THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIFICATION PURSUANT TO RULE 244, SCACR
United States District Court for the District of South Carolina
Joseph F. Anderson, Jr., District Court Judge

Appellate Case No. 2012-212741

Perrin Babb, Debbie Babb, Wayne Elstrom, Sarah Elstrom, Allan Jackson, and Kathy Jackson, Plaintiffs,

v.

Lee County Landfill SC, LLC, Defendant.

BRIEF OF PROPOSED AMICI CURIAE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, SOUTH CAROLINA PALMETTO CHAPTER OF THE SOLID WASTE ASSOCIATION OF NORTH AMERICA, AMERICAN FOREST & PAPER ASSOCIATION, AND INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.

Elizabeth B. Partlow
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1320 Main Street, Suite 600
Columbia, SC 29201
803-252-1300 (Telephone)
803-254-6517 (Facsimile)
beth.partlow@ogletreedeakins.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF QUESTIONS CERTIFIED

1. UNDER SOUTH CAROLINA LAW, WHEN A PLAINTIFF SEEKS RECOVERY FOR A TEMPORARY TRESPASS OR NUISANCE (ASSERTING CLAIMS FOR ANNOYANCE, DISCOMFORT, INCONVENIENCE, INTERFERENCE WITH THEIR ENJOYMENT OF THEIR PROPERTY, LOSS OF ENJOYMENT OF LIFE, AND INTERFERENCE WITH MENTAL TRANQUILITY AND ABANDONING ALL CLAIMS FOR LOSS OF USE, DIMINUTION OF VALUE, AND PERSONAL INJURY), ARE THE DAMAGES LIMITED TO THE LOST RENTAL VALUE OF THE PROPERTY?

2. 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?

3. IS THE MAXIMUM AMOUNT OF COMPENSATORY DAMAGES A PLAINTIFF CAN RECEIVE IN ANY TRESPASS OR NUISANCE ACTION (TEMPORARY OR PERMANENT) THE FULL MARKET VALUE OF THE PLAINTIFF'S PROPERTY WHERE NO CLAIM FOR RESTORATION OR CLEANUP COSTS HAS BEEN ALLEGED?

4. WHEN A PLAINTIFF CONTENDS THAT OFFENSIVE ODORS HAVE MIGRATED FROM A NEIGHBOR'S PROPERTY ONTO THE PLAINTIFF'S PROPERTY, MAY THE PLAINTIFF MAINTAIN AN INDEPENDENT CAUSE OF ACTION FOR NEGLIGENCE OR IS THE PLAINTIFF LIMITED TO REMEDIES UNDER TRESPASS AND NUISANCE?

5. IF AN INDEPENDENT CAUSE OF ACTION FOR NEGLIGENCE EXISTS UNDER SOUTH CAROLINA LAW WHEN A PLAINTIFF CONTENDS THAT OFFENSIVE ODORS HAVE MIGRATED FROM A NEIGHBOR'S PROPERTY ONTO THE PLAINTIFF'S PROPERTY, DOES THE STANDARD OF CARE FOR A LANDFILL OPERATOR AND BREACH THEREOF NEED TO BE ESTABLISHED THROUGH EXPERT TESTIMONY?

STATEMENT OF THE CASE

Proposed Amici Curiae adopt the Statement of the Case set forth in Defendant's brief. Amici curiae conditionally submit this Brief along with a Motion for Leave to File, which describes the interest of amici curiae and the reasons an amicus brief is desirable in this case.

STATEMENT OF INTEREST OF AMICI CURIAE

As set forth in the accompanying motion for leave to file, businesses throughout South Carolina would be adversely affected by an expansion of South Carolina tort law to allow plaintiffs in trespass and private nuisance cases to recover damages that far exceed the value of their property interests, or to allow negligence claims to be brought for odors that periodically occur, particularly in the absence of expert testimony that the facility emitting the odors has violated the standard of care. If left undisturbed, the jury verdict in the district court case threatens the ability of private sector waste and recycling companies and their public sector brethren in municipal and county solid waste departments to provide cost-effective solid waste processing and disposal services to residents and businesses in South Carolina. It also threatens excessive damage awards against facilities as diverse as lawfully operated manufacturing businesses, municipal wastewater treatment works, and airports, even if those facilities are complying with federal and state law and with their permits. Amici curiae urge the Court to follow the well-settled law of nuisance and trespass in South Carolina and answer the District Court's certified questions as set forth below.

