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Withdrawn, Substituted and Re-filed October 17, 2003)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 ..... Respondent

v.

South Carolina Electric & Gas Company ..... Petitioner

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

This is an appeal by South Carolina Electric & Gas Company ("SCE&G") from an Order of the Court of Appeals reversing the Order of the Honorable G. Thomas Cooper, Jr. which dismissed, pursuant to a motion made by SCE&G pursuant to SCRCP 12(b)(6), causes of action sounding in statutory and common law nuisance. The factual allegations of the Complaint to which the laws of nuisance are to be applied in the consideration of this appeal are as follows:

1. Lake Murray is a navigable waterway. (R., p. 18).

2. Sarah B. Clarkson[1] purchased a lot on the shores of Lake Murray in 1964. (R., p. 10).

3. As the years passed, the Clarksons decided to begin using a small island some 300 feet from their property, separated by the navigable waters of Lake Murray. To reach this island, a structure of some 1500 square feet and 300 feet long was built across the waters of Lake Murray and upon land owned by SCE&G. (R., p. 11).

4. SCE&G publications state that structures, such as docks, must not interfere with surface water activities, including recreational boating. (R., p. 10).

5. SCE&G knew or should have known that the bridge was a trespass upon its lands, that the structure crossed over and blocked the waters of the Lake, that the structure was unlit, and that no warning markers existed to warn boaters of the privately constructed barricade. (R., pp. 11, 13-15).

6. SCE&G conducted periodic and routine inspections of the shoreline of Lake Murray for

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[1]The lawsuit involved initially two defendants, SCE&G and the owners of the bridge/dock, the "Clarksons." The Clarksons settled the claims as to them and are no longer a party to the suit.

the purpose of identifying structures built in violation of the requirements of the Federal Energy Regulatory Commission. (R., pp. 11-12).

7. SCE&G never ordered removal of the fixed dock that rested upon its lands and across its waters. Rather, SCE&G actively participated in the maintenance of the structure. (R., pp. 11-12, 15).

8. SCE&G is required by the Federal Energy Regulatory Commission to enforce that Agency's directives so as to prevent the unauthorized use of Lake Murray's waters below the 360 foot contour. (R., p. 10).

9. In order to convey the island to the Clarksons, SCE&G sought regulatory authority for its decision from, among others, the Federal Energy Regulatory Commission and the South Carolina Department of Natural Resources. In seeking that permission, which was granted, SCE&G stated that should the requested transfer be approved, SCE&G would work with Mr. Clarkson to establish a permit for the boardwalk, "... with appropriate conditions regarding maintenance, lighting, etc." (R., p. 14).

10. Having made these commitments described above, SCE&G did nothing to address issues of lighting and maintenance of the Clarkson-constructed structure on its property and across its waters. (R., p. 14).

11. Because Mr. Clarkson was "a politically/governmentally connected individual," the conveyance of the island property to Ms. Clarkson was approved by SCE&G in contradiction to its own internal policies. (R., pp. 12-14).

12. In the deed conveying the small island reached by the 300 foot bridge, SCE&G imposed

restrictive covenants on the use of the conveyed island lands, including a covenant that the property would be maintained in a manner that would protect the recreational uses of the lake within which the island was located. Only SCE&G was authorized to enforce this covenant. (R., pp. 14-15).

13. On the night of the injury, Overcash was headed home by boat from his job at Lake Murray Marina. Before heading home he had done a full day's work, which was then followed in order by boating, eating and drinking with friends, and five hours of sleep. (R., pp. 15-16).

14. As he drove along the lake, Overcash, after what he judged to be a reasonable period of time, began watching the tree line for the "drop" that would indicate the end of land and the turn towards home. (R., p. 16).

15. Stretching out from the point of land evidenced by the drop in the tree line against the backdrop of a darkened sky, the unlit dock built by the Clarksons totally blocked the path chosen reasonably by Overcash. (R., p. 16).

16. With no warning, a silhouette of something appeared in front of Overcash. He swung the boat hard to one side and pulled back the throttle in a vain attempt to avoid hitting the obstruction, but to no avail. (R., p. 16).

17. Overcash suffered massive facial trauma, endured a tracheotomy, literally lost one eye (which was torn from its socket by the impact), and lost the other eye to blindness. He is now blind and disfigured from the scarring and swelling all over his face. (R., p. 16).

18. Plaintiff incurred these severe, permanent and debilitating injuries and special damages as

a result of the nuisance erected by the Clarksons and maintained in concert by the Clarksons and SCE&G. (R., pp. 18-19).

