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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-180

No. COA21-410

Filed 15 March 2022

Mecklenburg County, No. 19 CVS 21763

JOHN R. KOCHILLA, HELEN BISHOP ALLISON TRUST, KELKE FAMILY TRUST Stephen Michael Kelke and Ruth Anna Kelke, Trustees, Plaintiffs,

v.

MATTAMY CAROLINA CORPORATION and MATTAMY CAROLINA BUILDING CORPORATION, Defendants.

Appeal by Plaintiffs from orders entered 11 September 2020 and 22 March 2021 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 2022.

Vann Law Firm, P.A., by Christopher M. Vann, for plaintiffs-appellants.

Offit Kurman, P.A., by Amy P. Hunt & Robert B. McNeill, for defendants-appellees.

MURPHY, Judge.

¶ 1 When a party brings an action for a violation of the Sedimentation Pollution Control Act ("SPCA"), it must allege in the pleadings that the defendant has been cited for a violation of a law, rule, ordinance, order, or erosion and sedimentation control plan. If the pleadings do not contain this allegation, then the party does not

have standing to bring the claim. However, when a claim is dismissed for a lack of standing, it must be dismissed without prejudice.

¶ 2 Here, Plaintiffs did not have standing to bring a claim for a violation of the SPCA because they did not allege in their pleadings that Defendants were cited by the City of Charlotte for a violation of the City's Soil Erosion and Sedimentation Control Ordinance. This claim must be dismissed, but without prejudice.

¶ 3 Under South Carolina law, an action for civil trespass must allege the trespass was intentional. As Plaintiffs did not allege in their pleadings that Defendants' alleged trespass was intentional, dismissing Plaintiffs' trespass claim was proper.

¶ 4 Additionally, under South Carolina law, a nuisance must be continuous over a period of time in order to be actionable. As the alleged nuisance here was "a single isolated occurrence or act," the trial court did not err by granting summary judgment on Plaintiffs' nuisance claim in favor of Defendants.

¶ 5 Further, a trial court does not abuse its discretion when it denies a motion to strike an affidavit if the movant does not argue they were prejudiced by the consideration of the affidavit. Here, because Plaintiffs did not argue they were prejudiced, the trial court did not abuse its discretion in denying the motion to strike the affidavit.

¶ 6 Finally, the trial court lacked jurisdiction to enter one of the orders at issue in this case. The order entered after Plaintiffs gave notice of appeal is void for lack of

jurisdiction and must be vacated.

BACKGROUND

¶ 7 Plaintiffs-Appellants John R. Kochilla, the Helen Bishop Allison Trust, and the Kelke Family Trust each own houses in Fort Mill, South Carolina on a cove of Lake Wylie, which is owned by Duke Energy. In 2017, Defendants-Appellees Mattamy Carolina Corporation and Mattamy Carolina Building Corporation[1] were constructing a housing development near Lake Wylie in Charlotte, North Carolina. Defendants were required to have a plan in place to manage stormwater, and this plan involved the construction of certain retention points that collect stormwater and allow sediment to settle into the pond. This retention pond is referred to as a best management practice ("BMP") to contain sediment and debris from stormwater runoff.

¶ 8 On 20 August 2017, the retention pond's dam failed, causing water, sediment, and debris to run off into the cove of Lake Wylie, though nothing crossed onto Plaintiffs' properties. As a result, on 22 August 2017, Defendants were cited by the City of Charlotte for a violation of the City's Soil Erosion and Sedimentation Control Ordinance. Defendants were assessed a civil penalty of $68,000.00 by the City of Charlotte on 9 November 2017.

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[1] According to Defendants, Mattamy Carolina Building Corporation merged into Mattamy Carolina Corporation in 2019.