ARGUMENT

I. UNDER SOUTH CAROLINA LAW, A PLAINTIFF ALLEGING A TEMPORARY TRESPASS OR NUISANCE MAY RECOVER DAMAGES ONLY FOR LOST RENTAL VALUE OF THE PROPERTY.

Claims for trespass and private nuisance are integrally connected to a plaintiff's interest in land. The law of trespass developed to protect a person's possessory interest in land. The law of private nuisance developed to protect a person's interest in the use and enjoyment of land. This fundamental precept is recognized in the very definitions of trespass and nuisance.

Trespass is an intentional interference with the plaintiff's right to exclusive, peaceable possession of his property. *Ravan v. Greenville Cty*, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct. App. 1993). Nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property. *O'Cain v. O'Cain,* 322 S.C. 551, 473 S.E.2d 460 (Ct. App. 1996); *Lever v. Wilder Mobile Homes, Inc.,* 283 S.C. 452, 322 S.E.2d 692 (Ct. App. 1984), citing *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 125 S.E.2d 628, 632 (1962). The classic principle of nuisance law is:

> While everyone has the right to use his property as he sees fit, this right is subject to the implied obligation of every owner or occupant of property to use it in such a way that it will not be unreasonably injurious to the equal enjoyment of other property owners having an equal right to the enjoyment of their property.

66 C.J.S. *Nuisance* § 8.

Thus, cases that have discussed the damages available to plaintiffs in trespass and nuisance cases have done so with reference to plaintiff's loss of some value associated with land. For trespass, the interest affected is

possession, and courts have allowed an award of nominal damages when no actual injury from the entry onto land can be proved. For nuisance, the interest affected is use and enjoyment, and courts have allowed damages for the lost rental value of property (for temporary nuisance) or diminution in value of property (for permanent nuisance).

In *Gray v. Southern Facilities,* 256 S.C. 558, 183 S.E.2d 438 (1971), the South Carolina Supreme Court established the rule for recovery of damages for environmental cases. The Court stated that where pollution results "in a temporary or nonpermanent injury to real property, the injured landowner can recover the depreciation in the rental or usable value of the property caused by the pollution." *Id.,* 256 S.C. at 569, 183 S.E.2d at 443.

Every South Carolina case since 1971 that has discussed the measure of damages for temporary trespass or nuisance has applied the *Gray* rule. *See, e.g., Yadkin Brick Co., Inc. v. Materials Recovery Co.,* 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000); *Ravan v. Greenville Cty,* 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993); *see also AVX Corp. v. Horry Land Co., Inc.* 686 F. Supp. 2d 621 (D.S.C. 2010).

The limitation of damages to lost rental value in private nuisance cases aligns with South Carolina law of public nuisance. Public nuisance is an unreasonable interference with rights common to the public. 1-3 *Toxic Torts Guide* § 3.06[b] (Matthew Bender 2012); *see Overcash v. S.C. Elec. & Gas Co.,* 364 S.C. 569, 614 S.E.2d 619 (2005) (briefly describing the history of the doctrine of public nuisance); *see also Belton v. Wateree Power Co.,* 123 S.C.

291, 301, 115 S.E. 587, 590 (1922) (the test of a public nuisance is not the number of persons annoyed, but the possibility of annoyance to the public by invasion of its rights, the fact that it is in a public place and annoying to all who come within its sphere).

