The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF FRANCIS A. HUMPHRIES, JR., PETITIONER

On June 2, 2003, Petitioner was suspended from the practice of law for a period of one year, with credit for two prior suspensions. In the Matter of Humphries, ____S.C.____, 582 S.E.2d 728 (2003). He has now filed a petition to be reinstated.

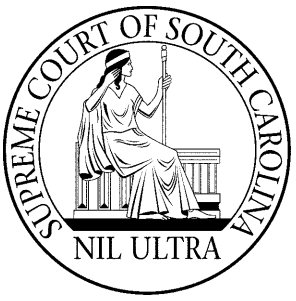
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than December 22, 2003.

Columbia, South Carolina

October 23, 2003



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

FILED DURING THE WEEK ENDING

October 27, 2003

ADVANCE SHEET NO. 39

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

June P. Andrade, Respondent,

v.

Jimmy Johnson, Sea Island Air, Inc., and South Carolina Electric & Gas Co., Inc., Defendants,

of whom South Carolina Electric & Gas Co., Inc. is Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Beaufort County
Howard P. King, Circuit Court Judge

Opinion No. 25738
Heard March 4, 2003 - Filed October 27, 2003

REVERSED

A. Parker Barnes, Jr., and David S. Black, both of A. Parker Barnes, Jr. & Associates, of Beaufort; Charles E. Carpenter, Jr., and S. Elizabeth Brosnan, both of

Richardson, Plowden, Carpenter & Robinson, PA, of Columbia; for petitioner.

J. Brent Kiker, Anne S. Douds and Scott M. Merrifield, all of Kiker & Douds, PA, of Beaufort, for respondent.

JUSTICE MOORE: We granted certiorari to determine whether the Court of Appeals erred by reversing the trial court's decision granting South Carolina Electric & Gas (SCE&G) a directed verdict on respondent's negligence claim. Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001). We reverse.

FACTS

Respondent contacted Sea Island Air for an estimate on replacing her heating, ventilation, and air conditioning (HVAC) system in her townhouse. She called Sea Island because of the large SCE&G Quality Dealer insignia in its phone book advertisement.

Sea Island's president, Jimmy Johnson, visited respondent and emphasized his SCE&G Quality Dealer designation. He also elaborated on the virtues of the Quality Dealer program and SCE&G's financing program that was available only to purchasers who used a Quality Dealer for installing an HVAC system.

Following the meeting, respondent obtained a brochure that explained the Great Appliance Trade-Up Program. The brochure explained that to qualify for a special rebate or credit toward the monthly electric bill, a customer must be an SCE&G electric customer on certain rates and have a high-efficiency unit installed by an SCE&G Quality Dealer. The brochure further explained that SCE&G-certified Quality Dealers are the only contractors whose installation work qualifies for rebates in their Great Appliance Trade-Up Program, as well as for special energy rates. Respondent testified the brochure confirmed Johnson's statements to her.

Respondent agreed to have two new HVAC systems installed in her home. After several delays in the installation, a crew finally completed the work. Respondent immediately observed difficulties with the operation of the system and informed Johnson of the deficiencies. However, she signed the financing forms authorizing SCE&G to pay Sea Island for the work. The financing agreement included the statement: "Customer further acknowledges that SCE&G has no warranty liability in connection with the Property or its installation."

Because the HVAC system was not working properly, respondent was forced to buy electric heaters to warm her house. At respondent's request, the Beaufort codes department inspected the installation and listed approximately fifteen code violations committed by Sea Island.[1] Prior to completing a full inspection of the HVAC systems, respondent had to remove the floor of her third floor room to allow a proper inspection.

Respondent also arranged to have Jeff Kleckley, the head of the local SCE&G Quality Dealer program, inspect the installation, even though SCE&G indicated it normally did not do inspections. SCE&G suggested to respondent that she pay Sea Island $500 to bypass the third floor so that she could get heat into the second floor bedrooms. This was suggested as a temporary fix until respondent installed insulation in the third floor and replaced the floor of the third floor room. Respondent did not take this advice because she received the Codes inspection report mentioned previously and did not want to put more money into the faulty system.[2]

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[1]Twenty-six other codes violations were discovered during the inspection. Most of these violations concerned respondent's attempt to have her attic turned into a habitable third floor room. Respondent had not obtained a permit for any of the third floor work and this work was partially completed when Sea Island arrived to install the HVAC systems.

[2]Subsequently, after receiving a letter from respondent, Kleckley, on behalf of SCE&G, sent her a letter reiterating that respondent needed to repair the third floor subfloor that had been removed, that adequate insulation should be installed in the third floor, and that the third floor should be

Respondent met with the general manager of SCE&G's Beaufort office and asked him to intervene with Johnson and Sea Island to remedy the problems. The general manager stated, although it was not something he normally dealt with, he would speak with Sea Island to see if Sea Island could get her system in working order. Finally, respondent was forced to hire another contractor to remove and replace the systems installed by Sea Island.

Prior to trial on her claims, respondent settled with Johnson and executed a covenant not to sue in his favor. The covenant expressly reserved any and all claims respondent had against SCE&G.

The trial court granted summary judgment to SCE&G on respondent's Unfair and Deceptive Trade Practices Act (UTPA) claim and on her claims based on SCE&G's vicarious liability. The court directed a verdict in SCE&G's favor on respondent's remaining causes of action alleging negligence and misrepresentation.

The Court of Appeals affirmed in part and reversed in part. The court affirmed the trial court's decision granting summary judgment to SCE&G on all claims based upon SCE&G's vicarious liability on the basis the covenant not to sue released both Johnson and SCE&G. The court reversed the trial court's decision granting SCE&G's summary judgment motion on the basis SCE&G was exempt from the UTPA. Finally, the Court of Appeals reversed the trial court's decision granting SCE&G a directed verdict on respondent's negligence claim. On this issue, the court found the evidence raised an inference that SCE&G owed a duty of care to respondent to ensure the proper installation of the HVAC systems. The court found the Quality Dealer Agreement provided evidence of a contractual duty undertaken by SCE&G to oversee the proper installation of HVAC systems and to address customer complaints regarding improper installation. While all of the Court of

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properly ventilated. He further wrote that SCE&G could not guarantee comfort since there were a number of factors that impacted overall comfort.

Appeals' findings were appealed, we granted certiorari solely on the issue concerning respondent's negligence claim.

ISSUE

> Did the Court of Appeals err by reversing the trial court's decision granting SCE&G's directed verdict motion on respondent's negligence claim?

DISCUSSION

Respondent alleged SCE&G was negligent for failing to properly supervise its Quality Dealer program, failing to properly train, qualify, and investigate its quality dealers, failing to act reasonably in responding to customer complaints, and failing to exercise reasonable care in the certification of its quality dealers. Respondent argues SCE&G's implementation, operation, and conduct of its Quality Dealer program gave rise to a duty of care.

Sea Island was an SCE&G certified quality dealer. The guidelines of the Quality Dealer Program state the program is

> designed to encourage proper installation of high efficiency heating and cooling systems. The program incorporates high standards of system design, installation, and maintenance. . . . Contractors who elect to participate and install new systems . . . must meet the Quality Dealer Program standards.

The Quality Dealer Program Agreement provided that Sea Island must adhere to all dealer requirements, installation requirements, mediation procedures in responding to customer complaints, and to SCE&G's inspection policy. SCE&G, in turn, agreed to assist in developing prospective customers, provide promotional materials, provide reasonable assistance and opportunities for training, and promote Quality HVAC installations to their customers.

To become a Quality Dealer, the dealer must agree to establish certain customer service practices. Further, the dealer must annually participate in a SCE&G orientation covering the program guidelines and basic design and installation requirements. Under the Agreement, the dealer was required to meet and adhere to a detailed list of installation requirements. The installation requirements stated that the dealer must "select and install systems and accessory equipment in accordance with all local, state and national codes."

The Agreement also outlines mediation procedures for when SCE&G receives a complaint from a customer dissatisfied with an installation by a Quality Dealer. The mediation procedures state that if the complaint is not resolved when the customer contacts the dealer, the SCE&G representative will notify the appropriate distributor and meet with the dealer and customer to inspect the system and investigate the complaint. The mediation procedures further provide:

> The [SCE&G] representative will inspect the system for program compliance and capacity measurements. The [SCE&G] representative will work with the dealer to find a solution to the complaint. If the problem can not, or will not, be resolved by the dealer, the manufacturer's and/or distributor's technical representative will be contacted to inspect the system.

If a dealer refuses to correct a justifiable customer complaint in a timely manner, the dealer will be suspended from the program for a minimum of one year.

Under the Agreement, SCE&G reserved the right to inspect or verify all installations for which a dealer or customer receives a rebate or special rate consideration. Inspections could be random or at a customer's request. The Agreement notes these inspections are used "to determine compliance with [their programs.]"

SCE&G argues the Court of Appeals erred by reversing the trial court's decision granting their directed verdict motion on respondent's claim of negligence.

When reviewing the denial of a motion for directed verdict, we must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728 (2001). If the evidence as a whole is susceptible of only one reasonable inference, no jury issue is created and a directed verdict motion is properly granted. *Id.*

In a negligence action, a plaintiff must show the (1) defendant owes a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages. Steinke v. South Carolina Dep't of Labor, Licensing and Reg., 336 S.C. 373, 520 S.E.2d 142 (1999).

A tort-feasor may be subjected to tort liability for injury to a third party arising out of the tort-feasor's contractual relationship with another, despite the absence of privity between the tort-feasor and the third party. Barker v. Sauls, 289 S.C. 121, 345 S.E.2d 244 (1986) (citation omitted). The tort-feasor's liability exists independently of contract, and rests upon the tort-feasor's duty to exercise due care. *Id.*

The key inquiry is what duty, if any, is owed by the tort-feasor to the third party. *Id.* It is essential to liability for negligence that the parties have some relationship recognized by law to support the duty owed by the tort-feasor. *Id.* This duty may be derived from the tort-feasor's contractual relationship with another. *Id.*

SCE&G did not owe a duty to respondent to ensure that its Quality Dealer properly installed her HVAC system. From the language of the Agreement, it is clear SCE&G did not owe such a duty to respondent, an SCE&G customer.

While an SCE&G customer receives some benefit from the agreement through the ability to participate in the Great Appliance Trade-Up Program and receive special electric rates, financing for the installation of a Quality HVAC system, and ensuring the HVAC system that is installed meets the Quality Dealer Program requirements, this does not thereby mean SCE&G has a duty to ensure a customer receives good service from one of its quality dealers. Further, the language in the SCE&G financing agreement signed by respondent evidences SCE&G did not have a duty to ensure the proper installation of the HVAC system. The agreement states: "Customer further acknowledges that SCE&G has no warranty liability in connection with the Property or its installation."

Therefore, we conclude the Court of Appeals erroneously reversed the trial court's decision directing a verdict in SCE&G's favor because SCE&G did not owe a duty to respondent to ensure Sea Island Air performed satisfactory work when installing respondent's HVAC system.
REVERSED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Case No. 96-CP-32-0968

Wannelle Hedgepath, Andrew Hedgepath, and Kristin Hedgepath, Plaintiffs,

v.

American Telephone and Telegraph Company, a corporation, AT&T Nassau Metals Corporation, Gaston Copper Recycling Corporation, and Southwire Company, Defendants.

Case No. 96-CP-32-1016

Karen Mack as Personal Representative of the Estate of Toby L. Sharpe, Sr., Petitioner,

v.

