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I. COURT ADDRESSES COMMON LAW NUISANCE LIABILITY IN HAZARDOUS WASTE SUITS

In *Clark v. Greenville County*[1] the South Carolina Supreme Court addressed common law nuisance as a cause of action in hazardous waste suits. The court also discussed causation requirements in actions for environmental damage and the proper use of affidavits in summary judgment motions.

To resolve the nuisance claim, the court held that a defendant with no control over property, who is allegedly causing a nuisance, is not liable. A hazardous waste generator avoids nuisance liability if the generator does not control either the waste itself or the land on which the waste resides at the time of the alleged nuisance.[2] The ruling logically extends prior South Carolina law, adopting precedent from other jurisdictions.

In reaching the nuisance holding, the court addressed important questions of evidence and procedure. On the evidentiary issue, the supreme court required a causal connection between the alleged damage and the alleged source of injury.[3] In addition, the court reaffirmed and clarified the "most probably" standard of causation for expert opinion testimony.[4] On the procedural question, the court refused to accept as evidence of material fact an affidavit that merely referred to evidence expected from expert witness depositions.[5]

Greenville County operated Simpsonville Landfill Number One from 1960 to 1972. Adjacent landowners complained of property damage and brought actions against the county and against various corporate generators of hazardous waste deposited at the site. The appellants sued the county for inverse condemnation and the generators for nuisance, negligence, trespass, and strict liability. By summary judgment, the lower court dismissed all causes of action brought by appellants because they failed to produce any evidence of damage caused by the landfill. The lower court also dismissed all but one of the nuisance claims against the generators because the generators did not control the waste or the landfill at the time of the alleged nuisance.[6]

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1. ___ S.C. ___, 437 S.E.2d 117 (1993).
2. *Id.* at ___, 437 S.E.2d at 119.
3. *Id.* at ___, 437 S.E.2d at 119.
4. *Id.* at ___, 437 S.E.2d at 119.
5. *Id.* at ___, 437 S.E.2d at 118.
6. *Clark*, ___ S.C. at ___, 437 S.E.2d at 118.

The supreme court phrased the appellant's exceptions as follows: (1) the trial judge failed to consider water samples taken from the landowners' property, (2) the trial judge should have considered "evidence" in the affidavit of appellant's counsel offered in opposition to summary judgment,[7] and (3) the trial judge disregarded deposition testimony and answers to interrogatories in deciding the summary judgment motion.[8]

On appeal the court dismissed the test results for failure to show causation. "[W]hile the raw figures may indicate contamination, the analyses of these figures indicate no connection to the landfill."[9] The appellants' data showed the presence, but not the origin, of contamination; the lack of any causal analysis and the presence of other potential contamination sources proved fatal for the appellants' case.[10]

The affidavit of the appellants' counsel failed under South Carolina's procedural rules. Rule 56(e)[11] requires that affidavits in opposition or in support of summary judgment motions be based on the affiant's personal knowledge. Also, the affidavit must set forth facts admissible into evidence.[12] The attorney's affidavit merely referred to experts who would testify on the appellant's behalf, and thus, the court held that the "[c]ounsel's statement [was] clearly insufficient . . . ."[13]

The court discounted the appellants' answers to interrogatories and expert witness depositions.[14] "Bald allegations of diminution in property value are insufficient to create a genuine issue of fact regarding damages absent any competent evidence showing the existence, amount, or causation of damages."[15] One expert's testimony failed because it contained no opinion on causation.[16]

The other expert discussed the contamination source; however, he did not satisfy South Carolina's "most probably" standard for an expert's opinion on causation.[17] The standard requires expert testimony to "state that the result

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7. On appeal, the appellants did not actually claim that the attorney's affidavit contained evidence of damage. Brief of Appellant at 10-13. The appellants argued that the affidavit pleaded to postpone summary judgment, because the affidavit referred to expert witness depositions taken but not yet published. *Id.* at 13.

8. *Clark*, ___ S.C. at ___, 437 S.E.2d at 118.

9. *Id.* at ___, 437 S.E.2d at 118.

10. *See id.* at ___, 437 S.E.2d at 118.

11. S.C. R. CIV. P. 56(e).

12. *Clark*, ___ S.C. at ___, 437 S.E.2d at 118.

13. *Id.* at ___, 437 S.E.2d at 118 (citing Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)).

14. *Id.* at ___, 437 S.E.2d at 118. The court analyzed the expert testimony but did not discuss the answers to interrogatories. *See id.* at ___, 437 S.E.2d at 118-19.

15. *Id.* at ___, 437 S.E.2d at 118 (citing *Baughman*, 306 S.C. 101, 410 S.E.2d 537).

