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Damaging the Special Injury Rule: A Restrictive Holding in Overcash v. South Carolina Electric & (and) Gas Co.

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I. INTRODUCTION

In May 2005, boaters across South Carolina enjoyed the Memorial Day weekend by relaxing in various watercraft. As vacationers returned to work on Tuesday, the South Carolina Supreme court issued a decision that should make South Carolinians think twice before stepping on a boat. In *Overcash v. South Carolina Electric & Gas Co.*,¹ the supreme court decided an individual plaintiff cannot recover for personal injury under a public nuisance theory; instead, a plaintiff can only recover for injury to property.²

"A public nuisance is an unreasonable interference with a right common to the general public."³ Some scholars have characterized the tort of public nuisance as a largely incoherent collection of infringements on public rights.⁴ Recently, however, the doctrine has regained prominence as the basis of liability in a variety of actions ranging from corporate liability for pollution⁵ to liability for handgun manufacturers.⁶ Generally, only a governmental entity can sue under a public nuisance theory,⁷ but some states, including South Carolina, have adopted a "special injury" rule that allows an individual private plaintiff to bring a public nuisance action.⁸ Under the special injury rule, a private plaintiff must show an injury to himself that differs in kind from that of the general public.⁹

Although the special injury rule first appeared in the 1500s,¹⁰ courts today continue to struggle when deciding what types of injuries constitute special injuries.¹¹ In *Overcash II*, the South Carolina Supreme Court adopted a bright-line rule and decided that a private plaintiff can recover only for injuries to real or personal property under a public nuisance theory, and thus a private party cannot recover for personal injury.¹² The court examined the history of nuisance, as well as South Carolina precedent, and concluded that allowing recovery for personal

1. (*Overcash II*), 364 S.C. 569, 614 S.E.2d 619 (2005).

2. *Id.* at 575, 614 S.E.2d at 622.

3. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

4. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 643–44 (5th ed. 1984).

5. See, e.g., *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005) (discussing the plaintiff's ability to recover for injuries caused by lead-based paint).

6. See, e.g., *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633 (D.C. 2005) (discussing the plaintiff's ability to recover for handgun-related injuries).

7. See, e.g., *Dozier v. Troy Drive-In-Theaters, Inc.*, 89 So.2d 537, 548 (Ala. 1956) (stating the Alabama Attorney General may pursue injunctive relief).

8. See *McMeekin v. Cent. Carolina Power Co.*, 80 S.C. 512, 515, 61 S.E. 1020, 1023 (1908); KEETON ET AL., *supra* note 4, § 90, at 647.

9. KEETON ET AL., *supra* note 4, § 90, at 647.

10. *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 573, 614 S.E.2d 619, 621 (2005).

11. KEETON ET AL., *supra* note 4, § 90, at 647.

12. *Overcash II*, 364 S.C. at 575, 614 S.E.2d at 622.

injury under the special injury rule would “perpetuate the erosion of any semblance of doctrinal consistency in the common law of nuisance.”¹³ This Note argues the supreme court improperly restricted the scope of the special injury rule, and neither the development of nuisance law nor prior South Carolina precedent supports the decision. A better rule would include personal injury in its scope, or in the alternative, entirely abolish the private right of action.

Part II discusses the factual background and the court’s analysis in *Overcash II*. Because part of the court’s reasoning rests on the historical development of nuisance, Part III gives the necessary historical background on the development of nuisance law. Part IV argues the court’s reasoning does not support the adoption of a rule that disallows recovery for personal injury but instead supports either a narrow rule barring private action or a broader rule that allows recovery for personal injury. Part V explains why a private cause of action for public nuisance should exist and examines the proper standard of liability. Part VI argues the private right of action in South Carolina should permit recovery for personal injury.