¶ 9 Plaintiffs commenced this lawsuit against Defendants on 12 November 2019, seeking redress for alleged injuries caused by sedimentation pollution from the retention pond's dam failure. Plaintiffs' *Complaint* asserted claims for violation of the SPCA, trespass, and nuisance. According to Plaintiffs, the sediment and debris has turned the bottom of the cove into muck such that they and their families can no longer swim in the cove. Plaintiffs also claim boating has become difficult because of the shallowing caused by the debris buildup that had made the water by the docks unnavigable. Specifically, one of the Plaintiffs does not use his jet ski since the dam failure because he does not want the muck in the cove to destroy the motor or impeller. To support their claims, Plaintiffs offered the opinion of Dr. Brad Johnson, a professor of environmental studies at Davidson College. Plaintiffs also retained Robert Wilson of Rowboat Dock and Dredge as an expert on their damages, who estimated that his company could dredge the cove to remove the sediment for $200,290.00—the cost of removing 4,250 cubic feet of material from the cove to provide eight-and-a-half feet of depth, restoring the original pond elevation.

¶ 10 Defendants filed a motion to dismiss and answer on 17 January 2020. Defendants also filed a motion for judgment on the pleadings on 28 January 2020. In an order entered 11 September 2020 ("September 2020 Order"), the trial court granted in part and denied in part Defendants' motion for judgment on the pleadings.

The trial court dismissed Plaintiffs' claims for violation of the SPCA and trespass with prejudice; it denied the motion with respect to the nuisance claim.

¶ 11 Defendants subsequently filed a motion for summary judgment and a supporting affidavit from Mike McElroy as to Plaintiffs' nuisance claim on 21 January 2021. Plaintiffs filed a *Motion to Strike Affidavit of Mike McElroy* on 19 February 2021, arguing Defendants failed to identify McElroy as an individual with knowledge of the facts and circumstances of this case. On 26 February 2021, Plaintiffs filed a *Motion to Amend Complaint* to add claims for interference with littoral rights and public nuisance. Plaintiffs also filed a *Motion for Relief Pursuant to Rule 60,* arguing they were entitled under Rule 60 of the North Carolina Rules of Civil Procedure to pursue a claim for the damages they have sustained under the SPCA.

¶ 12 On 22 March 2021, the trial court entered an order denying Plaintiffs' *Motion to Strike Affidavit of Mike McElroy* ("Affidavit Order") and a separate *Order Granting Defendants' Motion for Summary Judgment* ("Summary Judgment Order"). On 20 April 2021, Plaintiffs filed a *Notice of Appeal*, appealing from the September 2020 Order, the Affidavit Order and the Summary Judgment Order. On 3 June 2021, the trial court entered an order ("June 2021 Order") denying Plaintiffs' *Motion for Relief Pursuant to Rule 60* and *Motion to Amend Complaint*. Plaintiffs filed another *Notice of Appeal* on 14 June 2021, appealing from the June 2021 Order.

ANALYSIS

¶ 13 Plaintiffs argue that (A) the trial court erred by granting Defendants' motion for judgment on the pleadings with respect to the claims for violation of the SPCA and trespass; (B) the trial court erred by granting summary judgment as to the nuisance claim; (C) the trial court erred by refusing to strike the affidavit of Mike McElroy; and (D) the June 2021 Order is void for lack of jurisdiction.

¶ 14 As a preliminary matter, we note that Defendants argue because Plaintiffs do not own the cove, they do not have property rights in the cove and therefore their trespass and nuisance claims must fail. We do not address whether Plaintiffs have the right to the use and enjoyment of the cove because, assuming, *arguendo*, they do have those rights, their claims fail under South Carolina law for the reasons set forth below.

A. Motion for Judgment on the Pleadings

¶ 15 Pursuant to Rule 12(c) of our Rules of Civil Procedure, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C.G.S. § 1A-1, Rule 12(c) (2021). "The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). "The function of Rule 12(c) is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Benigno v. Sumner Constr., Inc.*, 278 N.C. App. 1, 2021-NCCOA-265, ¶ 8 (citations omitted).