American Telephone and Telegraph Company, a corporation, AT&T Nassau Metals Corporation, Gaston Copper Recycling Corporation, and Southwire Company,

Of whom Gaston Copper Recycling Corporation, and Southwire Company, Are Respondents,

Case No. 96-CP-32-2573

Maggie Banyard, et al., Plaintiffs,

v.

American Telephone and Telegraph Company, a corporation, AT&T Nassau Metals Corporation, Gaston Copper Recycling Corporation, and Southwire Company, Defendants.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 25739
Heard October 9, 2003 - Filed October 27, 2003

DISMISSED AS IMPROVIDENTLY GRANTED

Raymon E. Lark, Jr., of Austin, Lewis & Rogers, of Columbia, for petitioner.

Mark S. Barrow and William R. Calhoun, Jr., both of Sweeny, Wingate & Barrow, of Columbia, for respondents.

PER CURIAM: We granted certiorari to review the Court of Appeals' opinion in Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). After careful consideration, we dismiss certiorari as improvidently granted.

DISMISSED.

MOORE, A.C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice L. Casey Manning, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Janet B. Murphy and David M. Murphy, Respondents,

v.

Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, and as successor to Unarco Industries, Inc., ACandS, Inc., Rock Wool Manufacturing Co., Inc., The Anchor Packing Company, Rapid American Corporation, Garlock, Inc., Westinghouse Electric Corporation, Uniroyal, Inc., Metropolitan Life Insurance Co., Fibreboard Corporation, National Service Industries, Inc., A. P. Green Industries, Inc., Flexitallic Gasket Company, Inc., GAF Corporation, Armstrong World Industries, Inc., Asbestos Claims Management Co., United States Gypsum Company, T & N, PLC., C. E. Thurston & Sons, Inc., PPG Industries, Inc., Covil Corporation, and E.I. Dupont de Nemours and Company, Defendants,

Of which E.I. Dupont de Nemours and Company is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25740
Heard February 6, 2003 - Filed October 27, 2003

AFFIRMED

David E. Dukes, C. Mitchell Brown, and Michael W. Hogue, all of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for Petitioner.

L. Joel Chastain, of West Columbia, Terry E. Richardson, Jr., and Daniel S. Haltiwanger, both Richardson, Patrick, Westbrook and Brickman, L.L.C., of Barnwell, V. Brian Bevon, of Ness, Motley, of Mt. Pleasant, and William J. Cook, of Ness, Motley, of Barnwell, for Respondents.

R. Bruce Shaw and W. Thomas Causby, both of Nelson Mullins Riley & Scarborough, of Columbia, for Amicus Curiae Owens-Illinois, Inc.

JUSTICE PLEICONES: We granted certiorari to consider when a "cause of action shall have arisen…within this State" under the Door Closing Statute, S.C. Code Ann. § 15-5-150 (1976), where the cause of action is a tort suit premised on a latent disease claim. The circuit court held this suit barred by the statute, and a panel of the Court of Appeals affirmed. The

case was then reheard *en banc*, and by a vote of 7 to 2,[1] the Court of Appeals held the Door Closing Statute did not apply. Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001). We granted certiorari and now affirm.

FACTS

Petitioner E.I. du Pont de Nemours and Company (petitioner) employed respondent Janet Murphy's (Janet's) father (Father) as a chemical engineer from 1951 to 1984. Father was exposed to insulating asbestos dust and fibers in the course of his employment as he observed the reconfiguration of textile spinning equipment.

Father worked at petitioner's Virginia plant from 1951 to 1966. Janet was born in 1960. From 1966 until 1969 the family lived in South Carolina. They returned to Virginia until 1974, then spent four years overseas, and Father spent the last six years of his employment with petitioner in Virginia.

In July 1995, Janet was diagnosed with mesothelioma, a lung cancer caused exclusively by exposure to asbestos.[2] She brought this tort action in South Carolina, and her husband (David) brought his loss of consortium suit here. They allege Janet developed the disease as the result of her childhood exposure to asbestos fibers and dust in Father's clothing. Further, they contend that while Father was exposed to asbestos at all of petitioner's facilities, his exposure was greatest at the South Carolina plant.

Petitioner moved to dismiss Janet's and David's claims under Rule 12(b)(1), SCRCP, on the grounds South Carolina lacked subject matter jurisdiction over the suits in light of the Door Closing Statute. The circuit

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[1] In this case, the *en banc* panel consisted of four judges of the Court of Appeals and five acting Court of Appeals judges drawn from other state courts. The five acting judges sat by designation of Chief Justice Toal. See S.C. Const. art. V, § 4 ("The Chief Justice shall…have the power to assign any judge to sit in any court within the unified judicial system").

[2] Janet died of mesothelioma during the pendency of this matter.

court dismissed the actions. See e.g. Nix v. Mercury Motors Express, Inc., 270 S.C. 477, 242 S.E.2d 683 (1978). Janet and David appealed, and the *en banc* Court of Appeals reversed. Murphy v. Owens-Corning, *supra*. Following the circuit court's ruling and the decision of the Court of Appeals, we overruled our precedents including Nix which had held that the Door Closing Statute determines subject matter jurisdiction, and explained that the statute in fact governs a party's capacity to sue. Farmer v. Monsanto Corp., 353 S.C. 553, 579 S.E.2d 325 (2003).

LAW

The Door Closing Statute provides:

> § 15-5-150. Foreign corporations as defendants.
>
> An action against a corporation created by or under the laws of any other state, government, or country may be brought in the circuit court:
>
> (1) By any resident of this State for any cause of action; or
>
> (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

In this case, subsection (2) of § 15-5-150 is the relevant provision since neither Janet nor David is a South Carolina resident. In Ophuls & Hill v. Carolina Ice & Fuel Co., 160 S.C. 441, 158 S.E. 824 (1931), the Court explicated the meaning of the statutory terms 'cause of action' and 'subject of the action.' 'Cause of action' was "described as being a legal wrong threatened or committed against the complaining party" while the 'subject of the action' was defined as "*the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this is, ordinarily the property, or the contract and its subject matter*, or other thing involved in the dispute." Id. at

450, 158 S.E. at 827 (emphasis in original). In this tort case, the focus is on the term 'cause of action,' and not on the 'subject of the action.'

In order for Janet to bring her suit[3] in South Carolina, she must meet the Door Closing Statute's requirement that "the cause of action shall have arisen…within this State." § 15-5-150 (2). Janet's complaint unequivocally meets the 'cause of action' component of this requirement since she alleges that the legal wrong occurred in South Carolina when she was exposed to asbestos fibers and dust on Father's clothing. Ophuls & Hill v. Carolina Ice & Fuel Co., *supra*. As the Court of Appeals held, the critical inquiry here is whether the cause of action **arose** within the State. We thus examine, for the first time, when a latent disease cause of action 'arises.' Cf. Grillo v. Speedrite Prods., Inc., 340 S.C. 498, 532 S.E.2d 1 (Ct. App. 2000) *cert. denied* December 12, 2000 (discovery rule/statute of limitations in toxic exposure case). In doing so, we reexamine our precedents which equate the terms 'arise' and 'accrue.'

Our consideration of the novel issue raised by this case begins with an examination of the policies underlying the Door Closing Statute. Those policies have been articulated as follows:

> (1) It favors resident plaintiffs over nonresident plaintiffs;
>
> (2) It provides a forum for wrongs connected with the State while avoiding the resolution of wrongs in which the State has little interest; and
>
> (3) It encourages activity and investment within the State by foreign corporations without subjecting them to actions unrelated to their activity within the State.
>
> Farmer v. Monstanto Corp., *supra* citing

[3] We focus our discussion on Janet's suit since David's consortium claim is dependent on the viability of Janet's claim.

Rosenthal v. Unarco Industries, Inc., 278 S.C. 420, 297 S.E.2d 638 (1982).

The first policy, favoring resident plaintiffs, is reflected in subsection (1) of § 15-5-150 of the Door Closing Statute, which allows "any resident of this State" to maintain "any cause of action." This subsection, essentially "opening the Door" for resident plaintiffs, is irrelevant to determining whether Janet, a nonresident, has the capacity to maintain this suit. The second policy expressed in the statute restricts actions brought in state courts to those where the alleged wrong is connected to the State. Janet's suit does not offend this policy. The third policy consideration when a nonresident seeks to sue a foreign corporation in state court is whether the suit is predicated on the corporation's in-state activities. Id. Permitting Janet to maintain her action in our state courts does not contravene this policy. Having concluded that no fundamental policy would be offended by this suit, we turn to the arise/accrue distinction.

In traditional tort settings, we have held that a cause of action arises in this State for purposes of the Door Closing Statute when the plaintiff has the right to bring suit. See Cornelius v. Atlantic Greyhound Lines, 177 S.C. 93, 180 S.E. 791 (1935). In construing the statutory requirement that "the cause of action shall have arisen . . . within in this State," the Cornelius court cited with approval to an authority that "stated that 'a cause of action **accrues** when facts exist which authorize one party to maintain an action against another.'" Id. at 96, 180 S.E. at 792 (emphasis supplied). Cornelius is consistent with our later decision in Stephens v. Draffin, 327 S.C. 1, 488 S.E.2d 307 (1997), where we held "our cases use the verbs 'arise' and 'accrue' interchangeably when discussing the issue of the juncture at which the right to sue came into existence." Id. at footnote 4; see also Tilley v. Pacesetter Corp., Op. No. 25697 (S.C. Sup. Ct. filed August 11, 2003).

Were we to apply our traditional view of when a tort cause of action arises or accrues, we must conclude that Janet's cause of action did not arise "within the State" because no injury or damages occurred while she was in

South Carolina.[4] Until the exposure to asbestos resulted in injury or damage, Janet's tort cause of action did not accrue. See e.g., Gray v. Southern Facilities, 256 S.C. 558, 183 S.E.2d 438 (1971) ("It is basic that a negligent act is not in itself actionable and only becomes such when it results in injury or damage to another"). Respondents urge us to reconsider whether to recognize a distinction between the terms 'arise' and 'accrue' in the context of latent disease tort actions within the ambit of the Door Closing Statute.

As explained above, the policies reflected in the Door Closing Statute would not be offended by allowing Janet's suit to proceed in state court. The only obstacle to Janet's maintenance of this action results from the nature of the latent disease process.

We find that it is not appropriate to apply a strict accrual test to latent disease tort actions brought by a nonresident against a foreign corporation. We hold that the proper inquiry is whether the foreign corporation's activities that allegedly exposed the victim to the injurious substance, and the exposure itself, occurred within the State. If so, then the legal wrong was committed here. See Ophuls & Hill v. Carolina Ice & Fuel Co., *supra*. The fact that the legal wrong did not result in injury and/or damages until the plaintiff had left the State does not foreclose a suit under the Door Closing Statute. Janet's latent disease claim 'arose' in South Carolina.

[4] Unlike the Court of Appeals, we do not rely upon a medical doctor's affidavit, submitted after the motion to dismiss was granted, to find injury at the time of exposure. It is questionable whether the affidavit was properly before the circuit court when it was deciding the Rule 59 motion. See Wright, Miller, & Kane *Fed. Proc. Practice: Civil 2d § 2810.1* (1995 and Supp. 2002). Whether to allow the affidavit upon remand is a question we leave to the trial court's discretion.