II. BACKGROUND OF *Overcash II*

A. Facts

In 1964, Sarah and Crawford Clarkson purchased a lot on Lake Murray.¹⁴ Later, the Clarksons built a dock from their shoreline to an island, owned by South Carolina Electric and Gas Company (SCE&G), located over 100 yards away.¹⁵ SCE&G owns Lake Murray, subject to the regulation of the Federal Energy Regulatory Commission (FERC),¹⁶ and has a duty to prevent unauthorized use of the lake and the land surrounding the lake that sits below a certain water level.¹⁷ The Clarksons’ dock “constituted an unlawful obstruction of the navigable waterway,” and SCE&G had either actual or constructive notice of the dock.¹⁸

On July 17, 1999, Karl Overcash, a twenty-four-year-old employee of Lake Murray Marina, returned home from the marina by boat.¹⁹ Overcash collided with the Clarksons’ unlit dock and suffered severe personal injuries to his upper body, including blinding injuries to both eyes.²⁰ Overcash sued both the Clarksons and

13. *Id.* at 575, 614 S.E.2d at 622.

14. *Overcash v. S.C. Elec. & Gas Co. (Overcash I)*, 356 S.C. 165, 167, 588 S.E.2d 116, 118 (Ct. App. 2003) [hereinafter *Overcash I*], *rev’d*, 364 S.C. 569, 614 S.E.2d 619 (2005).

15. *Id.* at 167, 588 S.E.2d at 118.

16. *Id.* at 167, 588 S.E.2d at 118.

17. See Third Amended Complaint at 2–5, *Overcash v. S.C. Elec. & Gas Co.*, No. 01-CP-40-223 (S.C. Ct. C.P. Oct. 5, 2001). The complaint asserted the Clarksons built the dock on lands wholly owned by SCE&G because the entire dock rests below the 360 foot contour line. *Id.* at 2–5. After several years, SCE&G deeded the island to the Clarksons, and reserved the right to enforce covenants on its use. *Id.* at 6–7. The record fails to clarify whether the Clarksons acquired title to the shoreline that abuts the Clarksons’ lot and is below the 360 foot contour.

18. *Overcash I*, 356 S.C. at 167–68, 588 S.E.2d at 118.

19. *Id.* at 168, 588 S.E.2d at 118.

20. *Id.* at 168, 588 S.E.2d at 118; Third Amended Complaint, *supra* note 17, at 8–9.

SCE&G on multiple theories of recovery, including common law and statutory public nuisance.²¹ The Clarksons settled with Overcash and SCE&G remained as the lone defendant in the action.²²

B. Procedural History

The Court of Common Pleas for Richland County granted SCE&G's motion to dismiss for failure to state a claim.²³ The trial court reasoned, "All who forcefully collide with an obstruction face the prospect of personal injury whether the obstruction is on a public highway or a navigable stream."²⁴ That statement implies the trial court viewed Overcash's injuries as no different than those suffered by the general public; therefore, Overcash could not satisfy the special injury rule. The trial court also stated only damages for injury to real or personal property—and not damages for personal injury—were recoverable.²⁵ Finally, the court stated that South Carolina Code section 49-1-10 did not allow a private right of action.²⁶

The South Carolina Court of Appeals reversed the trial court.²⁷ The court of appeals found an earlier South Carolina case, *Drews v. E. P. Burton & Co.*,²⁸ controlling, and stated section 49-1-10 provided a private right of action.²⁹ The court of appeals stated South Carolina law allows a private plaintiff to sue for public nuisance, as long as the plaintiff suffered an injury different in kind than the general public's injury.³⁰ Applying this rule, the court of appeals held Overcash's injury satisfied the special injury requirement.³¹ The court reasoned the public injury was the illegal obstruction of a public waterway, not the possibility of physical injury from collision.³² Overcash's physical injuries therefore differed in kind from the public injury and satisfied the special injury rule.³³ The South Carolina Supreme Court reversed, holding that only injury to real or personal

21. *Overcash v. S.C. Elec. & Gas Co. (Overcash I)*, 356 S.C. 165, 168, 588 S.E.2d 116, 118 (Ct. App. 2003), *rev'd*, 364 S.C. 569, 614 S.E.2d 619 (2005). The South Carolina Code codifies the claim for public nuisance at section 49-1-10, which states that a person who obstructs a navigable waterway commits a nuisance. S.C. CODE ANN. § 49-1-10 (1976). The common law claim finds support in the South Carolina Constitution, which states that all navigable waterways are common public highways. S.C. CONST. art. XIV, § 1.