¶ 16 "We consider whether [P]laintiffs asserted the claim in their complaint with sufficient specificity to withstand judgment on the pleadings, and review the trial court's order granting a motion for judgment on the pleadings *de novo*." *Newman v. Stepp*, 267 N.C. App. 232, 234, 833 S.E.2d 353, 356 (2019) (marks and citations omitted), *aff'd*, 376 N.C. 300, 852 S.E.2d 104 (2020). In considering a motion for judgment on the pleadings, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. "All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Id.* "When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Id.*

1. Violation of the SPCA

¶ 17 Plaintiffs argue that the trial court erred by partially granting Defendants' motion for judgment on the pleadings and thereby dismissing the claim for violation of the SPCA because they "pled all of the elements of a claim for civil relief under the SPCA and have standing since Defendants were cited for violating the Charlotte City Ordinance." Additionally, Plaintiffs argue "Defendants' denial of two of Plaintiffs' allegations raises material issues of fact regarding whether Defendants' conduct violated the SPCA."

¶ 18 "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of a matter, and it is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Cherry Cmty. Org. v. City of Charlotte*, 257 N.C. App. 579, 582, 809 S.E.2d 397, 400 (citations omitted), *disc. rev. denied*, 371 N.C. 114, 812 S.E.2d 850 (2018). Plaintiffs, as the party invoking jurisdiction, bear the burden of establishing standing. *Id*.

¶ 19 "[B]ecause standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, a challenge to standing may be made at any time." *Crouse v. Mineo*, 189 N.C. App. 232, 236, 658 S.E.2d 33, 36 (2008) (citations omitted). "Since standing is a jurisdictional requirement, the party seeking to bring [a] claim before the court must include allegations which demonstrate why [it] has standing in the particular case[.]" *Cherry v. Wiesner*, 245 N.C. App. 339, 346, 781 S.E.2d 871, 877, *disc. rev. denied*, 369 N.C. 33, 792 S.E.2d 779 (2016). In establishing the elements of standing, "each element must be supported in the same way as any other matter on which [Plaintiffs] bear[] the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id*.

¶ 20 Our Supreme Court has held that, before an "injured person can have standing to bring a civil action pursuant to [the civil relief provision] of the SPCA, the defendant must have been cited for a *violation* of a law, rule, ordinance, order, or erosion and sedimentation control plan." *Applewood Props., LLC v. New S. Props.,*

LLC, 366 N.C. 518, 519, 742 S.E.2d 776, 777 (2013). Both in their brief and at oral argument, Plaintiffs concede they "did not specifically plead that Defendants were cited for a violation of the Charlotte City Ordinance in their complaint."

¶ 21 In their *Complaint*, Plaintiffs alleged:

> 22. On or about [20 August 2017], Defendants initiated land-disturbing activity on a tract of more than one acre, which tract was in close proximity to Lake Wiley.
>
> 23. Defendants' land-disturbing activity uncovered more than one acre of land.
>
> 24. Defendants failed to install such sedimentation and erosion control devices and practices as are sufficient to retain the sediment generated by the land[-]disturbing activity within the boundaries of Defendants' tract during construction and upon [] development of said tract, in violation of [N.C.G.S.] § 113A-57(3).
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> 25. Plaintiffs have been injured by Defendants' violations of the Sedimentation Pollution Control Act, [N.C.G.S.] § 113A-50, *et seq*, in excess of $25,000.00.

¶ 22 Plaintiffs failed to meet the standing requirement set forth in *Applewood Props*. Without asserting in the *Complaint* that Defendants were cited for a violation of the SPCA, Plaintiffs could not have been entitled to judgment. As Plaintiffs lack standing based on the undisputed fact that they failed to assert Defendants were cited for a violation of the SPCA in their *Complaint* as required by *Applewood Props.*, judgment on the pleadings in favor of Defendants on Plaintiffs' claim for violation of

the SPCA was appropriate. The trial court did not err in dismissing Plaintiffs' claim for violation of the SPCA.

