* brief filed on March 18, 2013.

IV. The Court should not afford the CCL Parties' brief any weight because it contains irrelevant and inaccurate information outside the record and is nothing more than a restatement of the plaintiffs' arguments.

An *amicus* brief should be "limited to argument of the issues on appeal as presented by the parties and must comply with the requirements of Rules 208(b) and 211, SCACR." Jean Hofer Toal, Shahin Vafai, & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 218 (2d ed. 2002). "An *amicus curiae* may not raise arguments in its brief that were not made to the lower court." *Id.* (citations omitted). The seven introductory pages of the CCL Parties' brief contain irrelevant and prejudicial information outside the record in an obvious attempt to inflame the Court against the defendant. For example, on pages 2 through 7 of their brief, the CCL Parties provide statistics regarding solid waste tonnage in South Carolina and describe nuclear, hazardous and infectious waste with no support of any kind in the record or otherwise. The landfill at issue is not a nuclear, hazardous or infectious waste landfill. Rather it is a municipal solid waste landfill. Trial Tr. 1378:23 – 1379:1, March 28, 2012.

Additionally, the brief is replete with inaccurate information. For example, while irrelevant to the legal questions before the Court and not in the record, the CCL Parties indicate at page 7 of their brief that the defendant is involved in a pending lawsuit seeking approval to accept "enormous amounts of radioactive contaminated soil" from New Jersey at the Lee County Landfill. This simply is not correct. The case referenced by the CCL Parties did not exist at the time of trial, but was pending before the South Carolina Administrative Law Court until last Friday, April 12, 2013, when the petitioner in that case filed a voluntary dismissal to end the case. Even a cursory review of the docket indicates that the defendant is not a party or otherwise involved in the case. *See*

Sayreville Seaport Assoc., L.P. v. S.C. Dep't of Health and Envtl. Control, Docket No. 12-ALC-07-0324-CC. Furthermore, contrary to statements made by the CCL Parties, the defendant has stated publicly that it has no intention of accepting the “radioactive contaminated soil” at the Lee County Landfill.

By way of further example, the CCL Parties assert on pages 4 and 5 of their brief that “[w]aste generated from great distances outside of South Carolina is more problematic” than South Carolina waste because it is “baking in the sun” for weeks before arriving at the defendant’s railyard in South Carolina. Again, while entirely irrelevant to the legal questions before this Court, the CCL Parties’ assertions are wrong. In the *Babb* trial, the plaintiffs made this same argument that the CCL Parties are now making regarding out-of-state waste but the plaintiffs’ own expert visited the railyard of the defendant landfill and testified under oath that it was his opinion that rail cars containing out-of-state waste that allegedly had “baked in the sun” for weeks were not the source of odors at the landfill. See Trial Tr. 619:7 – 620:5, Dr. Timothy Townsend, March 21, 2012.

Finally, the very term *amicus curiae* means “friend of the court” as distinguished from an advocate of one of the parties. See *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974) (noting that “[a]n *amicus curiae* is not a party to the litigation . . . and therefore does not necessarily represent the views or interests of either party” and that “it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the *amicus*”). Here, the plaintiffs and CCL Parties unquestionably are tightly aligned and the CCL Parties are advocating directly for the plaintiffs. In fact, the plaintiffs themselves filed the CCL Parties’ brief with this Court on behalf of the CCL

Parties. Because the CCL Parties' brief is an advocacy piece for the plaintiffs rather than an impartial discussion for the Court, the Court should not afford it any weight. *See, e.g., Leigh v. Engle*, 535 F. Supp. 418, 422 (N.D. Ill. 1982) (refusing to consider an *amicus* brief because the individual who filed the brief was a friend of the party to the case rather than an impartial friend of the court).

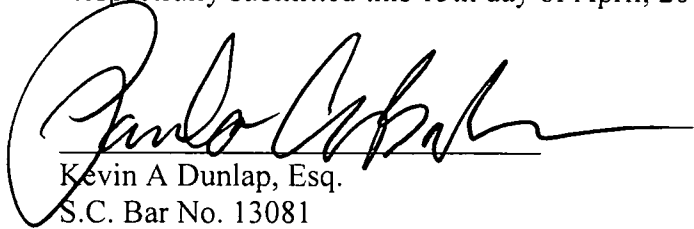
CONCLUSION

For the reasons set forth above and set forth in its opening brief, the defendant respectfully requests that the Court answer the District Court's certified questions as follows:

1. Under South Carolina law, when a plaintiff seeks recovery for temporary trespass or nuisance, the plaintiff's damages are limited to the lost rental value of the property.
2. The maximum amount of compensatory damages a plaintiff can receive in any trespass or nuisance action is the full market value of the plaintiff's property.
3. South Carolina law does not recognize a cause of action for trespass solely from invisible odors.
4. When a plaintiff contends that odors have migrated from a neighbor's property onto the plaintiff's property, no independent cause of action for negligence exists. Additionally, when a plaintiff pleads multiple claims on the same facts, the plaintiff may not recover on multiple claims but instead is limited to a single recovery.
5. The standard of care for a landfill operator and breach thereof must be established through expert testimony. Additionally, regulations that could serve as the

standard of care and an alleged breach of that standard must be established through expert testimony.

Respectfully submitted this 15th day of April, 2013.

A handwritten signature in black ink, appearing to read "Kevin A. Dunlap", written over a horizontal line.

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CERTIFICATION FROM UNITED STATES DISTRICT COURT
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Honorable Joseph F. Anderson, Jr., United States District Court Judge

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Perrin and Debbie Babb, Wayne and Sarah
Elstrom, Alan and Kathy Jackson,..... Plaintiffs,

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Lee County Landfill SC, LLC,..... Defendant.

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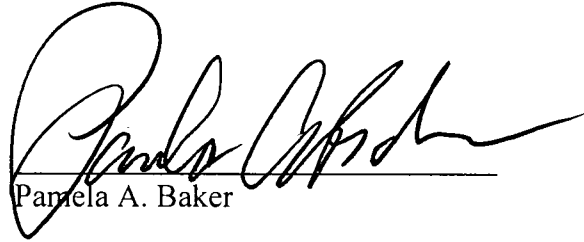
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This 15th day of April, 2013.



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