22. *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 571, 614 S.E.2d 619, 620 (2005).

23. *Id.* at 571, 614 S.E.2d at 620.

24. Order at 4, *Overcash v. S.C. Elec. & Gas Co.*, No. 01-CP-40-0223 (S.C. Ct. C.P. Oct. 5, 2001).

25. *Id.*

26. *Id.* at 6; *see* S.C. CODE ANN. § 49-1-10.

27. *Overcash v. S.C. Elec. & Gas Co. (Overcash I)*, 356 S.C. 165, 167, 588 S.E.2d 116, 117 (Ct. App. 2003), *rev'd*, 364 S.C. 569, 614 S.E.2d 619 (2005).

28. 76 S.C. 362, 57 S.E. 176 (1907).

29. *Overcash I*, 356 S.C. at 168–69, 588 S.E.2d at 118.

30. *Id.* at 175, 588 S.E.2d at 122.

31. *Id.* at 177, 588 S.E.2d at 123.

32. *Id.* at 178, 588 S.E.2d at 124.

33. *See id.* at 178, 588 S.E.2d at 124.

property satisfies the special injury requirement and that section 49-1-10 does not provide a private right of action.³⁴

C. *The South Carolina Supreme Court's Analysis in Overcash II*

The South Carolina Supreme Court found the trial court's reasoning persuasive.³⁵ The supreme court stated that personal injury is not compensable under a public nuisance theory.³⁶ Rather, only injury to property satisfies the special injury requirement.³⁷

The supreme court noted that it had never specifically ruled on whether personal injuries satisfy the special injury requirement.³⁸ The court began its analysis with a short history of the development of nuisance law in England.³⁹ The *Overcash II* majority questioned the legitimacy of the special injury rule by discounting its historical pedigree,⁴⁰ asserting the special injury rule derailed the course of nuisance law.⁴¹ After recounting the special injury rule's questionable pedigree, the majority narrowly construed the rule to apply only to injury to property.⁴² The court announced that a narrow construction of the rule would promote "doctrinal consistency in the common law of nuisance."⁴³ The majority concluded that a narrow interpretation is entirely consistent with South Carolina precedent because prior South Carolina cases had involved only injury to real or personal property.⁴⁴ In conclusion, the court stated that South Carolina law provides other "tort-based doctrines" under which the plaintiff could recover for personal injury.⁴⁵

III. A PRIMER ON NUISANCE AND THE SPECIAL INJURY RULE

There is no precise definition of nuisance, but Professors Prosser and Keaton may have stated it best: "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'"⁴⁶ The *Overcash II* court announced a bright-line rule for the sake of "doctrinal consistency."⁴⁷ Nonetheless,

34. *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 575-76, 614 S.E.2d 619, 622-23 (2005).

35. *Id.* at 575, 614 S.E.2d at 622.

36. *Id.* at 575, 614 S.E.2d at 622.

37. *Id.* at 575, 614 S.E.2d at 622.

38. *Id.* at 574, 614 S.E.2d at 621.

39. *Id.* at 573, 614 S.E.2d at 620-21.

40. *See Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 573, 614 S.E.2d 619, 620-21 (2005).

41. *Id.* at 573, 614 S.E.2d at 621.

42. *Id.* at 573, 614 S.E.2d at 621.

43. *Id.* at 575, 614 S.E.2d at 622.

44. *Id.* at 573-74, 614 S.E.2d at 621.