Even in public nuisance cases, however, an individual may sue only if he has sustained injury to personal or real property. In *Overcash v. S.C. Elec. & Gas Co.,* 364 S.C. 569, 575, 614 S.E.2d 619, 622 (2005), this Court ruled there was no cause of action under the doctrine of public nuisance for "purely personal injuries." The Court noted under English common law, an action for nuisance was reserved for an interference with the use or enjoyment of rights in land. The Court concluded the "special injury" requirement necessary for an individual to maintain a cause of action for public nuisance is satisfied only by injury to the individual's real or personal property. Finally, the Court stated its concern for "doctrinal consistency in the common law of nuisance." *Id.,* 364 S.C. at 575, 614 S.E.2d at 622.

The linchpin of private nuisance is interference with the plaintiff's use and enjoyment of property. 1-3 *Toxic Torts Guide* § 3.06[b] (Matthew Bender 2012). As the case law makes clear, a plaintiff who proves a private nuisance may recover damages for his discomfort, annoyance, or inconvenience. However, the categories of recoverable damages are constrained by the extent to which a plaintiff's discomfort and annoyance interfere with his enjoyment of his property. Thus, a plaintiff may introduce evidence of injury suffered by her mother and sister who live with her, on the ground that such evidence "tends to show the

nature and extent of plaintiff's damages, since she has the right to have them live with her and enjoy the comforts of her home." *Woods v. Rock Hill Fertilizer Co.*, 102 S.C. 442, 449, 86 S.E. 817, 819 (1915).

Allowing a plaintiff to recover damages that exceed the lost rental or usable value of his property would disconnect trespass and nuisance law from their property law roots and open the floodgates of litigation by allowing parties with only a minimal interest in property to sue for large damage amounts. For example, a tenant who pays $250 per month for a month-to-month lease might elect to stay in a house and sue for thousands of dollars in damages for annoyance or inconvenience from a noisy factory rather than simply move. Indeed, it is not difficult to imagine would-be plaintiffs contriving to become neighbors of the noisy factory in these circumstances.

In addition, allowing damages that exceed the lost rental or usable value of property would give rise to inherently speculative damage claims. Juries would be left to guess the value of a backyard cookout canceled because of odor, sleep interrupted by noise, or sunrises made hazy by smoke.

The court should not allow the abandonment of a doctrine that has been in place for more than 40 years and replace it with a rule allowing plaintiffs who bring trespass and private nuisance claims to recover damages that exceed the lost rental or usable value of their property.

2. SOUTH CAROLINA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR TRESPASS BASED SOLELY ON INVISIBLE ODORS.

In the South Carolina Court of Appeals' opinion in *Snow v. City of Columbia,* 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991), Judge Bell traced the development of the law of trespass:

> At common law, all land held in peaceable possession is deemed to be enclosed. Subject to limited exceptions not relevant to this case, the person in peaceable possession has the right to exclude all others from the enclosure. The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted. The entry itself is the wrong. Thus, for example, if one without license from the person in possession of land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass by the very act of breaking the enclosure.

Snow, 305 S.C. at 552-553, 409 S.E.2d at 802 (citations omitted).

No case in South Carolina has recognized a trespass, a "breaking the enclosure," by the movement of gases or odors through the air over a plaintiff's property. This makes sense, since a physical invasion of property is required to constitute any interference with possession and support a claim for trespass.

Plaintiffs suggest that odors are "particulate matter" invisible to the human eye and should be treated like groundwater contamination. (Pl. Br. at 24.) As a scientific matter, odors may or may not be "particulate matter." Unlike groundwater, gases and odors do not touch a plaintiff's property or interfere unlawfully with plaintiff's possession.[1]

Expanding the law of trespass to include invisible or intangible odors would blur the distinction between trespass, which requires a physical invasion,

[1] If soot or dust placed in the air by defendant is actually deposited on plaintiff's property, a claim for trespass may lie.

and nuisance, which does not. Additionally, allowing trespass claims for invisible odors would open the door to trespass claims for all sorts of invisible, subjective "intrusions" into the property possessor's interest, including claims for wireless signals that allegedly cross a plaintiff's property, noises that move through the air across a plaintiff's property, or lights that shine across a plaintiff's property. One could imagine trespass claims against a trucking company whose trucks emit diesel fumes on a public highway adjacent to plaintiff's land.