CONCLUSION

The circuit court erred in dismissing the suits under the Door Closing Statute.[5] The decision of the Court of Appeals, reversing that decision and remanding the case to the circuit court, is

AFFIRMED.

WALLER and BURNETT, JJ., concur. TOAL, C.J., concurring in result in a separate opinion in which MOORE, J., concurs.

[5] We do not perceive any meaningful distinction between our resolution of this issue and that of the concurring opinion. That opinion differs only in that it decides not just the question whether Janet's claim arose in South Carolina, but also determines the action accrued in 1995 upon Janet's diagnosis. Since this case comes before us in the context of a 12(b)(1) motion, we need not decide any factual or legal question other than whether the circuit court has subject matter jurisdiction.

CHIEF JUSTICE TOAL: Although I agree the Court of Appeals should be affirmed in this case, I respectfully disagree with the analysis employed by the majority, and, therefore, write separately to concur in result only. *See Murphy v. Owens-Corning Fiberglass Corp.,* 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001). The majority opinion purports to affirm the Court of Appeals, but it ignores the distinction between **"arise"** and **"accrue"** upon which the Court of Appeals based its decision. For the following reasons, I would affirm the Court of Appeals opinion as it was written.

> The South Carolina Door Closing Statute provides,
>
> An action against a corporation created by or under the laws of any other state, government, or country may be brought in circuit court:
>
> (1) By any resident of this State for any cause of action; or
>
> (2) By a plaintiff not a resident of this State when the cause of action shall have **arisen** or the subject of the action shall be situated within this State.

S.C. Code Ann. § 15-5-150 (1976) (emphasis added). Both the majority opinion of this Court and the Court of Appeals' opinion recognize that in order for Janet to bring her suit in South Carolina, she must meet the Door Closing Statute's requirement that her cause of action **arise** within this State. S.C. Code Ann. § 15-5-150; *see Murphy,* 346 S.C. at 46, 550 S.E.2d at 593.

After noting that **arise** and **accrue** have been used interchangeably in the "typical tort setting," the Court of Appeals' opinion concluded that there is a distinction between **arise** and **accrue** in latent disease cases such as this one. *Murphy,* 346 S.C. at 47-48, 550 S.E.2d at 594-95.

> The record establishes that the alleged wrongdoing, from which [Janet's] right to bring this action proceeds, originated in South Carolina. Their claims, therefore, arose in this state even though they did not accrue until the mesotheliomia was diagnosed.

> In applying the Door Closing Statute, the manifestation of injury through diagnosis, while relevant, is not dispositive in every case for the purpose of determining whether a cause of action shall have **arisen** in South Carolina. Such an approach is too simplistic and would lead to results contrary to existing case law and the legislative goals of the statute.

Id. at 48, 550 S.E.2d at 594-95 (emphasis added).

The majority opinion, on the other hand, declines to accept a distinction between **arise** and **accrue**, stating, "[a]pplying our traditional view of when a tort cause of action **arises** or **accrues**, we must conclude that Janet's cause of action did **not arise** 'within the State,' because no injury or damages occurred in South Carolina." (emphasis added). The majority averts the result this conclusion logically mandates on grounds that "it is not appropriate to apply a strict accrual test to latent disease tort actions brought by a nonresident against foreign corporations."

> We hold that the proper inquiry is whether the foreign corporation's activities that allegedly exposed the victim to the injurious substance, and the exposure itself, occurred within the State. If so, then the legal wrong was committed here. The fact that the legal wrong did not result in injury and/or damages until the plaintiff had left the State does not foreclose the Door Closing Statute. Janet's latent disease claims 'arose' in South Carolina.

(citations omitted).

Although the majority reaches the same result as the Court of Appeals, in my opinion, the only appropriate way to reach this result is to distinguish **arise** and **accrue** according to their technical, legal definitions. *See Murphy,* 346 S.C at 47, 550 S.E.2d at 594 (citations omitted) (stating that a cause of action **arises** when the act or omission that creates the right to bring the suit happens or begins and that a cause of action **accrues** when it becomes

complete so that the aggrieved party can prosecute the action). The majority's decision goes beyond mere interpretation of the language of the Door Closing Statute and, instead, appears to make a judicial exception to the Statute for latent disease cases.

In this case, Janet alleges that she came into contact with asbestos in South Carolina between 1966 and 1969, which finally manifested in a diagnosis of mesothelioma in July 1995. Janet's Father worked at Petitioner's South Carolina plant during these years, and Janet alleges she was exposed to asbestos fibers and dust that became caught in Father's clothing while working at the plant. Under these facts, I would find that Janet's cause of action against Petitioner **arose** in South Carolina, but did not **accrue** until her diagnosis of mesothelioma in Virginia. While **arise** and **accrue** may be used interchangeably appropriately in most circumstances (because most causes of action **arise** and **accrue** simultaneously), the two terms retain a technical distinction which comes into play in latent disease cases such as this one.

For the foregoing reasons, I write separately and concur in result only.

MOORE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Abbeville
County Magistrate Clinton J.
Hall, II, Respondent.

Opinion No. 25741
Submitted October 7, 2003 - Filed October 27, 2003

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for Office of Disciplinary Counsel.

Clinton J. Hall, II, of Calhoun Falls, Pro Se.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the issuance of an admonition or a public reprimand or the imposition of a definite suspension for a period to be determined by this Court. We accept the agreement and impose a one year suspension. The facts as set forth in the agreement are as follows.

Facts

Respondent was ticketed for failing to use turn signals during lane changes in violation of S.C. Code Ann. § 56-5-2150. At the trial on the charges, respondent made untruthful statements regarding statements made to him by the arresting officer. Respondent attempted to exclude audio and video recordings of the traffic stop that showed the officer did not make the statements attributed to him by respondent. Finally, respondent was held in contempt for his gestures and behavior during the prosecution's closing argument after being admonished earlier for making signs of agreement or disagreement with questions asked or statements made during the proceeding.

Law

Respondent admits that he has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall uphold the integrity and independence of the judiciary) and Canon 2(A)(a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). Respondent also admits that these allegations constitute grounds for discipline pursuant to Rules 7(a)(1) and (7), RJDE, Rule 502, SCACR.

Conclusion

We find respondent's misconduct warrants a suspension from judicial duties. We therefore accept the Agreement for Discipline by Consent and impose a one year suspension.

DEFINITE SUSPENSION.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jack T. Flom, Respondent.

Opinion No. 25742
Head October 7, 2003 - Filed October 27, 2003

DISBARRED

Henry B. Richardson, Jr., and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Jack T. Flom, of Jacksonville, Florida, pro se.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct concluded respondent committed misconduct and recommended disbarment. We agree and disbar respondent.

Initial Formal Charges[1]

Matter I

After transmission repairs were performed by a mechanic on their Ford truck, Mr. and Mrs. Doe continued to have transmission difficulties and

[1] Although he did file a response to the Initial Formal Charges, because respondent did not appear at the hearing, he is deemed to have admitted the factual allegations in the complaint and to have conceded to the merits of any recommendation at the hearing. Rule 24(b), Rule 413, SCACR.

retained respondent. On June 28, 1994, respondent sent a letter to the mechanic explaining the situation and demanding relief. He then submitted a bill for this letter to UAW-Ford Legal Services. By letter dated July 15, 1994, the mechanic replied to respondent and denied liability.

Although respondent drafted a Summons and Complaint, he did not serve the documents. The statute of limitations against the mechanic and other potential defendants expired. Respondent did not advise the Does about the expiration of the statute of limitations.

After receipt of the Does' complaint, the Commission on Lawyer Conduct sent respondent a March 23, 1999, letter requesting a response within fifteen days. Respondent did not respond. The Commission again wrote respondent on May 4, 1999, requesting a response and advising that failure to respond was grounds for discipline. Respondent replied on May 18.

On July 9, 1999, a staff attorney at the Office of Disciplinary Counsel wrote respondent requesting additional information and a response within fifteen days. Respondent did not reply.

By letter dated August 25, 1999, Deputy Disciplinary Counsel again requested the information sought by the staff attorney and reminded respondent that failure to respond was grounds for discipline. Respondent did not reply.[2]

A Notice of Full Investigation was sent to respondent in December. Respondent did not reply.

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[2] In his Response to Formal Charges, respondent asserted he telephoned Deputy Disciplinary Counsel and told her he would be responding. However, before he responded, he received the complaint in a second matter. At the hearing, a witness for the Office of Disciplinary Counsel testified the Deputy Disciplinary Counsel did not grant respondent an extension of time to file a response.

Matter II

Client A retained respondent in March 1998 after she was served with a Summons and Complaint seeking a reduction in child support. At the same time, Client A's ex-husband reduced his child support payment and refused to provide medical insurance for the parties' son as previously ordered by the family court. The retainer agreement between Client A and respondent states a rate of $125/hour for out-of-court time and $150/hour for in-court time.

Although Client A contacted respondent weekly, months passed without any action by respondent. Respondent told Client A he was waiting for a court date to be scheduled by her ex-husband's attorney. During this time, Client A received the reduced child support payments and her ex-husband made no payments towards their son's medical bills.

Several letters from the ex-husband's attorney indicate a willingness to discuss settlement. Although Client A made it clear she could not accept a lower child support payment, respondent did not file an Answer or take other action.

The ex-husband hired a new attorney in December 1998. The attorney filed a new action against Client A. A court date was set for April 19, 1999. After she took time off from work and went to the courthouse to appear at the hearing, Client A discovered the hearing had been postponed by agreement of the attorneys but she had not been notified.

After a hearing in June 1999, the family court ordered full reimbursement of the back-due child support and reinstated the original support requirement. The family court held the insurance issue and respondent's request for attorney's fees in abeyance because the ex-husband had filed for bankruptcy shortly before the hearing. Respondent had submitted an affidavit for attorney's fees asserting his charge was based on rates of $150/hour for out-of-court work and $175/hour for in-court work.

In late June 1999, respondent received a check from Client A's ex-husband which represented the back-due child support. Respondent withheld $1735 from the check as his attorney's fees. Again, respondent determined this fee based on $150/hour out-of-court work and $175/hour for in-court work although the retainer agreement specified a lesser hourly rate.

The Commission advised respondent of Client A's October 1999 complaint and requested a response. Respondent did not reply.

By letter dated November 22, 1999, the Commission again wrote respondent requesting a response and advising him that failure to cooperate was grounds for discipline. The Commission's Notice of Full Investigation was sent to respondent by certified mail in February but returned unclaimed by the postal service.

Matter III

In December 1999, Client B retained respondent to file a post-conviction relief (PCR) action on behalf of her husband who was incarcerated in Florida. Client B signed a retainer agreement, gave respondent $1500, and agreed to pay $200 per month towards the $5,000 retainer fee.

Between December 1999 and April 2000, Client B contacted respondent on numerous occasions and inquired whether the PCR action had been filed. Although respondent told Client B the petition had been filed and copies had been mailed, neither Client B nor her husband received a copy of the petition.

Client B contacted the Attorney General's Office and the Horry County Clerk of Court and determined no action had been filed. Client B again contacted respondent; he again asserted he had filed the action. Client B told respondent that she intended to take legal action against him unless he provided proof by the next day, April 7, 2000, that the action had in fact been filed.