19. A. Crawford Clarkson, Jr., with the full knowledge and acquiescence of SCE&G caused to be constructed a barrier across the navigable waters of Lake Murray. The Clarksons maintained it and they have repaired it, all with SCE&G's knowledge and acquiescence. (R., p. 18).

20. SCE&G: (i) allowed the ongoing maintenance and use of a structure upon its lands and across the waters of Lake Murray; (ii) ignored or allowed the trespass of Clarkson; (iii) ignored the construction, maintenance, operation and repair of a fixed dock stretching across the waters of and intruding upon the lands beneath Lake Murray; (iv) failed to enforce rules imposed on other property owners; (v) failed to install or require the Clarksons to install lighting adequate to ensure the safety of the boating public by warning of the danger; (vi) allowed the seizure and use of its property by private individuals; (vii) created a hazard to the safe recreational use of Lake Murray; and (viii) allowed a fixed dock to obstruct the navigable waters of Lake Murray. (R., pp. 20-21).

21. SCE&G and the Clarksons maintained a structure that posed a hazard to boaters and impeded the recreational use of Lake Murray by: (i) failing to install proper lighting on the barrier they constructed; (ii) failing to utilize that lighting to warn boaters of the existence of the wooden barrier which blocked totally the navigable waters of Lake Murray; and (iii) failing to require such lighting. (R., p. 24).

With these facts before it, the trial court ruled that Mr. Overcash could not maintain an action for

personal injuries unless the injuries were of a type only he could sustain. The Court then found "All who forcefully collide with an obstruction face the prospect of personal injury." R., p. 5. Judge Cooper then found, however, that Mr. Overcash could have recovered for injury to his property, but not for injury to his person.

The Court of Appeals, Howard, J., reversed and remanded, holding that under South Carolina law: (1) A private plaintiff cannot recover for harm caused by a public nuisance unless the plaintiff suffers harm different in kind, not just degree, from that suffered by the public in general; (2) where a public nuisance consists of a blocking of a public waterway, the harm to the public in general is inconvenience caused by interference "with the public right to travel unobstructed along the waterway;" (3) personal injury like that suffered by Overcash is different in kind from inconvenience; and (4) therefore, Overcash has a claim for his personal injury. 356 S.C. 165, 588 S.E.2d 116 (Ct. App. 2003).

Petitioner SCE&G sought review by the filing of a Petition for Certiorari which was granted.

ARGUMENT

I. THERE HAS BEEN AND CONTINUES TO BE A PRIVATE RIGHT OF ACTION FOR PERSONAL INJURY CAUSED BY A PUBLIC NUISANCE WHEN THAT INJURY IS DIFFERENT IN KIND FROM THE INJURY INCURRED BY THE PUBLIC GENERALLY.

In its Order granting SCE&G's motion, the trial court first correctly stated the long-established law in this State, quoting McMeehen v. Central Carolina Power Co., 80 S.C. 512, 61 S.E. 1020 (1908), "the obstruction of a navigable stream is a nuisance and the remedy is by indictment, unless the person . . . can show special or peculiar damages, differing in kind from those to which all others in common with him are exposed." (R., p. 5). The trial court then misapplied the law and held that: (a) "All who forcibly collide

with an obstruction face the prospect of personal injury. . .;" and (b) "In order for a private individual to maintain a private action for damages caused by a public nuisance, the special injury must involve the property rights of the individual and the public nuisance would then constitute a private nuisance." (R., p. 5). The trial court concluded that, "A private nuisance must affect an interest one has in land or property." (R., p. 5). The Court of Appeals disagreed.

In its review and reversal of Judge Cooper's Order, the Court of Appeals traces the development of the right of an individual to recover for special injuries caused by a public nuisance, a right that has been "universally adopted" by American courts. Overcash v. South Carolina Electric & Gas, 356 S.C. 165, 588 S.E.2d 116, 120-123 (2003). Indeed, this has been the law in this State since at least 1712 with the adoption of the "Reception Statute," S.C. Code § 14-1-50, which incorporated the common law of England into our jurisprudence. That body of law, which remains unchanged, includes Fowler v. Sanders, 15 Cro. Jac. 446, 79 Eng. Rep. 382 (1617) which recognized a claim for personal injuries caused by a public nuisance in the form of blocks of logs upon a highway.

Thereafter, in 1833, our Court of Appeals addressed the state of the law and explained clearly the difference in injury to the public at large and when incurring a "particular damage" would support a private cause of action (as here). In Carey v. Brooks, 19 S.C.L. 365, 1 Hill (S.C.) 365, 1833 WL 1682 (S.C. App. 1833), the Court considered a suit to recover individual damages sustained due to a public nuisance.