¶ 23 Plaintiffs also argue that if we find the trial court did not err by dismissing the SPCA claim, it was error to dismiss the claim with prejudice. As to this part of their argument, we agree.

¶ 24 When a claim is dismissed for lack of standing, the dismissal operates as a dismissal for lack of subject matter jurisdiction. *See Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 ("If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim."), *disc. rev. denied and appeal dismissed*, 359 N.C. 631, 613 S.E.2d 688 (2005). A dismissal for lack of subject matter jurisdiction "must be made without prejudice, since a trial court without jurisdiction would lack authority to adjudicate the matter." *Holton v. Holton*, 258 N.C. App. 408, 415, 813 S.E.2d 649, 655 (2018). "Because we affirm the dismissal based on lack of subject matter jurisdiction we vacate the part of the judgment dismissing the [claim for violation of the SPCA] with prejudice." *Flowers v. Blackbeard Sailing Club*, 115 N.C. App. 349, 353, 444 S.E.2d 636, 639 (1994), *disc. rev. denied*, 340 N.C. 357, 457 S.E.2d 599 (1995).[2]

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[2] While Plaintiffs designate a separate claim for an injunction in their *Complaint*, an injunction is an additional remedy available under N.C.G.S. § 113A-66(a)(1). N.C.G.S. § 113A-66(a)(1) (2021) ("Any person injured by a violation of [the SPCA] or any ordinance, rule,

2. Trespass

¶ 25 Plaintiffs argue that the trial court erred by dismissing their claim for trespass because the pleadings raise material issues of fact, making judgment on the pleadings inappropriate. Before addressing the merits of their argument, we must first determine whether North Carolina substantive law or South Carolina substantive law should be applied to the trespass claim.

¶ 26 "When a court is faced with a situation such as this—litigation that features significant ties to multiple states, each of which has conflicting laws—the court must engage in a choice of law analysis to determine which state's laws should be applied to the claims raised in the suit." *Warren Cty. Dep't of Social Servs. ex. rel. Glenn v. Garrelts*, 278 N.C. App. 140, 2021-NCCOA-275, ¶ 10 (citing *Boudreau v. Baughman*, 322 N.C. 331, 333, 368 S.E.2d 849, 852 (1988)). "Our traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim, and remedial or procedural rights are determined by lex fori, the law of the forum." *George v. Lowe's Cos.*, 272 N.C. App.

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or order duly adopted by the Secretary or a local government, . . . may bring a civil action against the person alleged to be in violation . . . . The action may seek . . . [i]njunctive relief."). Our conclusion pertaining to the claim for violation of the SPCA—that the trial court did not err by dismissing the claim, but because we affirm the dismissal based on lack of subject matter jurisdiction, the trial court erred by dismissing the claim with prejudice—also applies to the accompanying injunction claim. We affirm the trial court's dismissal of the injunction claim, but we vacate the part of the judgment dismissing the injunction claim with prejudice. *See Flowers*, 115 N.C. App. at 353, 444 S.E.2d at 639.

278, 280, 846 S.E.2d 787, 788 (2020), *disc. rev. denied*, 378 N.C. 372, 860 S.E.2d 919 (2021). However, "*[l]ex loci* has traditionally been applied in cases involving tort or tort-like claims." *Garrelts*, 2021-NCCOA-275 at ¶ 12 (citations omitted). As trespass is a tort, the lex loci rule requires that we apply the law of the situs to Plaintiffs' trespass claim. *See Elmore v. Atlantic C. L. R. Co.*, 191 N.C. 182, 186-87, 131 S.E. 633, 635 (1926) ("The word 'trespass' is sometimes used in a broad sense as synonymous with 'tort'; but trespass in a restricted sense is treated as a separate tort[.]").