At 4:00 p.m. on April 7, Client B telephoned respondent and told him she had not received any proof of the filing. Although respondent asked if Client B would wait until Monday, she refused. Shortly thereafter, respondent faxed Client B a copy of a document captioned with the name of Client B's husband and civil action number 2000-CP-26-999. The application bore respondent's signature, was dated March 3, 2000, and was stamped as filed with the Horry County Clerk's Office on March 8, 2000.

Respondent gave Client B false information. Civil Action No. 2000-CP-26-999 was actually a lawsuit which had been filed against respondent personally. Respondent had removed the filing stamp from the previously-filed suit and placed it on the PCR action before faxing it to Client B.

Although the Commission sent respondent a copy of Client B's complaint and asked for a response, respondent did not reply. In June 2000, the Commission again wrote respondent requesting a response and advising him that failure to cooperate was grounds for discipline. Respondent did not reply. In August 2000, the Commission sent respondent a Notice of Full Investigation requiring a response in thirty days. After the Attorney General's Office subpoenaed respondent's client file, respondent replied to Client B's complaint.

Second Formal Charges[3]

[3] Respondent did not file an answer to the Second, Third, or Fourth Formal Charges. His failure to file an answer constitutes an admission of the factual allegations in those charges. Rule 24(a) of Rule 413, SCACR. In addition, because he failed to appear at the panel hearing, he is deemed to have admitted the factual allegations of these three charges and to have conceded the merits of the recommendation considered at the hearing. Rule 24(b) of Rule 413, SCACR.

Matter IV

Client C retained respondent to represent him in two different matters. Respondent failed to take any action regarding either matter.

Client C retained respondent in a third matter. Although he wrote the defendant a demand letter, respondent failed to take any further action.

Respondent received the Notice of Full Investigation from the Commission. He did not file a response.

Matter V

Client D retained respondent to file a lawsuit concerning causes of action which had occurred in 1995. After respondent filed suit in 1997, the defendant filed an answer and interrogatories. After not receiving interrogatory responses for three months, defense counsel wrote respondent seeking responses. Six months later, defense counsel filed a motion to compel discovery. After the motion was placed on the docket, respondent and defense counsel reached an agreement resolving the motion. In August 2000, Client D's case was voluntarily dismissed from the docket without participation of the defendant and without notice to Client D.

Shortly thereafter, the parties agreed to restore the matter to the docket, but respondent failed to prepare the consent order. Defense counsel then wrote respondent in August and again in November 2000 requesting a consent order to restore the case; he never received an order. The statute of limitations expired.

Client D made repeated telephone calls to respondent concerning the status of the case and was told there would be a delay before the hearing. When she checked the courthouse records, she learned the case had been dismissed. When Client D visited respondent's office and informed him of the dismissal, respondent advised the statute of limitations would not apply to the refiling of her case.

After respondent closed his office, Client D had difficulty locating him. When she did locate him, respondent reassured her that her case would go to court.

Client D filed a complaint with the Commission. She was unable to obtain her file from respondent.

A Notice of Full Investigation was sent by certified mail to respondent. The document was returned unclaimed after three attempts at service.

THIRD FORMAL CHARGES

Matter VI

Respondent prepared a will for Client E's husband in 1983. Respondent kept the original will. After her husband passed away in 2001, Client E contacted respondent to obtain the original will. Respondent could not locate the will.

Client E met respondent in Georgetown who took her to a storage warehouse which contained his locked safe. After he was unable to unlock the safe, respondent gave the safe to Client E. Client E took the safe to a locksmith in Myrtle Beach where it was opened. The safe contained 50 or more sealed envelopes, most labeled "Last Will and Testament" with a client's name. Client E's husband's will was not among the documents. Ultimately, the safe and documents were returned to respondent.

A Notice of Full Investigation requiring a thirty day response was served upon respondent. He did not reply.[4]

[4] An Attorney to Protect was appointed and is in the process of returning the original wills to respondent's clients.

Fourth Formal Charges

Matter VII

Client F retained respondent to obtain a divorce. She paid him a fee of approximately $1,000. Although he filed a Summons and Complaint seeking alimony, child support, and other relief, he failed to seek all this relief at the final hearing. Respondent failed to prepare and file the divorce decree.

Client F retained new counsel. The new attorney was unable to locate respondent's file and was required to listen to the taped recording of the family court hearing in order to prepare the final decree.

By letter dated August 13, 2001, the Office of Disciplinary Counsel wrote respondent about this matter, requesting a response in fifteen days. Respondent did not reply. Disciplinary Counsel sent respondent a second letter dated September 1, 2001. Respondent did not reply.

On January 31, 2002, the Notice of Full Investigation was mailed to respondent. Although this notice required a response within thirty days, respondent did not reply.

Matter VIII

A fee dispute complaint was filed by a client against respondent. An agreement was reached wherein respondent would refund $450 to client.

When respondent failed to refund the money within the stated deadline, the Fee Dispute Board notified the Office of Disciplinary Counsel. Disciplinary Counsel notified respondent of the complaint and requested a response within fifteen days. Respondent did not reply. Respondent also failed to respond to the Notice of Full Investigation.

Matter IX

In 1999, Client G hired respondent to represent him in a divorce and child custody case. Respondent failed to fully research his client's case, failed to gather pertinent files and records, and neglected the matter such that the client relinquished his parental rights. Respondent failed to return Client G's telephone calls, failed to take necessary action to enforce Client G's right to visitation, and failed to notify his client that his office was being closed and his telephone number changed.

After considering the testimony and exhibits from the hearing, the Commission on Lawyer Conduct concluded respondent breached the Rules of Professional Conduct (Rule 407, SCACR), specifically Rule 1.15 (failure to safeguard client's property), Rule 1.3 (failure to act with reasonable diligence and promptness in representing a client), Rule 1.4 (failure to keep a client reasonably informed about the status of a matter and comply promptly for requests for information; failure to explain matter to client to extent reasonably necessary to permit client to make informed decisions), Rule 1.1 (failure to represent a client competently), Rule 1.2 (failure to consult with a client as to objectives of representation and means by which they are to be achieved), Rule 1.5 (charged an unreasonable fee), Rule 1.16 (failure to provide reasonable notice of termination of representation), Rule 8.1(a) (knowingly make a false statement of material fact in connection with a disciplinary matter), Rule 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority), Rule 8.4(a) (violated the Rules of Professional Conduct), and Rule 8.4(e) (engaged in conduct that is prejudicial to the administration of justice). In addition, the Commission concluded respondent breached the Rules for Lawyer Disciplinary Enforcement (Rule 413, SCACR), specifically Rule 7(a)(1) (violating the Rules of Professional Conduct), Rule 7(a)(3) (failure to respond to request for appearance before disciplinary authority), Rule 7(a)(5) (engaged in conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute and engaged in conduct demonstrating unfitness to practice law), and Rule 7(a)(6) (violate oath of office).

DISCUSSION

Although this Court is not bound by the Commission's findings, its findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of witnesses. Matter of Moore, 329 S.C. 294, 494 S.E.2d 804 (1997); Matter of Yarborough, 327 S.C. 161, 488 S.E.2d 871 (1997). Nonetheless, the Court may make its own findings of fact and conclusions of law. Id. A disciplinary violation must be proven by clear and convincing evidence. Id.

We conclude the record establishes by clear and convincing evidence that respondent engaged in numerous acts of misconduct. On several occasions, respondent failed to handle client matters diligently and competently, failed to adequately communicate with clients, and failed to respond to requests for information from the Office of Disciplinary Counsel. Respondent failed to appear at the hearing before the Subpanel. In addition, he lied to a client about the filing of a legal document and prepared a fictitious document to bolster his misrepresentation. Respondent misplaced a client's original will and then gave a third party unfettered access to other clients' confidential documents. Finally, respondent charged a client a fee which was in excess of the hourly rate agreed upon in the written retainer.

We find that respondent's misconduct warrants disbarment. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. In addition, respondent is ordered to pay the costs of the disciplinary proceeding ($563.60). This amount shall be remitted to the Commission on Lawyer Conduct in accordance with Rule 413, SCACR.

DISBARRED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

RE: Amendments to Rule 410(e), SCACR

O R D E R

Pursuant to Art. V, § 4, of the South Carolina Constitution, Rule 410(e) is amended by requiring that address changes be sent to the Secretary of the South Carolina Bar at the Bar's address and by adding a section defining a member's address to include that member's e-mail address. As amended Rule 410(e) will read as follows:

> (e) Enrollment of Members. Every person admitted to the practice of law in South Carolina shall, within sixty (60) days after admission, register with the Secretary of the South Carolina Bar. Registration shall be made on a form provided by the South Carolina Bar.
>
> It shall be the responsibility of all members of the Bar to promptly notify the Secretary of the South Carolina Bar, at the South Carolina Bar's address, of any change of address. The member's address which is on file with the South Carolina Bar shall be the address which is used for all purposes of notifying and serving the member.
>
> For purposes of this section, member address information shall include the current e-mail address for any member wishing to practice in the Unified Court System.

These Amendments shall become effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 22, 2003

The Supreme Court of South Carolina

RE: Amendment to Rule 402, SCACR.

O R D E R

Pursuant to Art. V, § 4 of the South Carolina Constitution, Rule 402(k), the Oath of Office for Attorneys, is amended to read as attached. This Rule change is effective immediately and all attorneys in the State will be expected to take the amended oath. Continuing Legal Education opportunities will be offered around the State to discuss the content of the new oath and to administer it to those who have already been admitted to the Bar.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 22, 2003

Lawyer’s Oath

I do solemnly swear (or affirm) that:

I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been appointed, and that I will, to the best of my ability, discharge those duties and will preserve, protect and defend the Constitution of this State and of the United States;

I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them;

To my clients, I pledge faithfulness, competence, diligence, good judgment and prompt communication;

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

I will not pursue or maintain any suit or proceeding which appears to me to be unjust nor maintain any defenses except those I believe to be honestly debatable under the law of the land, but this obligation shall not prevent me from defending a person charged with a crime;

I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the judge or jury by a false statement of fact or law;

I will respect and preserve inviolate the confidences of my clients, and will accept no compensation in connection with a client's business except from the client or with the client's knowledge and approval;

I will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice;

[So help me God.]

The Supreme Court of South Carolina

RE: Adoption of Judge's Oath

O R D E R

Pursuant to Art. V, § 4 of the South Carolina Constitution, the attached Oath of Office for Judges is hereby adopted. All new justices and judges shall be administered this oath, and justices and judges who have already taken an oath of office will be administered this new oath at statewide meetings of the various branches of the judiciary.

This order is effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 22, 2003

Judge's Oath

I do solemnly swear (or affirm) that:

I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been appointed, and that I will, to the best of my ability, discharge those duties and will preserve, protect and defend the Constitution of this State and of the United States;

I pledge to uphold the integrity and independence of the judiciary;

I pledge, in the discharge of my duties, to treat all persons who enter the courtroom with civility, fairness, and respect;

I pledge to listen courteously, sit impartially, act promptly, and rule after careful and considerate deliberation;

I pledge to seek justice, and justice alone;

[So help me God.]

The Supreme Court of South Carolina

In the Matter of John Plyler Mann, Jr., Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, because he has been charged with the serious crimes of second degree burglary and Peeping Tom.

IT IS ORDERED that that the petition is granted and respondent is suspended from the practice of law in this State until further order of this Court.

s/ Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina

October 24, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Karl Albert Overcash, III, Appellant,

v.