The Court should not expand the law of trespass in South Carolina to encompass claims for invisible odors.

3. THE MAXIMUM AMOUNT OF COMPENSATORY DAMAGES A PLAINTIFF CAN RECEIVE IN ANY TRESPASS OR NUISANCE ACTION (TEMPORARY OR PERMANENT) IS THE FULL MARKET VALUE OF THE PLAINTIFF'S PROPERTY WHERE NO CLAIM FOR RESTORATION OR CLEANUP COSTS HAS BEEN ALLEGED.

As more fully set forth in Argument 1, the basis of a trespass or nuisance claim is the plaintiff's interest in land. A plaintiff alleging temporary trespass or nuisance is limited to the lost rental value of his property. A plaintiff alleging permanent trespass or nuisance is limited to the full market value of his property. This limitation holds even if a plaintiff makes a claim for restoration or cleanup costs. Both of these rules derive from the same source: the recognition that trespass and nuisance are property-based torts.

Beginning with *Gray* in 1971, South Carolina courts have held that plaintiffs in trespass or private nuisance actions might recover diminution in value for permanent injury to property. In *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 623 S.E.2d 373 (2005), this Court considered whether evidence of the

replacement cost of destroyed trees was admissible to prove damages for negligence. The court cited the Restatement (Second) of Torts § 929 for the proposition that a plaintiff might recover, at his election, either the difference between the value of the property before the harm and the value of the property after the harm, or the cost of restoration that has been or may be reasonably incurred. *Vaught,* 366 S.C. at 481, 623 S.E.2d at 376. A comment to the Restatement suggested the cost of restoration would not be allowed if it was disproportionate to the value of the land, unless the plaintiff had a personal reason for restoring the land to its original condition. The Court adopted a modified "disproportionality" rule, requiring both that the plaintiff have a personal reason for restoring the land to its original condition and the cost of restoration be reasonable in relation to the damage inflicted. The Court imposed an additional limitation that the plaintiff could recover no more than the market value of the land in any event. The Court stated the rule as follows:

> The general measure of damages for damaged/destroyed noncommercial trees, shrubs, and related vegetation is the difference in the value of the entire parcel of land — damaged and undamaged portions — immediately before and after the loss. When the property is restorable to its former condition at a cost less than the diminution in value, then the cost of restoration that has been or may be reasonably incurred or the diminution in value may be the proper measure of damages. When the cost of restoration exceeds the diminution in value, then the greater costs of restoration will be allowed when the landowner has a personal reason relating to the land for restoring the land to its original condition and when the cost of restoration is reasonable in relation to the damage inflicted. However, the landowner may not recover restoration costs which exceed the market value of the entire parcel prior to the loss.

Vaught, 366 S.C. at 484, 623 S.E.2d at 377-378.

Thus, the maximum amount of compensatory damages a plaintiff can receive in any trespass or nuisance action[2] under South Carolina law is the full market value of the plaintiff's property, whether or not a claim for restoration or cleanup costs has been alleged. Even under the Restatement rule, which would allow restoration costs in excess of fair market value if some "personal reason relating to the land" were involved, compensatory damages for plaintiffs who are not claiming restoration or cleanup costs are limited to the market value of the property.

4. A PLAINTIFF WHO CONTENDS THAT OFFENSIVE ODORS HAVE MIGRATED FROM A NEIGHBOR'S PROPERTY ONTO THE PLAINTIFF'S PROPERTY IS LIMITED TO REMEDIES FOR NUISANCE AND TRESPASS AND MAY NOT MAINTAIN AN INDEPENDENT CAUSE OF ACTION FOR NEGLIGENCE.

