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I. LANDOWNERS RECOVER ON COMMON-LAW THEORIES FOR IMPROPER DISPOSAL OF HAZARDOUS WASTE

In *Shockley v. Hoechst Celanese Corp.*,[1] the United States District Court for the District of South Carolina upheld a $250,000 jury verdict against Hoechst Celanese Corporation ("Hoechst Celanese") and other defendants.[2] The plaintiffs accused the defendants of contaminating groundwater in Greer, South Carolina, by failing to properly dispose of hazardous waste materials.[3]

The plaintiffs, who owned property near the contaminated groundwater, prevailed using common-law theories of strict liability, trespass, nuisance, and negligence.[4] The district court found sufficient evidence existed under all of the plaintiffs' theories and denied the defendants' renewed motions for judgment as a matter of law.[5]

Although numerous defendants were present in the jury trial, only Hoechst Celanese and William H. Groce, III ("Groce") litigated the motions for judgment as a matter of law.[6] Groce, a former chemist of Hoechst Celanese, opened a chemical reclamation plant across the street from the Hoechst Celanese plant. Groce accepted and stored rusty, leaking barrels containing hazardous chemicals for Hoechst Celanese. During the operation of Groce's facility, certain ultrahazardous chemicals spilled onto his property. After five years in business, Groce closed the reclamation plant and sold the property to Hoechst Celanese, who subsequently paved it for use as a parking lot. The plaintiff landowners purchased property adjacent to the parking lot intending to develop a residential subdivision. The chemicals that spilled at the Groce site ultimately contaminated the groundwater below the parking lot, and the contamination subsequently migrated to the landowners' property.

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1. 793 F. Supp. 670 (D.S.C. 1992), *aff'd in part and rev'd in part*, 996 F.2d 1212 (4th Cir. 1993) (Table) (unpublished opinion available on WESTLAW, Nos. 92-1521, 92-1543, 1993 WL 241179 (4th Cir. June 28, 1993)). The Fourth Circuit affirmed the *Shockley* decision insofar as it upheld the defendants' liability under the common law theories of trespass, nuisance, and negligence. Shockley v. Hoechst Celanese Corp., Nos. 92-1521, 92-1543, 1993 WL 241179, at *5 (4th Cir. June 28, 1993). However, the Fourth Circuit reversed the portion of the *Shockley* decision that held the defendants strictly liable. *Id.*

2. *Shockley*, 793 F. Supp. at 672.

3. *Id.*

4. *Id.*

5. *Id.* at 675. At the time of the district court's decision, both plaintiffs and defendants had pending CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act of 1980) claims. *Id.* at 672 n.2.

6. *Id.* at 672 n.1.

When Hoechst Celanese informed the landowners of the contamination problems at its parking lot, the landowners filed suit.[7]

In reaching its decision, the *Shockley* court relied primarily on common law strict liability for abnormally dangerous activities, recognized in South Carolina since at least 1894.[8] Without regard for the reasonableness of a defendant's actions, strict liability imposes liability on one who uses land for activities that are likely to cause injury to a neighbor, if injury actually occurs.[9] Both the common law and the Restatement (Second) of Torts adopt this view of strict liability.[10] However, strict liability for abnormally dangerous activities is restricted to extraordinary or unusual activities.[11] An activity may be abnormally dangerous, or ultrahazardous, for two reasons: "first, because . . . a mishap resulting in some harm to the plaintiff is very likely to occur; second, because the activity involves an appreciable chance of causing serious injury."[12]

The South Carolina Supreme Court has adopted the majority view, set forth in the Restatement, that dynamite blasting is an ultrahazardous activity; therefore, a person will incur strict liability for injuries caused by dynamite blasting.[13] However, "[t]here is little, if any, South Carolina authority on those activities other than blasting that would be considered abnormally dangerous."[14] Hoechst Celanese relied on *Snow v. City of Columbia*[15] for the proposition that the strict liability doctrine in South Carolina is limited to blasting cases.[16] However, in rejecting Hoechst Celanese's argument, the

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7. *Shockley*, 793 F. Supp. at 672.

8. *Id.*; *see* Frost v. Berkeley Phosphate Co., 42 S.C. 402, 409, 20 S.E. 280, 283 (1894) (imposing a strict liability standard on a defendant when noxious gases released from the defendant's mill injured the plaintiff's land).

9. *Frost*, 42 S.C. at 409, 20 S.E. at 283.

10. "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." RESTATEMENT (SECOND) OF TORTS § 519(1) (1977).

11. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 78, at 546 (5th ed. 1984); *see also* RESTATEMENT (SECOND) OF TORTS § 520 (1977) (listing the following factors to determine whether an activity is abnormally dangerous: (1) degree of risk, (2) likelihood of harm, (3) inability to eliminate risk, (4) commonality of usage, (5) inappropriateness of activity to area, and (6) social utility of the activity itself).

12. KEETON et al., *supra* note 11, § 78, at 556 (footnotes omitted).

13. Wallace v. A. H. Guion & Co., 237 S.C. 349, 117 S.E.2d 359 (1960).

14. F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 189 (1990).

15. 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991).

16. Shockley, 793 F. Supp. at 673. *Snow* involved water damage to property caused by a leak in a city pipe, and the court held that the management of water does not fall within the narrowly defined scope of activities considered ultrahazardous. *Snow*, 305 S.C. at 546-52, 409 S.E.2d at 798-800. The *Snow* court asserted that without fault, liability should only be imposed under an agreement, statute, or narrowly defined common-law principle. *Id.* at 547-48, 409

Shockley court stated that *Snow* clearly supports the rule that courts will impose strict liability for injuries caused by abnormally dangerous or ultrahazardous activities.[17] Although not apparent from the opinion itself, the *Shockley* court possibly considered the exception whereby strict liability "does not apply if the activity is one that is carried on in pursuance of a public duty."[18] The storage of hazardous wastes properly constitutes an ultrahazardous activity, thereby triggering the imposition of strict liability standards, and it does not fall within the limited public duty exception.[19] However, on appeal the Fourth Circuit stated that "[i]n South Carolina, the strict liability doctrine for the most part has been confined to a small number of ultrahazardous activities."[20] For that reason, the Fourth Circuit held that the district court in *Shockley* extended the strict liability doctrine beyond its permissible scope as established in South Carolina and that any such change in South Carolina's law must come from either its state courts or legislature.[21]

In the district court case, Hoechst Celanese also argued that under general principles of agency, it was insulated from liability because it simply delivered the chemicals to Groce, an independent contractor.[22] However, Hoechst Celanese fell within "a well established exception to the general rule of nonliability where injury results and the means or manner of the activity of the owner, whether done by independent contractor or not, may be found to be inherently or intrinsically dangerous to others."[23] Although liability depends upon the actual or implied prior knowledge of the employer-principal,[24] the district court found sufficient evidence of Hoechst Celanese's knowledge to impose the exception.[25]

S.E.2d at 799.

17. *Shockley*, 793 F. Supp. at 673.

18. KEETON et al., *supra* note 12, § 78, at 556.

19. HUBBARD & FELIX, *supra* note 14, at 190 ("Likely candidates [for the imposition of strict liability in South Carolina] would be activities like the . . . storage of hazardous wastes.").

20. Shockley v. Hoechst Celanese, Corp., 1993 WL 241179 at *5 (citing *Snow*, 305 S.C. at 549-50, 409 S.E.2d at 800 and Wallace v. A. H. Guion & Co., 237 S.C. 349, 354-55, 117 S.E.2d 359, 361 (1960)).

21. *Id.* Recently, the South Carolina Court of Appeals refused to address this issue, calling instead on the supreme court to do so. *See* Raven v. Greenville County, ___ S.C. ___, ___, 434 S.E.2d 296, 305 (Ct. App. 1993) (refusing to adopt the Restatement's criteria for abnormally dangerous activity).

22. *Shockley*, 793 F. Supp. at 673.

23. Allison v. Ideal Laundry & Cleaners, 215 S.C. 344, 350, 55 S.E.2d 281, 282 (1949).

24. *Id.* at 351, 55 S.E.2d at 283; *see also* RESTATEMENT (SECOND) OF TORTS § 427A (1965) (defining the exception as applicable to an employer who knows or has reason to know that the contracted work involves abnormally dangerous activity).

25. *Shockley*, 793 F. Supp. at 673 (citing RESTATEMENT (SECOND) OF TORTS § 427A (1965)). Testimony at trial indicated that Hoechst Celanese knowingly delivered the rusty, leaking barrels for indefinite storage at Groce's reclamation plant. *Id.*

In addition to strict liability, the *Shockley* court found Hoechst Celanese liable for trespass.[26] Trespass occurs when one intentionally enters onto the property of another without authorization, regardless of harm.[27] The requisite intent is shown if the defendant acted voluntarily and knew or should have known of the possible consequences of his act.[28] The defendant only need intend the act that causes the harm, not the actual harm itself.[29]