South Carolina Electric & Gas Company, Respondent.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 3667
Heard June 11, 2003 – Filed July 21, 2003
Withdrawn, Substituted and Re-filed October 17, 2003

REVERSED and REMANDED

F. Patrick Hubbard and Fred Walters, both of Columbia, for Appellant.

John M. Mahon, Jr., Robert A. McKenzie, and Gary H. Johnson, all of Columbia, for Respondent.

HOWARD, J.: Karl Albert Overcash, III, brought this private action for public nuisance against South Carolina Electric & Gas Company ("SCE&G"), seeking damages for personal injuries he sustained when the boat he was operating collided with a wooden dock constructed across a portion of Lake Murray. Overcash alleges the dock constituted a public nuisance and his "special" personal injuries give rise to a private cause of action. The circuit court disagreed and granted SCE&G's motion to dismiss Overcash's claim for failure to allege facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure. We reverse and remand.

FACTS/PROCEDURAL HISTORY

The pertinent facts alleged in Overcash's Complaint may be fairly summarized as follows. SCE&G was the owner and project manager of the hydroelectric facility commonly know as Lake Murray. Lake Murray is a navigable body of water within the applicable statutory definition.[1]

In 1964, Sarah and Crawford Clarkson purchased property on Lake Murray. They constructed a 250-foot long-wooden dock from their property to a small island located over 100 yards away. SCE&G allowed the dock to be built, deeded the island to the Clarksons reserving the sole right to enforce covenants to prevent a nuisance or dangerous condition, and granted a post-construction permit for the dock.

As part of its obligations to the Federal Energy Regulatory Commission ("FERC"), SCE&G conducted periodic, routine inspections of the Lake

[1] See S.C. Code Ann. § 49-1-10 (1987) ("All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to citizens of the United States, without any tax or impost therefor, unless such tax or impost be expressly provided for by the General Assembly . . . .")

Murray shoreline for the purpose of identifying structures built in violation of FERC requirements. SCE&G had actual or constructive knowledge the Clarksons' dock existed and constituted an unlawful obstruction of the navigable waterway.

On the night of July 17, 1999, Overcash was traveling home by boat from his job at Lake Murray Marina. His boat collided with the dock and he was thrown forward and sustained severe personal injuries.

Overcash brought this action seeking damages against SCE&G for the injuries he sustained, alleging, among other things, statutory and common law public nuisance. SCE&G moved to dismiss Overcash's public nuisance cause of action pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure, arguing: 1) a private cause of action for public nuisance does not exist pursuant to South Carolina Code Annotated section 49-1-10 (1987); and 2) personal injuries are not "special injuries" and thus cannot be the basis for a private action for public nuisance. The circuit court agreed, and Overcash appeals.

STANDARD OF REVIEW

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, must be based solely on the allegations set forth on the face of the complaint. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Washington v. Lexington County Jail, 337 S.C. 400, 404, 523 S.E.2d 204, 206 (Ct. App. 1999); McCormick v. England, 328 S.C. 627, 632-33, 494 S.E.2d 431, 433 (Ct. App. 1997). "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Therefore, pleadings in a case should be construed liberally and the trial court and this Court must presume all well pled facts to be true so that substantial justice is done between the parties. See Justice v. Pantry, 330 S.C. 37, 42, 496 S.E.2d 871, 874 (Ct. App. 1998).

DISCUSSION

I. Statutory Cause of Action

Overcash argues the circuit court erred by holding section 49-1-10 does not provide a private, statutory cause of action for public nuisance. We agree, as we believe our decision is controlled by our supreme court's holding in Drews v. E.P. Burton & Co., 76 S.C. 362, 57 S.E. 178 (1907).

In Drews, the plaintiff alleged injuries resulting from the defendant's obstruction of a navigable stream. At the close of the plaintiff's case, the defendant moved for nonsuit, arguing the plaintiff failed to produce evidence of negligence. The circuit court denied the motion but charged the jury that it must find negligence to award damages to the plaintiff. The jury subsequently returned a verdict for the plaintiff and awarded damages.

The defendant appealed, arguing the plaintiff failed to prove negligence and thus could not sustain a cause of action for obstruction of a navigable stream.

Our supreme court ruled the plaintiff was not required to demonstrate negligence to state a cause of action. Rather, the complaint appropriately alleged two causes of action – one for negligence and one for public nuisance. Consequently, the court ruled that notwithstanding the circuit court's erroneous jury charge "in so far as it related to the cause of action based upon nuisance, [the error] was . . . favorable to the . . . [defendant]," and thus did not prejudice the defendant.

More specific to our analysis here, the court stated, "[w]hen a person sustains a special injury . . . arising from the obstruction of a navigable stream, he is entitled to recover damages, on the ground that such obstruction

constitutes a nuisance . . . [pursuant to section 1335 of the Civil Code of 1902], as well as at common law." 76 S.C. at 366, 57 S.E. at 178.[2]

Section 1335 provided in pertinent part, "if any person shall obstruct [a navigable water course], . . . such person shall be deemed guilty of nuisance, and such obstruction may be abated as other public nuisances are by the laws of this State." Similarly, section 49-1-10 provides, "[i]f any person shall obstruct any [navigable water course], . . . such person shall be guilty of a nuisance and such obstruction may be abated as other public nuisances are by law."

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).

II. Personal and Special Injuries

Overcash argues personal injury constitutes direct and special injury, and the trial court erred in holding that a plaintiff who suffers personal injury from colliding with a public nuisance blocking a public right of way does not have a right to recover damages for that injury, either at common law or pursuant to statute. We agree.

The argument is deceptively simplistic in its phrasing. However, neither this Court nor our supreme court have had occasion to rule on the

[2] See Taylor v. Lexington Water Provider Power Co., 165 S.C. 120, 120, 163 S.E. 137, 140 (1932) (quoting Drews).

precise question of whether personal injury, standing alone, constitutes the type of "special" or "particular" injury necessary to maintain a private action for public nuisance in South Carolina. Likewise, no reported decision expressly determines whether, as found by the circuit court, some property right must be injured in conjunction with a personal injury so that a personal injury may serve as a harm sufficient to allow a private action for public nuisance. Finally, no reported decision specifically determines whether the danger of colliding with an obstruction erected in a public waterway is a different type of harm from that presented to the general public.

To properly address these inquiries we find it necessary to explore the historic development and application of nuisance law in this state, both generally and particularly as it concerns a private right of action for public nuisance. In doing so, we venture, with some amount of consternation, into what Dean William Prosser fittingly referred to as the "impenetrable jungle . . . which surrounds the word 'nuisance.'" W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser & Keeton on Torts § 86 at 616 (5th ed., West 1984).

A. Historical Overview

In part, the mystery surrounding the common law of nuisance arises because, although the word "nuisance" literally means nothing more than harm, injury, inconvenience, or annoyance, the term has at times meant "all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach in a pie." Id. (footnote omitted).

Modern American public nuisance law is traceable to the medieval English criminal writ of "purpresture." See 4 William Blackstone, Commentaries on the Laws of England 167 ("Where there is a house erected, or an enclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a purpresture."). At the time of its emergence, purpresture was not a tort but rather a criminal remedy for infringement on the rights of the Crown (or general public), and was enforceable solely by indictment

brought pursuant to the police powers of the sovereign. Keeton, Prosser & Keeton on Torts, § 86 at 617.[3]

The concept of a mutual sovereign and public right to seek redress beyond criminal sanctions for interference with the rights of the general public emerged in Sixteenth Century England with a line of cases "recogniz[ing] that a private individual who had suffered special damage might have a civil action in tort for the invasion of the public right." Id. at 618 n.14. Seminal among the cases credited with contributing to the development of both the "special injury rule" and the less stringent "different in degree rule" is an "anonymous" 1536 King's Bench decision. Y.B. Mich. 27 Hen. 8, f. 26, pl. 10 (1536). The 1536 case involved an unnamed plaintiff who alleged the defendant obstructed the King's highway in an attempt to prevent the plaintiff from traveling from his house to his fields. In a one-sentence opinion, Chief Justice Bladwin, writing for the majority, concluded the plaintiff could not maintain the action:

> It seems to me that this action does not lie to the plaintiff for the stopping of the highway; for the King has the punishment of that, and he has his plaint in the [criminal court] and there he has his redress, because it is a common nuisance to all the King's [subjects], and so there is no reason for a particular person to have an [action on his case]; for if one person shall have an action by this, by the same reason every person shall have an action, and so he will be punished a hundred times on the same case.

[3] Although the common law of private nuisance found its parentage at the same time, it springs from entirely different legal roots. The assize of nuisance, introduced in thirteenth century England, was a criminal writ affording incidental civil relief as redress for conduct on one person's land resulting in the invasion of the land of another. The assize of nuisance eventually gave way to the action on the case for nuisance, which remedy addressed only interference with the use or enjoyment of land. Keeton, Prosser & Keeton on Torts, § 86 at 617.

Id., quoted as translated in Denise E. Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 Ecology L.Q. 755 (2001). In a brief but ultimately significant dissent, Justice Fitzherbert opined:

> I agree well that each nuisance done in the King's highway is punishable in the [criminal court] and not by an action, unless it be where one man has suffered greater hurt or inconvenience than the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of his special hurt.

Id. (Fitzherbert, J., dissenting). Thereafter, Justice Fitzherbert set forth the following hypothetical which has become legendary in the labyrinthine path leading to the modern special injury rule:

> If one makes a ditch across the highway, and I come riding along the way in the night and I and my horse are thrown into the ditch so that I have great damage and displeasure thereby, I shall have an action here against him who made this ditch across the highway, because I have suffered more damage than any other person. So here the plaintiff had more convenience by this highway than any other person had, and so when he is stopped he suffers more damage because he has to go to his close. Wherefore it seems to me that he shall have this action *pour ce special matiere* [for the special matter], but if he had not suffered greater damage than all other suffered, then he would not have the action.

Id. As Prosser noted centuries later: "It was Fitzherbert who was followed; and with this decision the crime of public nuisance became also a tort in any instance in which the plaintiff could show damage which was particular to him and not shared in common with the rest of the public." William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1005 (1966) (footnote omitted).

B. Modern Development

Similar to English courts, American courts, including South Carolina, continue to employ a broad definition of the term nuisance.

'Nuisance' has . . . variously been defined as –

- conduct that is either unreasonable or unlawful and causes annoyance, inconvenience, discomfort, or damage to others.
- that which unlawfully annoys or does damage to others.
- anything that works injury, harm or prejudice to an individual or the public.
- anything which works hurt, inconvenience, or damage on another.
- anything which works or causes injury, damage, hurt inconvenience, annoyance, or discomfort to one in the legitimate enjoyment of his or her reasonable rights of person or property.
- anything which causes a well-founded apprehension of danger.
- anything that essentially interferes with the enjoyment of life or property.
- something that is offensive, physically, to the senses, and which, by such offensiveness, makes life uncomfortable.

58 Am. Jur. 2d Nuisances § 1 (2002).

While numerous distinguishing considerations exist regarding what generally constitutes a nuisance, American courts distinguish between private and public nuisances in the same manner as was historically employed under English common law. "The difference between public and private nuisance does not consist in any difference in the nature or character of the nuisance itself, but only in the degree, that is, in the extent or scope of its injurious effect." Id. at § 31 (footnotes omitted). "[A] public nuisance affects the

public at large, while a private nuisance affects one or a limited number of individuals only. In other words, to be considered public, the nuisance must affect an interest common to the general public." Id. at § 32 (footnote omitted).