No South Carolina case has recognized an independent cause of action for negligence by a plaintiff who contends offensive odors have migrated from neighboring property onto plaintiff's property. This is most likely true in part because plaintiffs generally allege all plausible theories under which they might recover. Additionally, courts have recognized that while a negligent act may give rise to a nuisance claim, a nuisance may exist even in the absence of negligence. *Peden v. Furman Univ.*, 155 S.C. 1, 19, 151 S.E. 907, 913 (1930); *FOC Lawshe Ltd. P'ship v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002). In other cases, this Court has noted the distinction between

[2] Because temporary trespass and nuisance actions by definition do not involve costs of restoration, South Carolina courts have not opined on whether damages for temporary trespass and nuisance are capped at the full market value of the property. South Carolina limits damages for temporary trespass or nuisance to the rental or usable value of property. Plaintiff alleges that capping damages for temporary trespass and nuisance at fair market value would "undermine the nature" of the continuing tort. (Pl. Rep. Br. at 10-11.) It is difficult to imagine a circumstance where the rental or usable value of property would exceed full market value, even if plaintiff brought multiple successive suits for temporary nuisance.

a trespass claim based on a negligent act, which would not support an award of punitive damages, and a trespass claim based on a willful or deliberate act. *See Hinson v. A.T. Sistare Const. Co., Inc.*, 236 S.C. 125, 113 S.E.2d 341 (1960), overruled on other grounds by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

South Carolina should not recognize a stand-alone negligence claim for odors. First, in the absence of a nuisance claim,[3] the law recognizes no duty to avoid odors. *See Sanders v. Norfolk Southern Ry. Co.*, 400 Fed. Appx. 726 (4th Cir. 2010). In *Sanders,* the court held although it was foreseeable that plaintiffs, who lived between two and five miles from the site of a collision where defendant railway released chlorine gas, would incur injuries from having to evacuate or seal themselves inside their homes, they could not establish that the railroad owed them any duty giving rise to liability for negligence. For such a duty to exist, the parties must have a relationship recognized by law, but the concept of duty must not be extended beyond reasonable limits. *Id.* at 728, citing *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986). The Court concluded although injury to plaintiffs was foreseeable, plaintiffs had failed to establish that the railroad owed them any duty.

A second problem with a stand-alone negligence claim is the potential universe of new lawsuits alleging a defendant "negligently" emitted odors, particularly for industries whose permits or regulatory authorities require them to

[3] As more fully discussed in Section 2 of this Brief, there is not and should not be a cause of action for trespass for invisible odors.

minimize odors that leave their premises. *See Fairchild v. South Carolina Dep't of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (2012) (violation of statute is negligence per se). Additionally, the universe of potential plaintiffs is enormous; it would extend to anyone who smells a paper mill, chemical facility, or hog farm, including mere passersby.[4] These new plaintiffs would only have to allege they were annoyed or inconvenienced by the smell to state a cause of action. Such a broad expansion of potential liability would create disincentives for business and industry to locate or expand in South Carolina and could flood the courts with new claims. A well-developed body of tort law already gives injured parties the tools they need to obtain damages for invasion of their rights. The law cannot, and should not, afford a remedy for every inconvenience or annoyance that is necessarily experienced by people living in a community. *See Snow v. City of Columbia,* 305 S.C. 544, 552, 409 S.E.2d 797, 801 (Ct. App. 1991); *Home Sales, Inc. v. City of North Myrtle Beach,* 299 S.C. 70, 382 S.E.2d 463 (Ct. App. 1989). Expansion of tort liability to allow negligence claims for odors is unwarranted.

5. IF THE COURT RECOGNIZES AN INDEPENDENT CAUSE OF ACTION FOR NEGLIGENCE WHEN A PLAINTIFF CONTENDS THAT OFFENSIVE ODORS HAVE MIGRATED FROM A NEIGHBORING LANDFILL ONTO PLAINTIFF'S PROPERTY, THE STANDARD OF CARE FOR LANDFILL OPERATIONS MUST BE ESTABLISHED BY EXPERT TESTIMONY.

Expert testimony is required in South Carolina to establish the standard of care if the subject matter that forms the standard of care is not within the common understanding of a jury. *See, e.g., Ellege v Richland/Lexington School*

[4] This would include persons who are particularly sensitive to odors that might not affect most people. To allow these kinds of claims for annoyance by scents in the ambient air is to invite a wave of litigation.

