THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 3667 (Filed July 21, 2003.
Withdrawn, Substituted and Re-filed October 17, 2003)

Karl Albert Overcash III, ... Appellant

v.

South Carolina Electric & Gas Co., ... Respondents

PETITIONER'S REPLY BRIEF

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Petitioner submits the following argument in Reply to the Brief of Respondent.

I. PUBLIC NUISANCE

A. The historical justification for recognizing an action for purely personal injuries arising from an alleged public nuisance no longer exists.

In his brief to the Court, Respondent sets forth what he terms to be the "universally" accepted notion that personal injuries are in fact the type of "special injuries" which support a private cause of action based upon a public nuisance. Respondent correctly quotes language from various sources supporting his position, although Petitioner has cited cases to the contrary. What Respondent fails to do is address the underlying reason and rationale for the origin of this concept or to provide any justification for this Court to put South Carolina down a path into the "impenetrable jungle" surrounding public nuisance law.

As noted in Petitioner's Brief to this Court, the right of action to recover personal injuries caused by a public nuisance developed as a reaction to the defense that any such nuisance was actionable only by the sovereign. William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1005 (1966). The timing of this development was before the advent of a general theory of negligence. The concept of negligence as a basis for personal injury recovery is a product of the Industrial Revolution and the Nineteenth Century. 57A Am Jur 2d Section 2 (1989). Thus, an injured party had no redress available for recovery in any setting which the defendant could assert public nuisance as a defense. By happenstance, the doctrine adopted the term nuisance, the identical term used to classify actions for interference with the rights in one's

property.[1] This, along with the substantial overlap between the two actions (as discussed in Petitioner's Brief), has contributed greatly to the confusion and uncertainty surrounding the public nuisance doctrine.

Rather than address the historical roots of the doctrine, Respondent simply accepts the basic premise that such an action exists. In its decision, the Court of Appeals acknowledged the legal problems with accepting this view but followed what it felt to be the weight of authority in approving of the action and reversing the lower court. The emergence of negligence as the primary vehicle to address personal injuries resulted in the elimination for the underlying basis of the tort of public nuisance. Thus, the doctrine largely disappeared from precedent until, as Prosser himself notes, its "unfortunate" revival in the mid 1800s. William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 1011-1012 (1966). The isolated instances in which the matter appeared in English precedent before the mid 1800s, according to Prosser, were actions apparently sounding in negligence. Id. at 1011. Thus, any implication that the doctrine of a personal injury action based upon a public nuisance was firmly entrenched in English precedent is misplaced.

B. This Court has already rejected the idea of allowing a suit for purely personal injuries arising from an alleged public nuisance.

Fortunately, this Court has already looked down this road and taken the path less traveled. In Teague v. Cherokee County Memorial Hospital, 272 S.C. 403, 252 S.E.2d 296 (1979), this Court stayed out of the "impenetrable jungle" surrounding such an action. Both the Court of

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[1]The concept of a private nuisance and a public nuisance are completely distinct. The use of the common term "nuisance" for both has been the source of criticism and regret. William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1005 (1966).

Appeals and Respondent have attempted to characterize this Court's holding in Teague as simply an interpretation of a negligence cause of action and not as a rejection of the legal concept of a private right of action based upon a public nuisance for purely personal injuries. This represents an improperly narrow reading of Teague.

As this Court noted in Teague, the action, though originally plead as an action in negligence, was amended to sound in nuisance. In Teague, this Court was thus faced with an appeal of a matter sounding in nuisance that alleged injuries that were distinct from any injuries suffered by the public as a whole (personal injuries resulting from a fall). Though Teague clearly saw through the motivation behind this change in the pleadings, its decision was not based upon such reasoning. Instead, Teague clearly addressed the right to seek a recovery for personal injuries based upon a public nuisance against an entity protected by governmental immunity. South Carolina courts had already addressed the same basic issue when the action was based upon property rights and declared that immunity did not insulate one from a nuisance claim. See Peden v. Furman University, 155 S.C. 1, 151 S.E. 907 (1930). Despite the existence of South Carolina precedent acknowledging that immunity was not a defense to a nuisance action and the "universally" accepted view that personal injuries were recovered under a public nuisance claim, this Court in Teague refused "to extend the nuisance exception to the rule of governmental immunity to allow recovery in cases of injury or death . . ." Id. at 297.