In South Carolina, "[a] public nuisance exists whenever acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights." State v. Turner, 198 S.C. 487, 495, 18 S.E.2d 372, 275 (1942). Further, to be deemed public, the nuisance must affect a number of people. See Morton v. Rawlison, 193 S.C. 25, 32, 7 S.E.2d 635, 638 (1940) (holding "[a] public nuisance must be in a public place or where the public frequently congregate"); State v. Rankin, 3 S.C. 438, 447 (1872) ("Whether it be one or the other [public or private] depends upon the extent of its existence."); but cf. Bowlin v. George, 239 S.C. 429, 434-35, 123 S.E.2d 528, 531 (1962) ("[A] nuisance may effect a considerable number of persons in the same manner and yet not be a public nuisance." (quoting Woods v. Rock Hill Fertilizer Co., 102 S.C. 442, 450-51, 86 S.E. 817, 820 (1915))).

Besides the common law governing what constitutes a nuisance, certain conduct is statutorily prohibited in South Carolina such that a violation of the statute constitutes a nuisance. See, e.g., S.C. Code Ann. § 49-1-10 (1987) (providing, in part, "[i]f any person shall obstruct any such stream, otherwise than as in Chapters 1 to 9 of this Title provided, such person shall be guilty of a nuisance and such obstruction may be abated as other public nuisances are by law").

Conforming to the development of English common law, American courts have universally held a public nuisance affecting a purely public right gives no right of action to an individual unless the individual has suffered some particular or special damage. Keeton, Prosser & Keeton on Torts, Nuisance § 90 at 646. Thus, where such a special damage exists, the right of the injured individual to bring a tort action for nuisance subsists separately from the right of public officials to bring civil actions for nuisance, and of states to bring criminal actions against nuisance perpetrators. 58 Am. Jur. 2d Nuisances § 35 (2002).

C. The Special Injury Rule

Having universally adopted the general concept that special injuries will support private rights of action for special damages, American courts have found it an entirely more difficult task to determine what constitutes "special" or "particular" damage sufficient to support the private tort action for public nuisance. Courts have held a private individual may establish standing to bring an action for public nuisance merely by having sustained an injury in fact, and the concerns regarding a multiplicity of suits are satisfied by any means, such as by way of a class action. See Akau v. Olohana Corp., 652 P.2d 1130 (1982). A separate and antiquated view holds it is sufficient to show one's injury is different in degree only. See Carver v. San Pedro, L.A. & S.L.R. Co., 151 F. 344 (C.C.S.D. Cal. 1906). However, most jurisdictions, including South Carolina, adhere to the view that the plaintiff in such an action must establish damages different in kind, not degree, from the damage shared by the general public stemming from the exercise of the same rights. See generally Huggin v. Gaffney Dev. Co., 229 S.C. 340, 92 S.E.2d 883 (1956); Brown v. Hendricks, 211 S.C. 395, 45 S.E.2d 603 (1947); 66 C.J.S. Nuisances §§ 2, 76, 78-79 (1998); Restatement (Second) of Torts, § 821C (1979).

Although it is clear an individual plaintiff seeking to bring a tort suit for public nuisance in South Carolina must establish a special injury which is different in kind, not merely in degree from that of the general public, we are yet faced with the additional challenge of determining the more particular matter of what constitutes an injury different in kind from the injury suffered by the general public in the case of an obstruction of a public waterway.

Only a limited body of South Carolina case law exists which even tangentially discusses the issue now before us. Unlike other jurisdictions, South Carolina has no bright-line rule indicating "[p]ersonal injuries are sufficient to show an individual's peculiar injury as required to maintain an action for public nuisance," or stated differently, "[i]njuries to a person's health are by their nature special and peculiar for the purposes of maintaining such an action." 58 Am. Jur. 2d Nuisances § 252 (2002); see also

Restatement (Second) of Torts § 821C ("When the public nuisance causes 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."); Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. at 1012 ("[T]here can now be no doubt that the nuisance action can be maintained where a public nuisance causes physical injury."); see, e.g., Breeding v. Hensley, 519 S.E.2d 369 (Va. 1999) (allowing award for personal injuries resulting from bicyclist's collision with trash dumpster left by city workers to obstruct public roadway); Gilmore v. Stanmar, Inc., 633 N.E.2d 985 (Ill. App. Ct. 1994) (holding injuries sustained by motorist, who was injured in collision caused by pedestrian canopy extending into street, were different in kind from those of the general public); City of Evansville v. Rinehart, 233 N.E.2d 495 (Ind. App. Ct. 1994) (upholding award of damages in public nuisance action against city for injuries minor received by falling in a ditch, cutting his knee, which then became infected because of germs in contaminated waters of ditch); Erickson v. Sorenson, 877 P.2d 144 (Utah Ct. App. 1994) (upholding award of damages for personal injuries in public nuisance action sustained due to sign left for protection of worker at road construction site held recoverable in public nuisance suit); Nash v. Schultz, 417 N.W.2d 241 (Iowa Ct. App. 1987) (upholding award of damages in public nuisance action where woman sustained personal injuries when she tripped and fell over sump pump hose left lying across sidewalk); Guy v. State, 438 A.2d 1250 (Del. Super. Ct. 1981) (holding when tall growths of corn and other vegetation obstructing view of intersection were a public nuisance, injuries arising from automobile accident were different in kind from injury to general public); Flaherty v. Great N. Ry. Co., 16 N.W.2d 553 (Minn. 1944) (holding injuries sustained due to obstruction of roadway by railroad train or automobile held distinct from interference with the public right of travel); Downes v. Silvia, 190 A. 42 (R.I. 1937) (reversing grant of demurrer where plaintiff sustained injuries after encountering unguarded excavation site on private property very near highway); Hammond v. Monmouth County, 186 A. 452 (N.J. 1936) (allowing recovery for personal injuries when truck encountered unlighted and unguarded excavation site); Baker v. City of Wheeling, 185 S.E. 842 (W. Va. 1936) (holding pedestrian injured by falling into an unguarded declivity below the end of a blind alley could maintain an action for public nuisance).

D. Overcash's Special Injury

In this case, the circuit court found Overcash's accident did not constitute an injury different in kind from that suffered by the general public. In support of this view, the circuit court reasoned, and SCE&G argues on appeal "all who forcefully collide with an obstruction face the prospect of personal injury whether the obstruction is on a public highway or navigable stream." We find this rationale untenable.

In Drews, 76 S.C. at 366-67, 57 S.E. at 178, our supreme court expressly determined, when the obstruction of a public waterway was a nuisance, damage to the plaintiff's boat arising from a collision with the obstruction constituted a "special injury" sufficient to maintain a tort action for nuisance. In so holding, the court held the damages sustained in the collision were a special injury to Drews and not a general injury to the public. As we view this decision, the injury common to both Drews and the public was the inconvenience resulting from the obstruction of the right of way. The sheer possibility a boater might collide with the obstruction did not render it a nuisance. Rather, its mere presence in the public waterway constituted the public nuisance because it interfered with the public right to travel unobstructed along the waterway. Id.

Applying this interpretation to the instant case, we hold the circuit court erred in finding Overcash's injuries were not different in kind from those of the general public. We can discern no meaningful distinction between the essential reasoning in Drews and the reasoning applicable to the facts and circumstances as alleged in this case. Applying the Drews analysis, the public is "injured" by the creation of the illegal obstruction in the public waterway, and Overcash sustained injuries of a wholly different kind when he collided with the dock.[4]

[4] We do not suggest that a personal injury will always be sufficient to meet the requirements of the special injury rule. For example, if the public nuisance complained of were the sort of nuisance that by its very nature endangers the public health, then a plaintiff injured by the nuisance would

Moreover, we find the discussion in Carey v. Brooks, 19 S.C.L. (1 Hill) 146, 147-48 (Ct. App. 1833), both instructive and compelling.

> But if by such nuisance, the party suffer a particular damage, as if by stopping up a highway with logs, &c. [sic] his horse throws *him*, by which *he is wounded or hurt*, an action lies. [B]ut 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 [a damage to a property interest], *or some corporal hurt in falling into a trench on the highway* [a personal injury], &c. [sic].

(Emphasis added) (internal quotations omitted). Clearly, in Carey, the court contemplated the precise situation we face in this case. We see no reason to ignore the clear example provided by the court. Furthermore, the court's reasoning is sound. In the Carey court's hypothetical, the public nuisance would be the blocking of the highway with logs, causing each and every member of the public to be delayed. The special injury would be caused if the traveler's horse threw him into the roadside ditch. Likewise, in the present case, the public nuisance was created by building a dock across a navigable waterway, causing each and every member of the public to be

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likely suffer injury of the same kind as the public in general. See, e.g., Ventro v. Owens-Corning Fiberglass Corp, 99 Cal. Rptr. 350 (Cal App. 1971) (holding, in an air pollution case, where the pollution is the public nuisance itself, a personal injury of the same type caused by the mere existence of the nuisance is insufficient to sustain a cause of action); Page v. Niagra Chem. Div. of Food Machinery & Chem. Corp., 68 So.2d 382 (Fla. 1953) (same).

delayed while traveling in Lake Murray. The special injury arose when Overcash struck the dock and was injured.

We further conclude the circuit court erred in ruling an injury not incidental to a property interest will not support a private action for a public nuisance. The circuit court correctly noted South Carolina public nuisance cases addressing the issue of special injury have largely been predicated on injury either directly to property or incidental to a property interest. However, the circuit court misinterpreted these cases when it concluded they limit recovery in nuisance solely to injury to property.

In its order, the circuit court cited Crosby v. S. Ry. Co., 221 S.C. 135, 69 S.E.2d 209 (1952) for the proposition that "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." However, the plaintiff's cause of action in that case was founded on the allegation that the public nuisance caused a diminution in the value of his land. Id. at 138-39, 69 S.E.2d at 210-11. Naturally, it follows that the asserted injury different in kind from that of the general public would necessarily involve the plaintiff's property rights. Id. However, nothing in Crosby or any other authority cited by either the circuit court or SCE&G indicates an injury different in kind can exist *only* in the case of an injury to a property interest.

In this regard, SCE&G posits Teague v. Cherokee County Mem. Hosp., 272 S.C. 403, 405, 252 S.E.2d 296, 297 (1979), overruled on sovereign immunity grounds by McCall ex rel Andrews v. Batson, 285 S.C. 243, 247, 329 S.E.2d 741, 743 (1985) for the proposition that South Carolina does not recognize a private action founded upon public nuisance when only a personal injury results.

In Teague, the plaintiff brought an action based in negligence for injuries she sustained when the heel of her shoe caught in a hole in a stairway of a public hospital. When the trial court granted a demurrer to the complaint based on sovereign immunity, she re-pled her action as one in nuisance. The trial court again granted a demurrer on the grounds of sovereign immunity

because no allegation of interference with the use of or any damage to private property, a necessary element of private nuisance, existed in the complaint. On appeal, the plaintiff argued her action was sustainable as a private action for personal injuries arising out of a public nuisance.

Our supreme court noted previous decisions had stripped governmental immunity from the sovereign if the danger causing the harm was in fact a nuisance, but noted this rule had never been extended to a claim for personal injuries or death. Speaking of an action for private nuisance, the court noted "[t]his position, while admittedly the minority view, is consistent with the basic rationale upon which the nuisance exception originated, namely as an action to recover for interference with the use or enjoyment of rights in land." Id. at 405, 252 S.E.2d at 297. The court then stated: "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." Based upon these observations, SCE&G argues the Teague Court refused to recognize a cause of action for personal injuries arising out of a public nuisance. We disagree with this analysis.