Dist. Five, 341 S.C. 473, 534 S.E.2d 289 (Ct. App. 2000) (error to exclude documents reflecting industry standards for playground equipment to support expert testimony on same subject), *affirmed,* 352 S.C. 179, 573 S.E.2d 789 (2002); *City of York v. Turner-Murphy Co., Inc.* 317 S.C. 194, 452 S.E.2d 615 (Ct. App. 1994) (affirming dismissal of case against engineer where no expert testimony on standard of care).

Answering certified questions in 1989, this Court held South Carolina recognizes a professional standard of care and that it applied to blood services. *Doe v. Am. Red Cross Blood Services, S.C. Region,* 297 S.C. 430, 377 S.E.2d 323 (1989). The Court recited a number of cases in which a professional standard of care was at issue, including cases involving doctors and accountants. The Court stated as follows:

> Although our courts have previously recognized the professional standard of care, this court has not heretofore set forth with precision the standard of care to be used to measure the conduct of professionals. We now hold that in a professional negligence cause of action, the standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices in his profession. If the plaintiff is unable to demonstrate that the professional failed to conform to the generally recognized and accepted practices in his profession, then the professional cannot be found liable as a matter of law. In setting forth such a standard, we defer to the collective wisdom of a profession, such as physicians, dentists, ophthalmologists, accountants and any other profession which furnishes skilled services for compensation. *See, Kemmerlin v. Wingate*, 274 S.C. 62, 261 S.E.2d 50 (1981). Establishing such a standard which measures conduct of a professional against other professionals is rooted, as Professor Prosser commented, in this court's "healthy respect ... for the learning of a fellow profession, and [our] reluctance to overburden it with liability based on uneducated judgment." Prosser and Keeton, *Law of Torts*, § 32, p. 189 (5th ed. 1984).

Doe, 297 S.C. at 435, 377 S.E.2d at 326.

The same considerations about overburdening a profession with liability based on uneducated judgment apply in this context. Modern landfills are designed and operated pursuant to a complex set of engineering and technical standards, statutes, and regulations.[5] Applications for landfill permits in South Carolina must be certified by a South Carolina-registered professional engineer or geologist and must be constructed according to plans and specifications approved by the South Carolina Department of Health and Environmental Control. S.C. Regs. § 61-107.19 Part IV (H); S.C. Regs. § 61-107.19.258.40. Once built, landfills must be operated in accordance with state law, state regulations, and the approved plans and specifications. S.C. Regs. §§ 61-107.19.258.20-258.36. Landfill operators must be trained and certified in accordance with regulatory requirements. S.C. Regs. § 61-107.14. The requirement of proper operation extends to all landfill components, including the waste cells, the leachate collection system, and the landfill gas collection system.

All of these matters are beyond the common knowledge of laypersons and require testimony of experts to explain what the landfill's operators were supposed to be doing and whether or not they were doing it. The jury cannot conclude from the mere existence of odors that a defendant failed to operate the landfill properly; the doctrine of *res ipsa loquitur* is not part of the law of South

---

[5] EPA has promulgated an extensive set of landfill regulations at 40 C.F.R Part 258 pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq.* Most states, including South Carolina, have adopted corresponding regulations, which by law must be no less stringent than the federal regulations. Federal and South Carolina regulations impose requirements relating to site location, composite liners, leachate collection and removal systems, operating practices, groundwater monitoring, closure and postclosure care, corrective action, and financial assurance. EPA has devoted a number of pages on its website to describe these and related requirements. *See* http://www.epa.gov/wastes/nonhaz/municipal/landfill.htm.

Carolina. *Snow v. City of Columbia*, 305 S.C. 544, 555 n. 7, 409 S.E.2d 797, 803 n. 7 (Ct. App. 1991). Accordingly, even if the Court recognized a cause of action for negligence from the emission of odors from a landfill, proof of a plaintiff's claim would require expert testimony to establish the duty of care and breach of that duty.