¶ 27 "[T]he state where the injury occurred is considered the situs of the claim." *Boudreau*, 322 N.C. at 335, 368 S.E.2d at 854. "In a tort-based action, *lex loci* instructs that we should apply the substantive law of the state where the injury or harm was sustained or suffered, which is, ordinarily, the state where the last event necessary to make the actor liable or the last event required to constitute the tort takes place." *Garrelts*, 2021-NCCOA-275 at ¶ 14 (citations omitted). Although Plaintiffs appear to argue that the dam failure that resulted in the alleged trespass occurred in North Carolina, the injury to Plaintiffs' use and enjoyment of the cove occurred in South Carolina—the state where Plaintiffs' properties and the cove are located. As such, we apply South Carolina substantive law to Plaintiffs' trespass claim.

¶ 28 South Carolina civil trespass law differs from North Carolina civil trespass law. In South Carolina, "[t]respass has been defined as any *intentional* invasion of the plaintiffs' interest in the exclusive possession of his property." *Graham v. Town of Latta*, 417 S.C. 164, 192-93, 789 S.E.2d 71, 86 (Ct. App. 2016) (citation omitted) (emphasis added).[3] "To constitute an actionable trespass, . . . there must be an affirmative act, the invasion of land must be intentional, and the harm caused must be the direct result of that invasion." *Snow v. Cty. of Columbia*, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991).

¶ 29 Defendants argue that, because Plaintiffs did not include any allegations in their *Complaint* that Defendants intentionally invaded their properties, they did not state a claim for relief and judgment on the pleadings was appropriate. At oral argument, Plaintiffs conceded that they did not plead the intentional element of trespass in their pleadings. In their *Complaint*, Plaintiffs merely alleged:

> 13. Defendants constructed a storm drainage system and dam for the [] residential community Defendants were building. The dam was faulty and it failed causing significant pollution, silt, sediment, debris, and other contaminants to cross onto, enter into, and pollute Lake Wiley and the cove where Plaintiffs own property.

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[3] Under North Carolina law, to constitute actionable civil trespass, there is no requirement that the action be intentional. *See Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 289, 618 S.E.2d 768, 772 (2005) ("The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass."), *aff'd*, 360 N.C. 397, 627 S.E.2d 462 (2006).

> 14. The pollution of these waters has injured Plaintiffs' property, rendering its water supply not suitable for use, endangering the very existence of their cove, diminishing the value of their properties, and interfering with their use of the land.
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> 15. Plaintiffs have been damaged by Defendants' trespass in an amount in excess of $25,000.00.
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> 16. Moreover, Defendants' trespass on Plaintiffs' land is ongoing, and if continued, will cause substantial, permanent, and irreparable harm to Plaintiffs.

¶ 30 The *Complaint* fails to allege an intentional act that constituted the "intentional invasion" required for a trespass claim under South Carolina law. The *Complaint* never uses "intentional" or any other word alleging that the sedimentation pollution was an "intentional invasion" by Defendants. The *Complaint* simply alleges that "the dam was faulty" and "it failed causing significant pollution," neither of which is sufficient to allege that such pollution was intentional. The pleadings reveal Plaintiffs could not recover for trespass because they did not assert Defendants' invasion was intentional—a required element for a trespass claim under South Carolina law. *See id.* at 553, 409 S.E.2d at 802. The trial court did not err by granting the motion for judgment on the pleadings with respect to the trespass claim, and it was not error to dismiss the trespass claim with prejudice.

B. Motion for Summary Judgment

¶ 31 Plaintiffs argue the trial court erred by granting Defendants' motion for summary judgment as to their nuisance claim because they "presented a sufficient

forecast of evidence that the BMP failure has caused substantial interference with their property" and this "forecast of evidence raises genuine issues as to Plaintiffs' loss of use and enjoyment of their property and as to whether Defendants unreasonably interfered with the Plaintiffs['] use of their land."