The Teague Court noted that on appeal the plaintiff portrayed her private cause of action as one for special injuries suffered as a result of a public nuisance. However, the court concluded "[e]ven if the condition of the hospital stairs rose to the dignity of a nuisance, either public or private, which is tenuous at best, the basis of the appellant's claim would still have to rest upon the negligence of the hospital and would require suing the hospital in a tort action, which would find no authorization under our statutes." Id. at 406, 252 S.E.2d 298. Thus, the court ruled the action was barred by the doctrine of sovereign immunity.

Significantly, in reaching this conclusion, the court referred to Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. at 1003-05, in which Prosser noted the basis for liability for public nuisance recognized by the courts has been either the violation of a statute, as is alleged by Overcash in this case, *or* on any one of the three traditional tort bases: intent, negligence or strict liability. 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. We do not consider this dictum to be controlling, but in any event, we do not interpret the ruling to rest on a conclusion that special injury will sustain an action for public nuisance only if it involves damage to property interests.

In the absence of any applicable authority limiting special injuries solely to injuries to property interests, we decline to interpret the South Carolina caselaw to restrict a private cause of action for public nuisance to special property damage claims.

CONCLUSION

For the foregoing reasons, the circuit court's order dismissing Overcash's cause of action for public nuisance is reversed and the case remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

STILWELL and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mary M. Slack and Stephen H. Slack, Respondents,

v.

Lonnie James and Shannon James, Appellants.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3686
Heard September 9, 2003 – Filed October 27, 2003

REVERSED AND REMANDED

Stanley Clarence Rodgers, of Charleston, for Appellants.

Richard S. Rosen, and Daniel F. Blanchard, III, both of Charleston, for Respondents.

GOOLSBY, J.: Mary and Stephen Slack ("Sellers") filed a complaint against Lonnie and Shannon James ("Buyers") concerning a real estate contract. Buyers appeal from the circuit court's order dismissing and striking their counterclaims. We reverse and remand.

FACTS

When we view the facts as alleged in the pleadings in the light most favorable to the Buyers, the pleadings show Sellers and Buyers, each represented by real estate agents, entered into a written contract for the sale of Sellers' home for $1,208,000.00. The sales contract includes the following provisions, which we quote only in part:

> **14. ENCUMBRANCES AND RESTRICTIONS.** Buyer agrees to accept property subject to: . . . restrictive covenants and easements of record, provided they do not materially affect [the] present use of said property.
>
> **21. ENTIRE AGREEMENT.** This written instrument expresses the entire agreement, and all promises, covenants, and warranties between the Buyer and Seller. . . . Both Buyer and Seller hereby acknowledge that they have not received or relied upon any statements or representations by either Broker or their agents which are not expressly stipulated herein.

After entering into the contract, Buyers hired an attorney to handle the closing. In conducting a title examination of the property, the title examiner informed Buyers' attorney that there was a permanent four-inch sewer easement across the property. The sewer line easement materially affects the present use of the property. At this point, Buyers refused to purchase the property. Prior to entering into the written contract, Buyers had asked Sellers' real estate agent "whether there were any easements on the property" and the agent indicated none existed.

Sellers filed a complaint against Buyers alleging breach of contract and seeking (1) specific performance, (2) actual damages, and (3) forfeiture of earnest money deposit and/or liquidated damages. Buyers filed an answer asserting a general denial and a counterclaim for breach of contract. Sellers

then filed an amended complaint alleging the same cause of action and seeking the same relief as the original complaint. Buyers filed an answer and asserted the following counterclaims: (1) breach of contract, (2) fraud, (3) negligent misrepresentation, and (4) violation of the South Carolina Unfair Trade Practices Act (UTPA).[1]

Sellers filed a motion to dismiss or to strike Buyers' counterclaims pursuant to Rules 12(b)(6) and 12(f), SCRCP.

Based on the parol evidence rule and the merger doctrine, the circuit court partially struck from Buyers' breach of contract counterclaim four allegations of oral statements made prior to the parties' contract that are also realleged by reference in the fraud and negligent misrepresentation causes of action. The court then dismissed Buyers' fraud, negligent misrepresentation, and UTPA counterclaims, finding Buyers failed to exercise reasonable care to protect their interests and had no right to rely on the alleged misrepresentation by Sellers' agent. The circuit court denied Buyers' subsequent motion to alter or amend, pursuant to Rule 59(e), SCRCP.

STANDARD OF REVIEW

In deciding whether the circuit court properly granted the motion to dismiss under Rule 12(b)(6), SCRCP, this court must consider whether the complaint, when viewed in the light most favorable to the plaintiff, states any valid claim for relief.[2] A motion to dismiss "should not be granted if 'facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.'"[3] The circuit court's ruling on a motion to strike will not be reversed absent an abuse of discretion.[4]

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[1] S.C. Code Ann. §§ 39-5-10 to -560 (Supp. 2002).

[2] Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999) (quoting Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)).

[3] Id.

[4] Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

LAW/ANALYSIS

Buyers argue the circuit court erred in dismissing their counterclaims for fraud and negligent misrepresentation. Specifically, Buyers argue the court erred in finding they acted unreasonably in relying upon an oral representation whose falsity could have been ascertained by a title examination of the property.

The recipient of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have discovered its falsity through investigation.[5] "The person committing the fraud cannot defeat a claim for misrepresentation simply because the person defrauded is charged with notice under a recording statute, particularly where the misrepresented facts are peculiarly within the representor's knowledge."[6] The purpose of the recording act is to protect one who buys a recorded title against one who acquires a paper title but fails to record it. The recording act is not intended to protect a seller who makes a false or misleading statement.[7]

We think this case falls squarely within our holding in Reid v. Harbison Development Corporation.[8] Once Sellers' real estate agent made a statement about the lack of an easement on the property, Buyers were justified in relying upon the truth of the statement.[9] While Buyers could have ascertained the existence of the easement through investigation of public records, they were not required to investigate the public record to assert a tort

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[5] Reid v. Harbison Dev. Corp., 285 S.C. 557, 560, 330 S.E.2d 532, 534 (Ct. App. 1985), aff'd in part, 289 S.C. 319, 345 S.E.2d 492 (1986) (citing Restatement (Second) of Torts § 540 (1979)).

[6] Id. at 561, 330 S.E.2d at 534.

[7] Restatement (Second) of Torts § 540, cmt. b (1977).

[8] Reid v. Harbison Dev. Corp., 285 S.C. 557, 330 S.E.2d 532 (Ct. App. 1985), aff'd in part, 289 S.C. 319, 345 S.E.2d 492 (1986).

[9] See Harrington v. Mikell, 321 S.C. 518, 523, 469 S.E.2d 627, 629 (Ct. App. 1996) ("Generally, a broker has a duty to avoid fraudulent conduct and misrepresentation.").

claim for fraud or negligent misrepresentation later on.[10] The question of whether Buyers could reasonably rely on the statement at issue in view of the information entered upon the public record is for a jury, not the court, to determine.

The circuit court erred, therefore, when it found Buyers acted unreasonably as a matter of law in relying upon the misrepresentation.

Regarding the merger and disclaimer provisions in the contract, they likewise afford no protection to Sellers to the counterclaims asserted against them for fraud and negligent misrepresentation.[11]

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[10] See Reid, 285 S.C. at 561, 330 S.E.2d at 534.

[11] See Allen-Parker Co. v. Lollis, 257 S.C. 266, 272-73, 185 S.E.2d 739, 742 (1971) ("Even specific provisions or stipulations in a contract providing in effect for immunity from or nullification or waiver of preliminary or extraneous misrepresentations in connection with the contract are generally ineffective, and do not prevent a subsequent assertion of the misrepresentations as a basis for fraud."); Robert E. Lee & Co. v. Comm'n of Pub. Works, 248 S.C. 84, 90, 149 S.E.2d 55, 58 (1966) (holding a contractor was entitled to rely upon a representation and an owner's responsibility under it was not overcome by disclaimer clauses); Aaron v. Hampton Motors, Inc., 240 S.C. 26, 30, 124 S.E.2d 585, 586 (1962) (affirming a jury verdict in an action for fraud and deceit based on a rollback of the speedometer mileage despite a provision in the sales contract that stated, "It is further understood and agreed that the seller . . . makes no representation or guarantee as to correctness of speedometer mileage shown on car . . ." and also upholding the trial court's refusal to grant a directed verdict and judgment notwithstanding the verdict based on the contention that negotiations leading up to the sale of the automobile merged into the written agreement of sale); F. Hubbard and R. Felix, The South Carolina Law Of Torts 344 (2d ed. 1997) ("Since fraud is a tort claim challenging the basis of a contractual undertaking, contractual defenses like disclaimers are not a defense to a fraud claim."); 37 Am. Jur. 2d Fraud and Deceit § 324 (2001) ("[F]raud in the inducement, or fraud in preliminary negotiations, to a written contract is not ordinarily merged in the contract so as to preclude an action for the fraud."); MacFarlane v. Manly,

CONCLUSION

Based upon the foregoing, the circuit court's order dismissing Buyers' counterclaims for fraud and negligent misrepresentation and striking allegations of oral statements made prior to the parties' contract so far as they are realleged by reference in these two counterclaims is

REVERSED AND REMANDED.

HUFF and BEATTY, JJ., concur.

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274 S.C. 392, 264 S.E.2d 838 (1980) (holding an "as is" clause in a contract of sale of real estate does not constitute an absolute defense to an action for fraud and deceit).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mary Livingston a/k/a Marie Livingston, Appellant,

v.

Town of Mt. Pleasant, Respondent.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 3687
Heard September 9, 2003 – Filed October 27, 2003

AFFIRMED

George J. Morris, of Charleston, for Appellant.

J. Paul Trouche and Thomas S. White, both of Charleston, and R. Allen Young, of Mt. Pleasant, for Respondent.

GOOLSBY, J.: This appeal concerns whether a parcel of property owned by Mary Livingston is subject to a special assessment that was imposed by the Town of Mt. Pleasant to fund the widening and improvement

of Patriots Point Boulevard. The assessment was adopted pursuant to the Municipal Improvement Act of 1999.[1] The circuit court upheld the assessment, and Livingston appeals. We affirm.

FACTS

Mary Livingston[2] owns a parcel of property adjoining Patriots Point Boulevard in the Town of Mt. Pleasant. In May 2001, the Town Council of Mt. Pleasant adopted a resolution creating the Patriots Point Improvement District to implement the Patriots Point Improvement Plan. The Improvement Plan involved widening and redesigning Patriots Point Boulevard and provided for landscaping, the construction of sidewalks, and the addition of pedestrian and biking trails. The Improvement Plan also contemplated improvements to drainage and to the intersection where Coleman Boulevard meets Patriots Point Boulevard.

The Town Council's resolution anticipated the total cost of the project, as estimated by the Improvement Plan, would be $5,110,000. The Town of Mt. Pleasant was to contribute $1,470,000 and the remaining $3,640,000 was to come from special assessments imposed on the property owners within the District. The vast majority of these assessments were to be from commercial property owners with previous development agreements with Mt. Pleasant. The remainder of the assessments, estimated at only $168,101, was to come from individual, private property owners like Livingston. Livingston's parcel, like that of other members of the District, was undeveloped and commercially zoned. None of the parcels in the District is owner-occupied residential property.