16. *Clark*, ___ S.C. at ___, 437 S.E.2d at 118.

17. *Id.* at ___, 437 S.E.2d at 119.

'most probably' came from the cause alleged."[18] The second expert stated, "I would say an important assumption here would be that the source of contamination of the materials . . . was the landfill . . . . The nature of the [waste] . . . is not completely clarified. So in the absence of specific information, we would have to assume a potential for the worst."[19] Holding that the expert made an assumption and not a causal connection as to the contamination's source, the court found the testimony insufficient.[20]

The trial judge granted the generators' motion for summary judgment on all but one of the nuisance claims, emphasizing that the respondents never owned, designed, constructed, operated, maintained, or closed the landfill.[21] The court noted also that the respondents did not use the landfill during the appellants' ownership of nearby property.[22] The supreme court concluded that "the trial judge correctly ruled the corporate respondents could not be liable for nuisance because they had no control over the property allegedly used as a nuisance."[23]

The court's analysis began with a nuisance definition. A private nuisance "arises from the unreasonable, unwarrantable, or unlawful use" of real or personal property by the owner.[24] "Nuisance law is based on the premise that '[e]very citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property.'"[25]

The court then referred to South Carolina precedent that found that "complete control" over property creates liability for any property use breeding a nuisance.[26] Liability accrues even if the party with complete control did not create the nuisance.[27]

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18. *Id.* at ___, 437 S.E.2d at 119 (citing *Baughman*, 306 S.C. 101, 410 S.E.2d 537). In *Baughman* the court stated:

> It is not sufficient for the expert . . . to testify merely that the ailment might or could have resulted from the alleged cause. He must go further and testify that taking into consideration all the data it is his professional opinion that the result in question *most probably* came from the cause alleged.

Baughman, 306 S.C. at 111, 410 S.E.2d at 543 (quoting Eubanks v. Piedmont Natural Gas Co, 198 F. Supp. 522, 526-27 (W.D.S.C. 1961))(emphasis added) (alterations in the original).

19. *Clark*, ___ S.C. at ___, 437 S.E.2d at 119.

20. *Id.* at ___, 437 S.E.2d at 119.

21. *Id.* at ___, 437 S.E.2d at 119.

22. *Id.* at ___, 437 S.E.2d at 119.

23. *Id.* at ___, 437 S.E.2d at 119.

24. *Clark*, ___ S.C. at ___, 437 S.E.2d at 119 (quoting Peden v. Furman Univ., 155 S.C. 1, 16, 151 S.E. 907, 912 (1930)).

25. *Id.* at ___, 437 S.E.2d at 119 (quoting *Peden*, 155 S.C. at 16, 151 S.E. at 912) (alterations in original).

26. *Id.* at ___, 437 S.E.2d at 119.

27. *Peden*, 155 S.C. at 1, 151 S.E. at 907 (finding lessor may be liable for lessee's creating

After acknowledging that complete control begets liability, the court addressed the related question: Is a party with *no control* over the property creating a nuisance liable?[28] The court answered negatively and looked to Michigan and Indiana law for support.[29]

Under the "no control" rule, the nuisance claim failed because the appellants neither alleged nor produced any evidence of respondents' control over the landfill or the hazardous waste deposited there.[30]

In alleging nuisance from an adjoining landfill, the appellants followed a traditional tactic in hazardous waste suits.[31] By requiring the defendants to control the property causing a nuisance before imposing liability, South Carolina's Supreme Court adopted a common reply.[32]

After *Clark*, potential defendants with no control over hazardous waste avoid nuisance liability; liability attaches only with complete control. However, the supreme court did not expressly define when "no control" ends and complete control begins. The opinion, however, does provide a good starting point. The court emphasized that the trial judge correctly found no control by the corporate generators.[33] The trial judge held that the appellants could not maintain a nuisance action because "(1) the corporate respondents 'never owned, designed, constructed, operated, maintained or closed the landfill' and (2) the corporate respondents did not use the landfill during the time appellants owned their property."[34]

The opinion also defines the scope of "property." The court emphasized that the generators did not control either the landfill or the hazardous waste, reiterating the rule that both personal and real property can cause a nuisance.[35]

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a nuisance by playing baseball on leased property).

28. *Clark*, ___ S.C. at ___, 437 S.E.2d at 119.

29. *See id.* at ___, 437 S.E.2d at 119 (citing City of Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611 (7th Cir. 1989) (applying Indiana law) and Stevens v. Drekich, 443 N.W.2d 401 (Mich. Ct. App. 1989) (per curiam)).

30. *See Clark*, ___ S.C. at ___, 437 S.E.2d at 119.