¶ 32 Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2021). "Our standard of review of an appeal from summary judgment is de novo . . . ." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "When considering a motion for summary judgment, [we] must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). "If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *In re Will of Jones*, 362 N.C. App. at 573, 669 S.E.2d at 576.

¶ 33 Before we reach the merits of Plaintiffs' argument, we must first determine whether North Carolina substantive law or South Carolina substantive law applies to the nuisance claim. As discussed in paragraphs 26-27, *supra*, "*[l]ex loci* has traditionally been applied in cases involving tort or tort-like claims." *Garrlets*, 2021-

NCCOA-275 at ¶ 12 (citations omitted). As nuisance is a tort, lex loci requires that we apply the law of the situs to Plaintiffs' trespass claim. *See Morgan v. High Penn Oil Co.,* 238 N.C. 185, 191, 77 S.E.2d 682, 688 (1953) ("Negligence and nuisance are distinct fields of tort liability."), *supra* at ¶¶ 26-27. As discussed in paragraphs 26-27, *supra*, Plaintiffs' injuries occurred in South Carolina, and we apply South Carolina substantive law to Plaintiffs' nuisance claim.

¶ 34 Under South Carolina law, "[a] nuisance has been defined as anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property." *Blanks v. Rawson*, 296 S.C. 110, 113, 370 S.E.2d 890, 892 (Ct. App. 1988) (citations omitted). "Since the degree of annoyance or inconvenience necessary to constitute an actionable nuisance cannot be generally qualified, each case must depend largely on its own facts." *Shaw v. Coleman*, 373 S.C. 485, 496, 645 S.E.2d 252, 258 (Ct. App. 2007). In order to be actionable, the nuisance must be a continuing nuisance because a nuisance "involves the idea of continuity or recurrence, rather than occasional or temporary injury or annoyance." *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 568, 183 S.E.2d 438, 442-43 (1971) ("The general rule is that maintenance of a nuisance implies a continuity of action over a period of time."). Further, "[a] single isolated occurrence or act, which if regularly repeated would constitute a nuisance, is not a nuisance, until it is repeated." *Id.* at 568, 183 S.E.2d at 443.

¶ 35 In *Gray*, the defendants pumped gasoline into a creek, which was later ignited, resulting in a fire that caused damage to the plaintiff's property, the smoking of his home, and great depreciation in the value of his property, depriving him of the full use and enjoyment of his residence. *Id.* at 561, 183 S.E.2d at 439. The South Carolina Supreme Court held that this single, isolated occurrence was not continuous or recurrent and therefore not sufficient to show a nuisance. *Id.* at 568, 183 S.E.2d at 443.

¶ 36 Here, Plaintiffs only argue *their injuries* arising from the alleged nuisance—not *Defendants' action(s)* causing the alleged nuisance—are continuing. Plaintiffs cite Dr. Johnson's report claiming that the "BMP failure appears to have immediately deposited a significant amount of sediment AND loaded the upstream system with sediment so that the impact would continue during any subsequent storm events." The report attributes the continuing impact to the sediment deposited after the BMP failure—a *single* action—and the South Carolina Supreme Court has made clear that a single isolated occurrence or act is not a nuisance until repeated. *See id.* at 568, 183 S.E.2d at 442-43.

¶ 37 There is no genuine issue regarding the material fact disposing of this claim—that the alleged nuisance was the result of a single BMP failure by Defendants. At oral argument, Plaintiffs agreed that the dam failure was a one-time event and not a continuing failure. The BMP failure was an isolated event and does not rise to the

level of an actionable nuisance under South Carolina law. The trial court did not err by granting Defendants' motion for summary judgment on Plaintiffs' nuisance claim.