> In Bacon's Abridgement, Tit. Nuisance, D. it is said that common nuisances against the public are only punishable by indictment. "But if by such nuisance, the party suffer a particular damage, as if by stopping up a highway with logs, &c. his horse throws him, by which he is wounded or hurt, an action lies." It is added however, "but if a highway is stopped that a man is delayed in his journey a little while, and by reason thereof, he is damnified or some important affair neglected, this is not such special damage for which an action

> on the case will lie; but a particular damage to maintain this action, ought to be direct and not consequential; as for instance, the loss of his horse, or some corporal hurt in falling into a trench on the highway, &c." Referring to Carth. 194. This seems to be the settled law, founded on the inconvenience of allowing a separate action to every individual who suffers an inconvenience common to many. The motion for nonsuit is therefore granted.

Id. at 365

In the case sub judice, the injury to the public at large is the inconvenience of having to navigate around the passage blocked by the SCE&G barrier. For that inconvenience, the State, upon petition by a member of the public so aggrieved, could seek to have the obstruction/bridge removed. Likewise, as in the Court's example in Brooks, when the damage caused is "some corporal hurt," such as the horrendous personal injuries inflicted upon Mr. Overcash, a private cause of action may be maintained.

Such is recognized and summarized in the RESTATEMENT (SECOND) OF TORTS § 821(c), comment d, as follows: "When the public nuisance caused personal injury to the plaintiff or physical harm to his land or chattels, the harm is normally different in kind from that suffered by other members of the public and the tort action may be maintained." Illustration 2 to Section 821(c), is directly on point:

> A digs a trench across the public highway and leaves it unguarded at night without any warning light. B, driving along the highway, drives into the trench and breaks his leg. B can recover from the public nuisance.

Here SCE&G knew of the barricade across its waters. (R., p. 11, 13-15). SCE&G knew no lights were on this bridge and, even though it had told the Federal Energy Regulatory Commission it would require lights to be placed on the bridge, it had not. (R., p. 14). Mr. Overcash is navigating across Lake Murray and collided with the structure, void of any warning light. (R., p. 16).

Notwithstanding, then ". . . the universally adopted . . . general concept that special injuries will

support private rights of action for special damages," Overcash at 122, SCE&G attempts to escape responsibility by elevating rights attendant to personal property above the value of human life and limb. SCE&G's position is as simple as it is harsh. Mr. Overcash could sue and recover for the damage to his boat but not for the damage to his body or even for the loss of his life.[2]

SCE&G continues to rely chiefly upon dicta in the case of Teague v. Cherokee County Memorial Hospital, 272 S.C. 403, 252 S.E.2d 296 (1979), for its position that only injuries to property are recoverable in a nuisance action in South Carolina. The Court of Appeals correctly explained the basic flaw in SCE&G's position:

> Unlike in this case, the facts as alleged by the plaintiff in Teague were susceptible to only negligence as a basis for underlying liability. Otherwise stated, no basis existed for claiming the stairway was a public nuisance. Rather, in a light most favorable to the plaintiff, only the *condition* of the staircase was claimed as a public nuisance. Thus, as the court recognized, ultimately the plaintiff's cause of action sounded in negligence, and was barred by sovereign immunity.

Overcash at 125.

No case cited by SCE&G states that the "special injury" requirement to bring a private action for damages occasioned by a public nuisance is limited to damage to property and, indeed, that limitation does not exist. See, e.g., South Carolina Steamboat Company v. Wilmington, C. & A. R. Co., 46 S.C. 327,

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[2]The attempted use of scare tactics by Petitioner, asserting a flood of litigation if there is a reported decision affirming the long-standing law of nuisance, is not a proper basis upon which the Court of Appeals' well-reasoned decision should be reversed. The fact that there have not been reported cases in this State for many years specifically allowing the recovery of damages for personal injuries caused by a public nuisance does not mean that the English common law has been overturned or that the language in Brooks or the advice of the RESTATEMENT are wrong. Rather, the dirth of reported cases only shows the unique nature of a set of facts required to maintain such an action. See, e.g., Overcash at 178, n. 4.

24 S.E. 337 (1896); Drews v. E.P. Burton, 76 S.C. 362, 57 S.E. 176 (1907).[3]

Petitioner cites various cases from other jurisdictions in support of its proposition as to Mr. Overcash's ability to recover damages for the serious personal injuries he received. In these cases, SCE&G either confuses the dicta related to private nuisances and the special injury exception to recovery for unique injuries caused by a public nuisance or simply asserts excerpts of opinions while ignoring other dicta or statutory provisions which state the general rules discussed by Professor Prosser at 52 Virginia Law Review 997, 1012 (1966).