31. *See, e.g.*, *Westinghouse*, 891 F.2d at 614; Kenney v. Scientific, Inc., 497 A.2d 1310 (N.J. Super. Ct. Law Div. 1985); Kelly v. Para-Chem S., Inc., ___ S.C. ___, 428 S.E.2d 703 (1993); *Baughman*, 306 S.C. at 103, 410 S.E.2d at 539; Ravan v. Greenville County, ___ S.C. ___, 434 S.E.2d 296 (Ct. App. 1993); Judy A. Johnson, Note, *Hazardous Waste Disposal: Is There Still A Role For Common Law?*, 18 TULSA L.J. 448, 452 (1983); Jeff Belfiglio, Note, *Hazardous Wastes: Preserving the Nuisance Remedy*, 33 STAN. L. REV. 675, 676 (1981) ("Nuisance has been the most popular doctrine used by the courts in attacking pollution problems.").

32. *See, e.g.*, *Westinghouse*, 891 F.2d at 611; *Kenney*, 497 A.2d at 1310 (finding owners and operators of landfill, not the generators and transporters of the waste, liable for nuisance).

33. *Clark*, ___ S.C. at ___, 437 S.E.2d at 119.

34. *Id.* at ___, 437 S.E.2d at 119.

35. *Id.* at ___, 437 S.E.2d at 119; *see also Peden*, 155 S.C. at 16, 151 S.E. at 912

Absolving a hazardous waste generator from nuisance liability initially appears to be at odds with common nuisance principles. The general rule provides that the creator of a nuisance does not avoid liability by conveying the offending property.[36] However, South Carolina is not alone in shielding a generator with no control over waste from any resulting nuisance liability.[37]

Two rationales reconcile this apparent inconsistency. First, *Clark* probably does not create an exception at all but instead technically defines when the nuisance begins. The appellants' cause of action implies that hazardous waste producers create a continuing nuisance at the time of the initial manufacturing or disposing of the waste into a landfill. In *Clark* the court refused to adopt this proposition and, thus, implicitly found that the nuisance starts after the landfill operator receives the waste.[38]

The trend toward holding hazardous waste generators strictly liable also supports limiting generator nuisance liability. A New Jersey court refused to hold a generator liable in nuisance for hazardous waste dumped at a landfill.[39] However, the court contemporaneously stated that generators remain strictly liable for any resulting damage.[40] Although South Carolina's Supreme Court has not yet adopted this approach, the South Carolina Court of Appeals recently noted the trend with apparent approval.[41] As a result, any advantage gained by deep-pocket generators from the limit on nuisance liability probably will vanish as strict liability actions increase.

The lack of a causal connection erects an obstacle common to many environmental nuisance suits:

> Even when soil and water tests indicate that dangerous levels of [hazardous substances] are present, the problem of proof remains. The plaintiff still must demonstrate that those [hazardous substances] are the actual cause of the injury. The problem of proof is further compounded when the injury could have resulted from one of several causes.[42]

The court's treatment of the appellants' test results vividly demonstrates the difficulty in proving causation. Even though the test indicated contamination,

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(classifying nuisance as unlawful use of property).

36. 58 AM. JUR. 2D *Nuisances* § 126 (1989).

37. *See supra* note 32.

38. *See Kenney*, 497 A.2d at 1324 ("The *locus* of any nuisance which may have existed was at the landfill, and any such nuisance was the result of the actions of the landfill's owners and operators.").

39. *Id.* The court also shielded waste transporters from nuisance liability. *Id.* at 1328.

40. *Id.* The court also indicated that strict liability may apply to a waste transporter while the transporter controls and possesses the waste. *Id.* at 1327.

41. *See Ravan*, ___ S.C. at ___, 434 S.E.2d at 304-05.

42. Johnson, *supra* note 31, at 454.

the analyses of the results failed to draw a causal connection with the landfill.[43] Other potential sources for the contamination existed, further damaging the plaintiffs' case.[44]

The causation standards in *Clark* differ significantly from those used by federal environmental law. Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[45] operators of waste sites and generators of the hazardous waste are potentially liable for damage caused by the hazardous substances.[46] CERCLA requires a much looser causal link than *Clark*: Proof of a direct nexus between a generator's waste and any resulting environmental harm is not required.[47] A plaintiff need only show that the substances causing harm are "alike, similar, or of a like kind to those that were present in a generator defendant's waste or that could have been produced by the mixture of the defendant's waste with other waste . . . ."[48] In fact, CERCLA places the burden squarely on the defendant by making the lack of causation an affirmative defense.[49] Therefore, alternative sources of contamination provide significantly smaller obstacles for CERCLA plaintiffs.