Teague is properly viewed as a rejection of a cause of action based a public nuisance for purely personal injuries against a governmental entity which otherwise enjoys immunity. This Court, in deciding Teague, acknowledged that the "advantage of this position is indicated by the confusion and inconsistency resulting in jurisdictions which have allowed tort actions for

personal injuries caused by a public nuisance." Id at 297.

C. On the use of sympathy and scare tactics.

Rather than acknowledge the development of negligence as removing the underlying basis for recognizing an action for purely personal injuries based upon a public nuisance or acknowledging the difficulties heretofore described as "impenetrable" in an action based upon a public nuisance, Respondent argues that one should not be able to recover for an invasion of property rights while being deprived of a right to sue for personal injuries. Though this sympathetic argument has a certain appeal, it ignores two fundamental issues. The first issue ignored by Respondent in asserting this argument is outlined almost universally in the cases cited to this Court by both parties: when an alleged public nuisance damages property, it becomes a private nuisance as to the owner of such property for which an action based upon the common law nuisance doctrine is recognized. See Woods v. Fertilizer Co, 102 S.C. 442, 86 S.E. 817 (1915)(stating that when special injures are pled from a public nuisance it becomes a private nuisance to the Plaintiff); Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350 (Cal. App. 1971). The concept of a common law action based upon private nuisance protects injury to property. Clark v. Greenville County, 313 S.C. 205, 437 S.E.2d 117 (1993). It is entirely appropriate to appeal to that doctrine to redress damage to one's property. The property bears no responsibility for its damage by a nuisance.

The other issue sought to be ignored by Respondent is the existence of a remedy for the individual so injured through an action in negligence. Since the doctrine of public nuisance for personal injuries has been viewed as a negligence cause of action in any event, this appeal to sympathy for an injured party has no bearing on the question before the Court. That question involves sorting through the myriad of legal problems stemming from an action based upon an

alleged public nuisance for purely personal injuries. The appeal to sympathy for the injured party is answered with the well developed body of law surrounding an action for negligence where the inured party's own actions may provide a defense. Respondent is seeking to establish strict liability in nuisance with his present suit. As a matter of policy, this Court should adhere to the rational in Teague. Petitioner would submit that it is not a "scare tactic" on the part of Petitioner to point out the legal nightmare one faces in such a sorting, as that issue is well documented in the authorities.

It is also not a "scare tactic" to assert that under present day use of the state's waterways privately owned docks have greatly increased as has pleasure boating and other water recreations of which the Court can take judicial notice. Potential future actions in South Carolina will be filed sounding in public nuisance as a result of the present resurrection of this doctrine. Due to the considerable overlap with the common law doctrines of nuisance and negligence, this litigation will generate the confusion and uncertainty feared in Teague. There is a reason public nuisance law is referred to as an "impenetrable jungle." The question before the Court is whether or not as a matter of policy the jungle is needed in light of the evolution of the law.

II CONFUSION AND INCONSISTENCY SURROUND ACTIONS FOR PERSONAL INJURIES BASED UPON A PUBLIC NUISANCE.

One need only look to the decisions cited by the Court of Appeals in this case for examples of the confusion and uncertainty surrounding a cause of action for personal injuries from a public nuisance.

In Breeding v. Hensley, 519 S.E.2d 369 (VA 1999) the Virginia Supreme Court noted

that "[w]hile nuisance and negligence are distinct legal concepts . . . it does not obliterate the distinction between them to say that negligence is an essential element or component of nuisance when, as here, one seeks to hold a municipality liable for maintaining a nuisance when performing an act authorized by law." The Hensley court ruled that the municipality would be liable "for maintaining a public nuisance only if the plaintiffs can establish the Town employees were negligent." Id. at 373.

In Gilmore v. Stanmar, Inc., 633 N.E.2d 985 (Ill App. 1994), the Appellate Division of Illinois noted that the "allegations necessary to plead a public nuisance cause of action may be based in part on negligence allegations. . . Moreover, the existence of an ordinance or other law purportedly making a nuisance legal does not automatically destroy a common law nuisance action where the defendant's conduct was not in compliance with the law, where the defendant was otherwise negligent, or where the law itself is invalid for allowing a nuisance." Id. at 993.