Friends of H. Street et al. v. City of Sacramento, 20 Cal. App. 4th 152, 24 Cal. Rptr. 2d 607, is cited by Petitioner to show a "private person has no direct remedy to abate a public nuisance unless the public nuisance is private nuisance to that person." Id. at 611. First, H. Street is an abatement case and the rights to abate a public nuisance are governed in part by statute. California Civil Code § 3494 states that, "A public nuisance may be abated by any public body or officer authorized thereto by law." California law also spells out the remedies available to address a private nuisance, "The remedies against a private nuisance are: 1. A civil action; or 2. Abatement." California Civil Code § 3501. H. Street simply has nothing to do with the case subjudice.

Similarly, the case of Trinkle v. California State Lottery, 71 Cal. App. 4th 1198, 84 Cal. Rptr. 2d 496 (1999) revolves around an action brought to abate a public nuisance. In Trinkle as in Teague, the plaintiff was attempting to amend the complaint to circumvent the barriers of sovereign immunity. The

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[3]See, also, the recent case of Johnson v. Bryco Aims, 304 F. Supp.2d 383 (E.D.N.Y. 2004) citing Overcash and numerous other cases where physical and even emotional injuries to individuals support a private recovery for injuries caused by a public nuisance. Id. at 391-394.

Court saw through the charade and refused to pursue the issues attendant to the alleged nuisance.

The Petitioner also relies upon Venuto v. Owens-Corning, 22 Cal. pp.3d 116, 99 Cal. Rptr. 350 (1971). See Petitioner's Brief at pp. 10-12, asserting the case "... again referred back to property rights in reviewing the propriety of an action for purely personal injuries." Id. at 12. SCE&G again confuses the statutory rights of California citizens to abate a public or private nuisance and the right to receive damages for special injuries caused by a public nuisance, the issue before this Court.

In Venuto[4], citizens filed suit against Owens-Corning for polluting the air and asserted such pollution constituted a nuisance. The Court discusses the various statutory rights of California citizens, what constitutes public and private nuisances in California and concludes that while plaintiffs had pled facts sufficient to show a public nuisance existed, they had not pled facts sufficient to let them maintain an action to abate a public nuisance.

The importance of Venuto, however, lies in the case upon which it is premised and which is cited at page 356 of that opinion, Lind v. City of San Luis Obispo, 109 Cal. 340 (1895). Although an abatement action, the Lind Court first makes reference to Section 3493 of the California Code which provides for a private action for a public nuisance if it is "specially injurious to himself..." Id. at 343, and then expounds:

> But when the alleged nuisance would constitute a private wrong by injury property or health... for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the

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[4]As explained by the Court of Appeals, Venuto sets forth the general rule in California (which, parenthetically is the same as in South Carolina) that a litigant normally cannot recover for damages caused by a public nuisance as the injuries shared by one are shared by all. Overcash at Footnote 8.

guilty party liable to indictment for common nuisance.

Id. at 344 (emphasis added).

South Carolina law is analogous. "[A] private citizen may maintain a civil action for damages or abatement with respect to a public nuisance upon allegation and proof of such obstruction and if direct and special damages resulting to him, different in kind from what the public may sustain." Huggin v. Gaffney Development Co., 229 S.C. 340, 344, 92 S.E.2d 883, 884 (1956)(quoting Gray & Shealy v. Charleston W.C.R. Co., 81 S.C. 370, 371-372, 62 S.E. 442, 443 (1908).

The Florida cases cited by Petitioner likewise fail to support its position. In Florida, as here, an individual may bring an action to recover damages caused by a public nuisance if the litigant sustains special injuries, different in kind from those incurred by the public at large. Page v. Niagra Chemical, 68 So.2d 382 (Fla. 1953), cited by Petitioner at pages 10-11 of its Brief is actually a case where a group of workers at a site adjacent to a chemical plant sought to enjoin the release of alleged harmful chemicals and dusts. In dicta the Florida Court addressed the general rule stated above and stated that a public wrong must be addressed by the state not by individuals who shared a common injury with the general public. No special injury was pled and their attempt to enjoin a public nuisance was therefore dismissed. Id. at 384.