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[1] S.C. Code Ann. §§ 5-37-10 to -180 (Supp. 2002). The Act was originally enacted in 1973 and has been amended several times, most recently by 1999 S.C. Act No. 118, § 2, which was effective June 30, 1999. See German Evangelical Lutheran Church v. City of Charleston, 352 S.C. 600, 576 S.E.2d 150 (2003).

[2] Livingston's first name appears as Marie, instead of Mary, on some documents in the record.

The Town Council based the amount of each property owner's assessment on the ratio of the acreage of the assessed property to the total acreage of all of the assessed properties in the District. The District consisted of nearly 400 acres. Livingston's parcel measured 4.63 acres, and the Town Council calculated her assessment at $46,218 as her pro rata share relative to the total acreage in the District.

The ordinance formally creating the District was enacted on June 25, 2001.[3] The Town Council found that the improvements would be beneficial within the District and encourage development, would preserve or increase property values within the District, and would likely maintain or improve the general welfare and tax base. The Town Council further found it would be fair and equitable to finance all or part of the costs by an assessment.

Livingston appeared at a hearing before the Special Committee of the Town Council to object to the special assessment imposed on her parcel, but the assessment was upheld. Livingston appealed to the circuit court, which affirmed and ordered Livingston to pay her share of the special assessment.

STANDARD OF REVIEW

Appeals regarding assessments "shall be heard and determined on the record in the manner of appeals from administrative bodies in this State."[4] Appeals from administrative bodies are governed by the Administrative Procedures Act (APA), which provides the reviewing court must affirm the agency's decision if it is supported by substantial evidence; further, the court "may not substitute [its] judgment for that of the agency upon questions as to which there is room for a difference of intelligent opinion."[5] "Substantial

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[3] Mt. Pleasant, S.C., Ordinance 01036 (June 25, 1991).

[4] S.C. Code Ann. § 5-37-140 (Supp. 2002).

[5] Byerly Hosp. v. South Carolina State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385-86 (1995); see also S.C.

evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached."[6]

LAW/ANALYSIS

Livingston asserts the circuit court erred in upholding the special assessment against her property because the improvements should have been totally paid for out of the general tax revenue and, even if the improvements were the proper subject of an assessment, the amount of her assessment was not supported by the record.

I.

We first consider Livingston's contention that the improvements should have been paid for out of the general tax revenue.

Normally, taxes are imposed on all property for the maintenance of the government, while assessments are imposed only on the property that is to be benefited.[7] In order to impose an assessment on property for an improvement, the improvement must confer a benefit on the property that is distinguishable from the general benefit enjoyed by surrounding areas.[8]

The Municipal Improvement Act of 1999 authorizes municipalities to establish improvement districts and create improvement plans in order to preserve or increase property values within the district, to prevent deterioration of urban areas, and to preserve the tax base and general welfare

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Code Ann. § 1-23-380(A)(6) (Supp. 2002) (setting forth procedures for appeals under the APA).

[6] McCraw v. Mary Black Hosp., 350 S.C. 229, 235, 565 S.E.2d 286, 289 (2002).

[7] Robinson v. Richland County Council, 293 S.C. 27, 358 S.E.2d 392 (1987).

[8] Id.

of the municipality.[9] An improvement district may be established when it would be fair and equitable to do so and the improvements would confer a special benefit to members of the District.[10]

The municipality is authorized to finance such improvement plans by the imposition of assessments, the issuance of bonds, or any combination of these methods.[11]

It is within the power and discretion of the legislature or, where delegated by statute, to a municipal corporation, "to determine whether the general public or property owners whose property abuts, fronts on, or is adjacent to [ ] a local improvement and is specially benefited[,] at least to the extent [of] the cost thereof[,] shall pay the entire cost thereof, or whether the cost shall be apportioned between the public and such property owners, and, if so, the proportion to be paid by each."[12]

"As a general rule, the courts consider the widening of a street to be of special benefit to the adjacent property so as to constitute a local improvement justifying a special assessment on such property, especially when the widening of the street makes it more attractive for commercial operations."[13] Additionally, where a street widening or improvement has resulted in special benefits to adjacent properties, they can be specially

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[9] S.C. Code Ann. § 5-37-40 (Supp. 2002).

[10] Id.

[11] Id. § 5-37-30; see also German Evangelical Lutheran Church v. City of Charleston, 352 S.C. 600, 576 S.E.2d 150 (2003).

[12] 64 C.J.S. Municipal Corporations § 1271 (1999).

[13] 70C Am. Jur. 2d Special or Local Assessments § 40 (2000).

assessed even though the improvement project will also be of some general benefit to the public.[14]

In the current case, when the Town Council's proposal was first presented to the property owners, the improvement of Patriots Point Boulevard was seen by Town Council representatives as primarily benefiting "users of the Patriots Point area, which includes the Patriots Development Authority property as well as the leased properties from Patriots Point." It was further noted "that 60%-70% of the citizens in the Town would not utilize this road." Moreover, the use of the municipal improvement district was seen as an equitable means by which to improve the road in the area and pay the cost thereof.

In the resolution establishing the Patriots Point Improvement Plan, the Town Council found and determined that it had the power under the Act "to effect improvements within an improvement district to preserve property values, prevent deterioration of urban areas, and preserve their tax bases." The Town Council further found the Improvement Plan "was necessary and in the best interest of the health, safety, and general welfare of the citizens of the Town."

In upholding the establishment of the District, the circuit court found that the Town Council "passed an ordinance to develop Patriots Point Boulevard after finding that this project would increase property values of the members of the District, would protect the tax base of the town, and would encourage development in the District." The court found that "Livingston's property, like that of other members of the District, is an undeveloped parcel, commercially zoned, and fronts on Patriots Point Boulevard" and that "[i]t is reasonable to assume that the improvements contemplated will encourage development in the District and will enhance the value of . . . Livingston's property."

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[14] Wade R. Habeeb, Annotation, Widening of City Street as Local Improvement Justifying Special Assessment of Adjacent Property, 46 A.L.R.3d 127, 141-42 (1972).

The court further found that "it is clear that the decision of Mt. Pleasant to require adjoining property owners to pay a small portion of the total cost of the project is fair and equitable within the meaning of the Municipal Improvement[] Act," especially considering that "Mt. Pleasant itself will pay $1,470,000.00 of the total cost" of the project and private property owners will pay only $168,101.

Under these circumstances and considering the record as a whole, we hold the circuit court did not err in upholding the decision of the Town Council to establish the District. Although reasonable persons could disagree, we find there was no basis for the circuit court to substitute its opinion for that of the Town Council regarding the propriety of establishing the District. As noted by the circuit court, Patriots Point Boulevard is a dead-end road primarily serving commercial business properties located along the boulevard. The primary beneficiaries of any improvement along the road are the adjoining property owners and their portion of the total cost of this rather substantial project is comparatively small. We see no reason, therefore, to disturb the court's ruling.[15]

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[15] See 70C Am. Jur. 2d Special or Local Improvements § 89 (2000) ("[T]he assessment of a portion of the cost of a street improvement on a business district is warranted by the fact that such improvement carries vehicular traffic into the business district on a more direct route."); 64 C.J.S. Municipal Corporations § 1273 (1999) ("The determination as to whether the cost of a public improvement shall be apportioned between the municipal corporation and property owners specially benefited thereby and, if apportioned, the respective portions of the cost to be borne by the municipality and the property owners so benefited, when made by a municipal council or some other subordinate board in whom the power to determine has been vested by statute, is generally held conclusive and final in the absence of evidence of fraud, or bad faith, or actual abuse of power, or a showing that the council or board acted arbitrarily, or made a mistake of fact or law. Such a determination will not be disturbed by the courts because there may a difference of honest opinion as to what should be the decision."); cf. Habeeb, supra note 13, at 138-39 ("In accordance with the general principles that the question of the existence and extent of a special benefit resulting from a

II.

Livingston further argues that, even if the improvements were the proper subject of an assessment, the circuit court erred in upholding the amount of her assessment. Specifically, she contends the Town Council should have used the front-footage method to apportion the assessments imposed rather than the area method.

Under the Municipal Improvement Act of 1999, the governing body of a municipality may impose assessments within an improvement district "based on assessed value, front footage, area, per parcel basis, the value of improvements to be constructed within the district, or any combination of [these methods]."[16] "The apportionment of benefits received from a special assessment is a legislative function and, if reasonable persons may differ as to whether the land assessed is benefited by the improvement, the finding of the legislative body that it does must stand."[17] "Included within the broad discretion accorded to a special assessment commission [or governing body] is the discretion to choose the method used to determine the benefits and apportion the costs to individual properties within the improvement district."[18]

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public improvement for which a special assessment is made is one of fact, legislative or administrative[,] rather than judicial in character, and that the determination of such question by the legislature, or by the body authorized to act in the premises, is conclusive on the property owners and on the courts, unless it is palpably arbitrary or grossly unequal and confiscatory, the courts have held or recognized in many cases . . . that the determination of whether a street widening resulted in a special benefit was committed to the legislature or delegated local authorities, whose decision would be conclusive in the absence of fraud, bad faith, or arbitrary action.").

[16] S.C. Code Ann. § 5-37-20(1) (Supp. 2002).

[17] 70C Am. Jur. 2d Special or Local Assessments § 87 (2000).

[18] Id. § 93.

In the case before us, the Town Council opted to apportion the amount of the assessments based on the area method, i.e., the assessment was based on the ratio of the acreage of the assessed property to the total acreage of all of the assessed properties in the District. Livingston asserts the Town Council should have used the front-footage method instead of basing it on the area of the property because her parcel, while large, has only approximately fifty feet of frontage on Patriots Point Boulevard.

In rejecting Livingston's contention that the assessment should have been based on front footage, the circuit court found that "[t]he frontage length is not the relevant measure of value. The important advantage for members of the District is proximity to traffic flow and the opportunity to benefit through points for entrance and egress between their properties and Patriots Point Boulevard." The court noted that "[t]his is not a function of space; it is a function of proximity. It would be discriminatory to subject those owners who happen to have more footage on Patriots Point Boulevard to a higher assessment for this reason alone." The court further observed that, "[w]hile some members of the District inevitably pay a higher assessment because they own more acreage, there is no demonstrably fairer way to establish the assessment among the alternatives presented under the [Municipal Improvement] Act." The court concluded that the Town Council had observed the requirements set forth in the Act in selecting a method of apportionment and that there had been no showing that the Town Council's actions were "arbitrary, capricious, or clearly erroneous, the only standards under the [APA] upon which . . . Livingston . . . made her challenge."

Considering the record as a whole, we see no reason to depart from the circuit court's determination that the Town Council did not act improperly in choosing the area method of apportionment and in calculating the amount of Livingston's special assessment.[19]

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[19] See 70C Am. Jur. 2d Special or Local Assessments § 95 ("[S]uch apportionment according to benefits is arrived at by resorting to a practical basis of apportionment, such as frontage or superficial area, which results in a distribution of the burden substantially, if not exactly, in proportion to the benefits conferred."); id. § 93 ("It is not for a court to determine which of the

AFFIRMED.

HOWARD, AND BEATTY, JJ., concur.

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various methods of assessing property for street improvements, whether by the front-foot rule or otherwise, is the fairer one, this being a matter of legislative discretion.").