Hoechst Celanese relied on *Snow* for the proposition that a failure to perform a duty is not a trespass.[30] The district court quickly dismissed this argument for two reasons. First, it found that Hoechst Celanese intended to deliver leaking barrels and knew or should have known that environmental contamination would result.[31] Liability is imposed on one who, via an abnormally dangerous activity, intentionally enters the plaintiff's land and causes harm.[32] Second, the *Shockley* court distinguished the *Snow* case because the defendants in *Snow* lacked intent to intrude and did not engage in an abnormally dangerous activity.[33] In contrast, Hoechst Celanese voluntarily conducted an abnormally dangerous activity, for which it should have anticipated the consequences.[34] Consequently, the jury's finding of trespass was proper because if a defendant acted voluntarily and knew or should have known that the particular harm would result, then the requisite intent to trespass is proved.[35]

Agency law applies to an action for trespass; consequently, an employer may be liable for the torts of its contractor.[36] An employer is liable for the

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26. *Id.* at 673-74.

27. *See generally* KEETON et al., *supra* note 11, § 13, at 67-84 (discussing trespass to land).

28. Snow v. City of Columbia, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991) (citing Snakenberg v. Hartford Casualty Ins. Co., 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989)); *see also* RESTATEMENT (SECOND) OF TORTS § 8A (1965) ("'[I]ntent' . . . denote[s] that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.").

29. *Snow*, 305 S.C. at 553, 409 S.E.2d at 802 (citing Phillips v. Sun Oil Co., 121 N.E.2d 249 (N.Y. 1954) and Lee v. Stewart, 10 S.E.2d 804 (N.C. 1940)).

30. *Shockley*, 793 F. Supp. at 673.

31. *Id.* at 673-74.

32. RESTATEMENT (SECOND) OF TORTS § 165 (1965). A trespass on land subjects a defendant to liability for intrusions resulting from abnormally dangerous activities if actual harm results. *Id.* § 165 cmt. c. ("The harm may be an impairment of the physical condition of the land or an invasion occurring on the land of some other legally protected interest of the possessor, connected with his interest of exclusive possession.")

33. *Shockley*, 793 F. Supp. at 674. In *Snow* the court considered a nonnegligent trespass of water that did not involve an abnormally dangerous activity. *Id.*

34. *Id.* at 673-74.

35. *Id.* at 673 (citing Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991)).

36. *Id.* at 674; *see also supra text accompanying* notes 22-25 and accompanying text (discussing the agency theory).

trespass of its independent contractor if the employer knew or had reason to know the hired work was likely to involve a trespass.[37] Thus, the district court stated that sufficient evidence existed to support the jury's finding that Hoechst Celanese was liable for the trespass committed by Groce.[38]

In addition to trespass, the *Shockley* court upheld the jury's finding that Hoechst Celanese was liable for nuisance.[39] The difference between trespass and nuisance "is that trespass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it."[40] The following factors help determine if the interference is sufficiently unreasonable to sustain a nuisance claim: (1) the intent of the defendant, (2) whether the interference was substantial, (3) whether the interference would upset an ordinary person, (4) the appropriateness of the activity in the area, (5) the manner in which the activity was conducted, and (6) the nature and social utility of the conduct.[41] Furthermore, when the defendant is only one of many creating the nuisance, his participation must be substantial before individual liability will attach.[42]

The jury found that Hoechst Celanese's knowing delivery of the barrels of hazardous chemicals constituted substantial participation sufficient to impose liability on Hoechst Celanese directly,[43] as well as indirectly for the harm Groce caused while acting in his agency capacity.[44] The district court in *Shockley* held that the evidence properly supported the jury's nuisance finding.[45]

The *Shockley* court further held that Hoechst Celanese could not successfully assert that the landowners "came to the nuisance" as a defense.[46] Coming to the nuisance does not bar recovery in South Carolina, especially if the injury continues even after the plaintiff discovers the harm.[47] Dicta in some South Carolina cases suggests that coming to the nuisance might bar a plaintiff's recovery if the plaintiff had prior knowledge of the nuisance

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37. *Shockley*, 793 F. Supp. at 674 (citing RESTATEMENT (SECOND) OF TORTS § 427B (1965)).

38. *Id.*

39. *Id.*

40. KEETON et al., *supra* note 11, § 87, at 622; *see also* HUBBARD & FELIX, *supra* note 14, at 165 (defining private nuisance as an "'unreasonable interference' with the plaintiff's use and enjoyment of land").

41. HUBBARD & FELIX, *supra* note 14, at 166-67.

42. RESTATEMENT (SECOND) OF TORTS § 834 cmt. d (1979).

43. *Shockley*, 793 F. Supp. at 674.

44. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 427B (1965)).

45. *Id.* at 674.