C. Motion to Strike Affidavit

¶ 38 Plaintiffs argue the trial court erred by denying their *Motion to Strike Affidavit of Mike McElroy*. "[W]e review an order striking an affidavit in support of or in opposition to summary judgment for abuse of discretion . . . ." *In re Estate of Phillips*, 251 N.C. App. 99, 104, 795 S.E.2d 273, 278 (2016). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

¶ 39 In challenging the denial of a motion to strike an affidavit, "[t]he appellant must show not only that the trial court abused its discretion in [not] striking an affidavit, but also that prejudice resulted from that error." *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 246, 677 S.E.2d 465, 472 (citations omitted), *disc. rev. denied*, 363 N.C. 651, 684 S.E.2d 690 (2009). "This Court will not presume prejudice." *Id.*

¶ 40 Plaintiffs did not argue, either at the trial court or on appeal, that prejudice would result from the consideration of the affidavit. Plaintiffs have not demonstrated

that the trial court committed a prejudicial abuse of discretion, and, as a result, we affirm the trial court's denial of the *Motion to Strike Affidavit of Mike McElroy*.

D. Validity of the June 2021 Order

¶ 41 Plaintiffs argue that, because the June 2021 Order was entered after they filed *Notice of Appeal* on 20 April 2021, the June 2021 Order should be vacated as the trial court was divested of jurisdiction once Plaintiffs filed their *Notice of Appeal*. We agree and vacate the June 2021 Order.

¶ 42 Whether a trial court has subject matter jurisdiction is a question of law, reviewed de novo on appeal. *Harper v. City of Asheville*, 160 N.C. App. 209, 213, 585 S.E.2d 240, 243 (2003). Subject matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130, *disc. rev. denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.,* as if it had never happened." *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970). "[T]he trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

¶ 43 N.C.G.S. § 1-294 addresses the effect of an appeal from a judgment:

> When an appeal is perfected as provided by this Article it

> stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C.G.S. § 1-294 (2021). "[N.C.G.S.] § 1-294 provides that the perfection of an appeal stays all further proceedings in the trial court with respect to matters embraced in the appeal." *Reid v. Town of Madison*, 145 N.C. App. 146, 149, 550 S.E.2d 826, 828 (2001), *disc. rev. denied*, 355 N.C. 276, 559 S.E.2d 786 (2002). "While an appeal is not perfected until it is actually docketed in the appellate division, a proper perfection relates back to the time of the giving of the notice of appeal, rendering any later orders or proceedings upon the judgment appealed from void for want of jurisdiction." *Swilling v. Swilling*, 329 N.C. 219, 225, 404 S.E.2d 837, 841 (1991); *see Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 581, 273 S.E.2d 247, 259 (1980) (vacating orders that were entered after the notice of appeal was given).

¶ 44 Here, Plaintiffs filed their *Notice of Appeal* from the Summary Judgment Order on 20 April 2021. The trial court entered the June 2021 Order on 3 June 2021. Since Plaintiffs' subsequent perfection of the appeal related back to the time of the giving of notice of appeal, all orders entered after 20 April 2021 are void for lack of jurisdiction. *See Lowder,* 301 N.C. at 581, 273 S.E.2d at 259. Therefore, the trial court's June 2021 order is void for lack of jurisdiction and "must be vacated." *Id.*

CONCLUSION

¶ 45 The trial court did not err by partially granting Defendants' motion for judgment on the pleadings and dismissing the claims for violation of the SPCA and trespass. However, because we affirm the dismissal of the claim for violation of the SPCA based on lack of subject matter jurisdiction, we modify the order in part and vacate the part of the judgment dismissing these claims "with prejudice."

¶ 46 In addition, the trial court did not err by granting Defendants' motion for summary judgment on the nuisance claim. Moreover, the trial court did not abuse its discretion by denying Plaintiffs' *Motion to Strike Affidavit of Mike McElroy*. Lastly, we hold the June 2021 Order is void for lack of jurisdiction and must be vacated.

MODIFIED AND AFFIRMED IN PART; AFFIRMED IN PART; VACATED IN PART.

Judges COLLINS and CARPENTER concur.

Report per Rule 30(e).