Here, the injury incurred by the general public is the inconvenience of having to navigate around the barricade SCE&G has allowed to be erected and maintained on its lands, rather than being able to boat directly through an otherwise navigable passage between the mainland and the island sold to a private party. The law is clear that a private cause of action does not exist for the "injury" of inconvenience or delay common to all by virtue of an obstruction of the public right of way. South Carolina Steamboat Company v. Wilmington C. & A. R. Co., 46 327, 24 S.E. 337 (1896). The law is equally clear that the severe

personal injuries sustained by Mr. Overcash are compensable. The special injury incurred by Mr. Overcash, unique to him, is the horror of being rendered blind and of enduring excruciating pain and disfigurement having collided with an unlawful obstruction of a public right of way. It is those injuries which allow Mr. Overcash, under South Carolina law, to pursue recovery from SCE&G for the public nuisance erected and maintained upon its lands with its knowledge and approval. And, it is those special injuries, the Court of Appeals concluded, which allow Mr. Overcash to pursue his claims of nuisance.

II. A VIOLATION OF S.C. CODE SECTION 49-1-10 SUPPORTS A PRIVATE RIGHT OF ACTION FOR PERSONAL INJURIES.

SCE&G posits next its argument that no private cause of action exists for injuries sustained by a plaintiff upon defendant's violation of S.C. Code § 49-1-10. They advance this argument as if Drews v. E.P. Burton, 76 S.C. 362, 57 S.E. 176 (1907) did not exist. It does and the Court of Appeals correctly reached the result required by this precedent. Overcash at 118-119.

In Drews, an action was brought by plaintiff to recover for damages to his schooner caused by a hidden log in a navigable stream. While Petitioner asserts at page 13 of its Brief that "Drews . . . [is] appropriately viewed as a negligence case and is not authority for the proposition that S.C. Code Ann. 49-1-10 (Law. Co-op. 1987) provides for a private right of action. . .," the express language of Drews is to the contrary:

> The allegations of the Complaint are appropriate to two causes of action – one based on negligence, and the other arising from the creation of a nuisance.

Id. at 178.

Having referred to the South Carolina Constitutional requirement that "all navigable waters shall forever

remain public highways," and having quoted Section 1335 of the Civil Code of 1902 which in all material respects is identical to Code § 49-1-10, the Court continued:

> When a person sustains a special injury, such as is alleged in the Complaint, arising from the obstruction of a navigable stream, he is entitled to recover damages, on the ground that the obstruction constitutes a nuisance under the statute as well as at common law (emphasis added).

Id. at 178.

The Court concluded that as a nuisance ". . . is in itself a wrongful act. . .," that ". . . it is not necessary to prove negligence, which is another wrong, . . ., as negligence is no part of that cause of action." Id. at 178.

In an attempt to circumvent the clear language of Drews and its application by the Court of Appeals, SCE&G does not correctly represent dicta in the later case of Free v. Parr Shoals Power, 111 S.C. 192, 97 S.E. 243 (1918). At page 13 of its Brief, SCE&G cites Free and asserts:

> "(noting that in Drews, '[t]he question whether the plaintiff's damages arose from a public nuisance is not involved, as the plaintiff's action is based solely upon negligence.'"

Id.

That is not a correct representation of Free. In Free, the Court concluded that in that case, "the sole issue raised by the pleadings. . . is whether there was negligence in the construction of the dam." Id. at 243. The Court continued later in that opinion, addressing that case:

> The question whether the plaintiff's damages arose from a public or private nuisance is not involved, as the plaintiff's action is based solely upon negligence.

Id. at 244. The Court does not characterize Drews in this statement and SCE&G portrays the quote

erroneously. Rather the Free Court simply shows Drews along with seven other cases in a string cite following its statement. The Court does not characterize the Drews decision as sounding only in negligence.

In any event, the unambiguous, controlling, language of Drews speaks for itself, SCE&G's attempt to ignore or misrepresent its precedential effect notwithstanding. As explained by the Court of Appeals:

> It is clear from a reading of section 1335 and section 49-1-10 that the two statutes are, in substance, identical to one another. Thus, given our supreme court's interpretation of section 1335 in *Drews*, we hold the legislature intended to create a private, statutory cause of action for public nuisance when it subsequently enacted section 49-1-10. *See Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) ("[T]here is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects."); *see also Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct.App.1993) (Holding where the law is unmistakably clear, the Court of Appeals is bound by decisions of the supreme court).

In short, Mr. Overcash should be allowed to pursue his cause of action pursuant to Code § 49-1-10 and to seek redress for the special injuries sustained – such is mandated by the precedent of Drews. The Court of Appeals is correct in this regard as well.

CONCLUSION

The Opinion of the Court of Appeals is well-reasoned, firmly founded upon South Carolina law and should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, Robbin Barr, an employee of Lewis, Babcock & Hawkins, L.L.P., do hereby certify that I have this date served a copy of the following pleading upon the individuals named below, by U.S. Mail to the addresses and telephone numbers listed below:

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RESPONDENT'S BRIEF

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