46. *Id.*

47. Carter v. Lake City Baseball Club, Inc., 218 S.C. 255, 272, 62 S.E.2d 470, 478 (1950) (citing 39 AM. JUR. *Nuisances* § 197 (1942)).

(reflected in the purchase price), and the injury ultimately ceased.[48] Thus, the *Shockley* court properly concluded that the coming to the nuisance defense did not bar the landowners' recovery because they were not aware of the contamination until after purchasing the property.[49]

The *Shockley* court also upheld the imposition of liability for negligence against both Hoechst Celanese and Groce.[50] The court stated that "Hoechst Celanese had a non-delegable duty to insure that the chemicals were disposed of properly."[51] In *Alexander v. Seaboard Air Line Railroad Co.* the South Carolina Supreme Court held that the defendant railroad company could not avoid liability by delegating the chemical spraying of weeds to a contractor.[52] Similarly, Hoechst Celanese could not avoid liability by delegating its duty to properly dispose of its chemicals to Groce. Further, the *Shockley* court relied on Hoechst Celanese's violation of the South Carolina Pollution Control Act[53] in approving the jury's finding of negligence.[54] Although not discussed in *Shockley*, violation of a safety statute in South Carolina ordinarily constitutes negligence per se.[55] Finally, the *Shockley* court held that Hoechst Celanese breached its duty to warn the landowners of the contamination.[56]

The *Shockley* court also rejected the contention of both Hoechst Celanese and Groce that contributory negligence barred the landowners' recovery under a negligence theory.[57] Groce further argued that he was not liable for negligence because the landowners assumed the risk as a matter of law when they purchased the property.[58] The landowners were under no duty to

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48. HUBBARD & FELIX, *supra* note 14, at 184-85.

49. *See Shockley*, 793 F. Supp. at 672.

50. *Id.* at 674-75.

51. *Id.* at 675 n.4 (citing RESTATEMENT (SECOND) OF TORTS §§ 416-429 (1965) and Alexander v. Seaboard Air Line R.R., 221 S.C. 477, 71 S.E.2d 299 (1952)).

52. *Alexander*, 221 S.C. at 487-88, 71 S.E.2d at 303-04; *see also* RESTATEMENT (SECOND) OF TORTS § 427 (1965) (stating that an employer is liable for the acts of an independent contractor if the contracted work is inherently dangerous).

53. The Pollution Control Act is codified at S.C. CODE ANN. §§ 48-1-10 to -350.(Law. Co-op. 1987 & Supp. 1992).

54. *Shockley*, 793 F. Supp. at 675. The South Carolina Pollution Control Act provides in pertinent part: "It shall be unlawful for any person, directly or indirectly, to throw, drain, run, allow to seep or otherwise discharge into the environment of the State . . . industrial wastes and other wastes . . . ." S.C. CODE ANN. § 48-1-90(a) (Law. Co-op. 1987).

55. *See e.g.*, Reed v. Clark, 277 S.C. 310, 317, 286 S.E.2d 384, 388 (1982); *see also* HUBBARD & FELIX, *supra* note 14, at 128-29 (discussing the requirements of statutory negligence per se). *But see* HUBBARD & FELIX, *supra* note 14, at 31 (Supp. 1992) (listing recent cases that implicitly hold that negligence per se may require a knowing violation of the statute).

56. *Shockley*, 793 F. Supp. at 675. The restatement imposes a duty on landholders who maintain dangerous, artificial conditions on their property to warn adjacent landholders of such conditions. *See* RESTATEMENT (SECOND) OF TORTS § 370 (1965).

57. *Shockley*, 793 F. Supp. at 675.

58. *Id.*

investigate for contamination, and the evidence showed they had no prior knowledge of the contamination.[59] The *Shockley* court held that although the landowners' alleged contributory negligence was properly before the jury, they had not assumed the risk as a matter of law.[60]

The district court applied established South Carolina common law in *Shockley*. Although *Snow* appeared to limit liability for environmental torts, the *Shockley* court factually distinguished the cases and rendered a sound decision. However, because the Fourth Circuit ultimately ruled that the federal courts may not so extend the state's strict liability doctrine, the *Shockley* reasoning dealing with strict liability will not be the law in federal court until action by a South Carolina court or the General Assembly. Furthermore, a need still remains for a precise definition of an ultrahazardous activity that triggers strict liability.

Jeanette P. Franklin

59. *Id.* Hoechst Celanese's expert testified that environmental audits were customary in 1988, and the landowners purchased their property in early 1989. However, on cross-examination the expert admitted that he knew of only two environmental audits ever performed in South Carolina's history. *Id.*

60. *Id.*