In Erickson v. Sorenson, 877 P.2d 144 (Utah Ct.App.1994), the Utah Court of Appeals declared that "[u]nfortunately for plaintiff, a private party seeking damages for the creation of a public nuisance must surmount an additional hurdle. Unless plaintiff can show that defendant's action constituted nuisance per se, plaintiff must demonstrate that the defendant's conduct was unreasonable in order to impose liability." Id. at. 149-150. The Erickson court then went on to discuss the application of a nuisance per se, yet another concept yet to be addressed by the Appellate Courts of South Carolina.

The common theme running through the cases cited by the Court of Appeals is the reasonableness of the conduct of the defendant, thus equating all such actions to the tort of negligence. This Court has also recognized the sounding of an action asserted upon the doctrine

of public nuisance rests in the concept of negligence. See Teague ("Even if the condition of the hospital stairs arose to the dignity of a nuisance, either public or private, which is tenuous at best, the basis of appellant's claim would still have to rest upon the negligence of the hospital and would require suing the hospital in a tort action."). Respondent's critique of the cases cited in Petitioner's Brief to this Court only confirms the nature and confusion surrounding the path the decision of the Court of Appeals has taken.

Respondent has asserted a cause of action based upon negligence against Petitioner. South Carolina has a well developed body of law regarding negligence actions to address that action. There is simply no need to resurrect a theory of recovery based upon a public nuisance cause of action. The historical basis for such an action is no longer valid. The overlap of such an action with the doctrine of common law nuisance creates confusion and will force South Carolina courts to begin the process of sorting what set of legal principals control the two actions. As noted in Petitioner's Brief to this Court, the end result will be one set of nuisance rules when property damage is involved and another set when personal injury is involved, or a migration of the concepts of negligence into nuisance actions, or a migration of strict liability into personal injury tort litigation. Moreover, this Court has already had the chance to travel this path and turned aside. The fact that the notion is "universally" accepted is not only inaccurate, it is not relevant. To date, South Carolina has not accepted it. The fact that the notion at one time had validity in the law does not answer the fundamental question this Court must address: Is it necessary in light of other tort doctrines to force South Carolina down the uncertain and confused path surrounding the concept of a personal injury action based upon a public nuisance?

III THERE IS NO PRIVATE RIGHT OF ACTION FOR AN ALLEGED VIOLATION OF S.C. CODE ANN. SEC. 49-1-10 (LAW. CO-OP. 1987).

Respondent once again asserts the notion that S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987), in and of itself, supports a private right of action for damages. Certainly, both Respondent and the Court of Appeals view this Court's decision in Drews v. E.P. Burton & Co., 76 S.C. 362, 57 S.E. 176 (1907) as dictating that result. Petitioner has already pointed out that the Drews court was faced with a negligence claim. It cannot be disputed that the language relied upon by Respondent and the Court of Appeals in Drews was dicta. This was confirmed by this Court's latter case of Free v. Parr Shoals Power Co., 111 S.C. 192, 97 S.E. 243 (1918). While the language quoted in Petitioner's Brief to this Court was related to the action before the Court in Free, it was supported by citation to Drews. Moreover, the present issue, whether the law properly recognizes a private right of action under the statute was not before the Court in Drews.

Petitioner and the Court of Appeals did not truly address the merits of whether or not S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987), under the laws of this State regarding statutory interpretation, does support a private right of action and simply relied upon Drews. As noted in Petitioner's Brief to this Court, S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987) is a statute for the general welfare of the public, it is found within the section of the Code denominated as Waters, Water Resources, and Drainage and contains criminal penalties and allows for abatement of the nuisance. S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987); S.C. Code Ann. Sec.49-1-40 (Law. Co-op. 1987). The statute does not provide for a right of action to recover for personal injuries. It provides for a specific remedy for a violation in the form of an abatement of the nuisance. All of these factors indicate no private right of action exists for personal injuries.

There is no basis, absent the dicta in Drews, that a private right of action exists under S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987). This Court should reverse the decision of the Court of Appeals and hold that no private right of action exists under the statute for purely personal injuries.

CONCLUSION

Due to the evolution of the law, the idea that an action for purely personal injuries arising from an alleged public nuisance is no longer needed. In its origins, the law protected to alleged wrongdoer by allowing only action by the sovereign to redress such public nuisances. The law has simply changed. An alleged wrongdoer can no longer assert the protection that his wrongs amount to a public nuisance. Negligence has corrected that quirk in the law. At this point in history, South Carolina has no need or justification to resurrect a theory which causes such confusion and uncertainty that it is deemed an "impenetrable jungle."

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