CONCLUSION

The court should answer the District Court's certified questions as follows:

1. Under South Carolina law, when a plaintiff seeks recovery for a temporary trespass or nuisance (asserting claims for annoyance, discomfort, inconvenience, interference with their enjoyment of their property, loss of enjoyment of life, and interference with mental tranquility and abandoning all claims for loss of use, diminution of value, and personal injury), damages are limited to the lost rental value of the property.
2. South Carolina law does not recognize a cause of action for trespass solely from invisible odors rather than a physical invasion such as dust or water.
3. The maximum amount of compensatory damages a plaintiff can receive in any trespass or nuisance action (temporary or permanent) where no claim for restoration or cleanup costs has been alleged is the full market value of the plaintiff's property.
4. When a plaintiff contends that offensive odors have migrated from a neighbor's property onto the plaintiff's property, the plaintiff may not

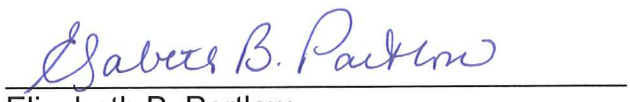
maintain an independent cause of action for negligence but is limited to remedies under trespass and nuisance.

5. If an independent cause of action for negligence exists under South Carolina law when a plaintiff contends that offensive odors have migrated from a neighbor's property onto the plaintiff's property, the standard of care for a landfill operator and breach thereof must be established through expert testimony

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

March 8, 2013



Elizabeth B. Partlow
1320 Main Street, Suite 600
Columbia, SC 29201
803-252-1300 (Telephone)
803-254-6517 (Facsimile)
beth.partlow@ogletreedeakins.com

Attorneys for National Solid Wastes Management Association, South Carolina Palmetto Chapter of the Solid Waste Association of North America, American Forest & Paper Association, and Institute of Scrap Recycling Industries, Inc.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON CERTIFICATION PURSUANT TO RULE 244, SCACR
United States District Court for the District of South Carolina
Joseph F. Anderson, Jr., District Court Judge

Appellate Case No. 2012-212741

Perrin Babb, Debbie Babb, Wayne Elstrom, Sarah Elstrom, Allan Jackson, and Kathy Jackson, Plaintiffs,

v.

Lee County Landfill SC, LLC, Defendant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief complies with Rule 211(b), SCACR.

Elizabeth B. Partlow
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1320 Main Street, Suite 600
Columbia, SC 29201
803-252-1300 (Telephone)
803-254-6517 (Facsimile)
beth.partlow@ogletreedeakins.com

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing **BRIEF OF PROPOSED AMICI CURIAE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, SOUTH CAROLINA PALMETTO CHAPTER OF THE SOLID WASTE ASSOCIATION OF NORTH AMERICA, AMERICAN FOREST & PAPER ASSOCIATION, AND INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.,** has been served upon the following persons by U.S. Mail, properly addressed, and with the correct amount of postage affixed thereto:

Gary W. Poliakoff, Esq.
Raymond P. Mullman, Jr., Esq.
Poliakoff & Associates, P.A.
Post Office Box 1571
Spartanburg, SC 29304

William E. Hopkins, Jr., Esq.
Beasley Allen Crow Methvin Portis & Miles, P.C.
Post Office Box 4160
Montgomery, AL 36103-4160

Richard H. Middleton, Jr., Esq.
The Middleton Firm, L.L.C.
Post Office Box 10006
Savannah, GA 31412

Kevin A. Dunlap, Esq.
Steven D. Weber, Esq.
Parker Poe Adams & Bernstein LLP
100 Dunbar Street, Suite206
Spartanburg, SC 29306

Dated this 8th day of March 2013.

Ginger E. Mills

Ginger E. Mills

Ogletree, Deakins, Nash
Smoak & Stewart, P.C.
1320 Main Street, Suite 600
Columbia, SC 29201
803-252-1300 (Telephone)
803-254-6517 (Facsimile)
Ginger.mills@ogletreedeakins.com