The supreme court followed established South Carolina precedent when it discounted one expert's testimony for failure to satisfy the "most probably"

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43. *Clark*, ___ S.C. at ___, 437 S.E.2d at 118.

44. *Id.* at ___, 437 S.E.2d at 118.

45. 42 U.S.C. §§ 9601-9675 (1988).

46. *Id.* § 9607(a) (2)-(4).

47. United States v. Monsanto Co., 858 F.2d 160, 169 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). *But cf.* Dedham Water Co. v. Cumberland Farms, Inc., 689 F. Supp. 1223, 1224 (D. Mass. 1988) (mem.) (requiring proof that waste from first site caused pollution at second site), *rev'd on other grounds sub nom.*, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989), *on remand*, 770 F. Supp. 41 (D. Mass. 1991), *aff'd*, 972 F.2d 453 (1st Cir. 1992). On appeal the plaintiff in *Dedham* did not dispute the district court's finding that the defendant did not cause the pollutants to collect in the plaintiff's water supply. Instead, the plaintiff argued, and the First Circuit agreed, that proof of actual damage is not required to recover for costs incurred in response to a "threatened release" of contaminants from the hazardous waste sites. *Dedham*, 889 F.2d at 1149, 1154. On remand, the district court denied recovery because the plaintiff contemplated, and thus incurred the costs of, responding to the pollutants before the wastes on the defendant's property threatened a release. *Dedham*, 770 F. Supp. at 42-43.

48. *Monsanto*, 858 F.2d at 169; *see also* United States v. Wade, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983) (mem.) ("[T]o require a plaintiff under CERCLA to 'fingerprint' wastes is to eviscerate the statute."). CERCLA uses looser causation standards to expand generator liability. Liability for the cost of a cleanup accrues even if the generator transfers only minuscule quantities of hazardous materials to a waste site. *See* United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2125-27 (D.S.C. 1984); *Wade*, 577 F. Supp. at 1339-40.

49. *Monsanto*, 858 F.2d at 170 ("Congress has, therefore, allocated the burden of disproving causation to the defendant who profited from the generation and inexpensive disposal of hazardous waste.").

rule. In *Baughman* the supreme court stated, "Our cases generally hold that, before expert testimony is admissible upon the question of the causal connection between plaintiff's injuries and the acts of the defendant, the testimony must satisfy the 'most probably' rule."[50]

The court's restatement of the rule in *Clark* potentially adds an important clarification. In previous applications of the rule, the court did not require experts to say "most probably" in their testimony.[51] In *Clark* the expert assumed that the landfill caused the alleged damage to adjacent property; he did not affirmatively make the causal connection.[52] In addition to noting the expert's assumption, the supreme court remarked that "expert testimony *must state* that the result 'most probably' came from the cause alleged."[53] This language strongly suggests that the court will now require experts to use expressly the words "most probably caused" to establish any causal connection between a defendant's behavior and a plaintiff's injuries.

In *Clark* the holding concerning the use of affidavits follows the general standard that an affiant may assert only facts within the affiant's personal knowledge.[54] An attempt to present facts not within the affiant's knowledge will fail as hearsay.[55] Similarly, courts often disregard allusions by attorneys to deposition testimony taken but not yet filed or published.[56]

The *Clark* decision does not address a closely related but distinct issue: While considering summary judgment, should a court use an attorney's affidavit referring to deposition testimony not yet in the record, not as evidence of the truth of the matter asserted, but as evidence that the testimony occurred?[57] One could argue that a deposition taken but not yet filed creates

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50. *Baughman*, 306 S.C. at 111, 410 S.E.2d at 543 (citing Armstrong v. Weiland, 267 S.C. 12, 225 S.E.2d 851 (1976); Martin v. Mobley, 253 S.C. 103, 169 S.E.2d 278 (1969); and Gambrell v. Burleson, 252 S.C. 98, 165 S.E.2d 622 (1969)).

51. *See Baughman*, 306 S.C. at 111, 410 S.E.2d at 543 ("In determining whether particular evidence meets this test it is not necessary that the expert actually use the words 'most probably.'") (citing Gamble v. Price, 289 S.C. 538, 347 S.E.2d 131 (Ct. App. 1986)).

52. *See supra* notes 16-19 and accompanying text.

53. *Clark*, ___ S.C. at ___, 437 S.E.2d at 119 (emphasis added) (citing *Baughman*, 306 S.C. at 101, 410 S.E.2d at 537).

54. *See* S.C. R. Civ. P. 56(e) (requiring affidavits in support of or opposition to motions for summary judgement to "be made on personal knowledge, [setting] forth such facts as would be admissible in evidence, . . . [showing] affirmatively that the affiant is competent to testify to the matters stated therein").

55. *See* Yarborough & Co. v. Schoolfield Furniture Indus., 275 S.C. 151, 153, 268 S.E.2d 42, 43 (1980) (refusing to consider attorney's affidavits because they were "conclusory in nature and based almost entirely on hearsay").

56. *See* Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986); Alston v. Blue Ridge Transfer Co., 308 S.C. 292, 294-95, 417 S.E.2d 631, 632-33 (Ct. App. 1992), *cert. denied* (holding depositions not filed but read into record as properly before court).

57. The appellant raised an almost identical issue on appeal: "Did counsel's affidavits constitute a proper request to the court to postpone or deny summary judgment because of the

good cause to delay or defeat summary judgment. Rule 56(f) of the South Carolina Rules of Civil Procedure supports this reasoning:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.[58]

In *Baughman*, a case with facts analogous to *Clark*, South Carolina's Supreme Court overturned summary judgment for a generator defendant because the premature judgment precluded the plaintiff from a full and fair opportunity to complete discovery.[59] In *Baughman* the plaintiff procured an inadmissible expert opinion.[60] However, the court thought that the evidence highlighted a need for further testing, warranting a delay in judgment.[61]

The attorney's affidavit in *Clark* potentially qualifies under Rule 56(f) as a plea for delay to await the publication of the expert depositions. "[C]ourts have not mandated strict compliance with the technical requirements of Rule 56(f) where . . . the need for further discovery is otherwise made known to the trial court."[62] The attorney's statements in *Clark* and the expert's testimony in *Baughman* were not admissible evidence. However, just as the evidence in *Baughman* indicated a need for further discovery, the attorney in

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unavailability of expert deposition transcripts?" Brief of Appellant at 1. However, the supreme court focused on the admissibility of evidence contained in the lawyer's affidavit. *See supra* note 7 and accompanying text. Most likely, the court did not address the issue because even if the trial judge had delayed summary judgment until the expert depositions became available, the finding that causation did not exist would remain unchanged. The supreme court's own review of causation supports this conclusion. *See supra* notes 13-19 and accompanying text.

58. S.C. R. Civ. P. 56(f).

59. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543-44.

60. *Id.* at 111, 410 S.E.2d at 543 (finding that expert's testimony failed the "most probably" rule).

61. *Id.* at 112, 410 S.E.2d at 543-44. The court provided a test for determining whether a delay under Rule 56(f) is appropriate:

> (1) Has the plaintiff "demonstrated a likelihood that further discovery will uncover additional evidence relevant to the issue of . . . causation and that [the plaintiff is] not merely engaged in a 'fishing expedition,'"
>
> (2) Was the plaintiff reasonably diligent in the pursuit of evidence to establish causation, and
>
> (3) Was the delay tempered by the complexity of the case and the hardship of proving causation?

Id. at 112-14, 410 S.E.2d at 544-45 (citations omitted).

62. *Id.* at 112 n.4, 410 S.E.2d at 544 n.4 (citing First Chicago Int'l v. United Exch. Co., 836 F.2d 1375 (D.C. Cir. 1988) and Snook v. Trust Co. of Ga. Bank, 859 F.2d 865 (11th Cir. 1988)).

Clark, testifying from his own personal experience and knowledge, proved the existence of expert depositions that possibly warranted a delay in summary judgment.

In *Clark* South Carolina's Supreme Court adopted a new rule for determining nuisance liability. Also, the court reaffirmed rules for establishing causation and using affidavits. In addition the opinion clarified standards for expert testimony on causation.

By holding that one who does not control property when the alleged nuisance occurred cannot be held liable, the court logically extended precedent. The availability of strict liability against producers of toxic chemicals supports the "no control" standard. South Carolina's Court of Appeals apparently has approved this form of liability. Therefore, *Clark* may presage a growth in South Carolina of strict liability cases against hazardous waste generators. The potential rise in strict liability actions would most likely offset the reduced number of nuisance actions.

The causation rules applied in *Clark* follow accepted common law principles. Compared to CERCLA, *Clark* provides significantly more stringent causation requirements.

The court strongly suggested a tightening of the technical requirements for an expert's testimony on causation. To avoid evidentiary and causal difficulties, experts should explicitly state that a given event or condition most probably caused a plaintiff's injury.

The court's discussion of attorney's affidavits raises a further question concerning an attorney's statements in requesting a delay in granting summary judgment. Rule 56(f) potentially provides a basis for delaying summary judgment when critical depositions have been taken but remain unpublished.

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