45. *Id.* at 575, 614 S.E.2d at 622.

46. KEETON ET AL., *supra* note 4, § 86, at 616.

47. *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 573, 614 S.E.2d 619, 621 (2005).

nuisance has confounded scholars and judges for centuries.⁴⁸ The distinction between personal injury and injury to property is only part of the confusion surrounding nuisance law.⁴⁹

A. *The Historical Development of Nuisance Law*

Early nuisance law resembled the modern tort of private nuisance, addressing interferences with servitudes or a person's inherent right to use his land.⁵⁰ The "assize of nuisance," which remedied conduct occurring wholly on another's land, appeared in the thirteenth century to complement the "assize of novel disseisin," which remedied a dispossession of land.⁵¹ To contrast the two remedies, one commentator used a common example:⁵² Suppose a landowner built a dam on his property that diverted water from his neighbor's property and the neighbor demanded relief.⁵³ Because the damming did not dispossess the neighbor of his land, the assize of novel disseisin provided no relief.⁵⁴ Assize for nuisance remedied the problem by requiring the landowner to abate the damming activity.⁵⁵ Action upon the case for nuisance soon replaced the assize for nuisance as the only action at common law.⁵⁶ Thus, this action became the "parent of the law of private nuisance as it stands today."⁵⁷

Nuisance began as a tort that provided relief for injury to real property rights.⁵⁸ One commentator suggested that this direct link to property rights foreclosed any possibility that lawyers at the time of the tort's inception could have conceived of nuisance as a grounds for personal injury recovery.⁵⁹ However, personal injury recovery does not arise in an injury-to-property context; it typically arises in an action for public nuisance that descends from the confluence of the private nuisance action and an old English criminal writ.⁶⁰

Public nuisance evolved from the civil action of private nuisance and from the criminal writ of "purpresture."⁶¹ Purpresture remedied infringements on public

48. See P. H. Winfield, *Nuisance as a Tort*, 4 CAMBRIDGE L.J. 189, 189–90 (1932); see also KEETON ET AL., *supra* note 4, § 86, at 617 ("[T]here has been a rather astonishing lack of any full consideration of 'nuisance' on the part of legal writers.").

49. See KEETON ET AL., *supra* note 4, § 86, at 617 (noting that nuisance has come to mean the invasion of various types of interests—and different kinds of conduct—by the defendant).

50. See Winfield, *supra* note 48, at 189.

51. See *id.* at 190; F. H. Newark, *The Boundaries of Nuisance*, 65 LAW Q. REV. 480, 481 (1949).

52. Winfield, *supra* note 48, at 190–91.

53. *Id.*

54. *Id.*

55. *Id.* at 191.

56. KEETON ET AL., *supra* note 4, § 86, at 617.

57. *Id.*

58. Newark, *supra* note 51, at 482.

59. *Id.*

60. *Id.* at 482–83.

61. KEETON ET AL., *supra* note 4, § 86, at 617.

land-based rights, not private land-based rights.⁶² In England, purprestures were encroachments upon land or highways owned by the Crown, and only the Crown could prosecute the wrongdoer.⁶³ Keeton suggested that a superficial similarity existed between an interference with a public road and an interference with a private drive.⁶⁴ Thus, society began using the term “nuisance,” which originally encompassed only private rights, to encompass both public and private actions.⁶⁵ Initially, although common usage had corrupted the nomenclature, private nuisance remained a tort and public nuisance remained a crime.⁶⁶ English courts turned away individual plaintiffs who claimed an action in nuisance for the blocking of a public way.⁶⁷ Courts refused private attempts to bring a public nuisance action because public nuisance—or purpresture—was criminal, and only the Crown could prosecute a criminal action.⁶⁸ Until the 1530s, the tort-crime distinction separated private nuisance from public nuisance.⁶⁹

B. *The Special Injury Rule*

In the 1530s, the King’s Bench rendered a decision that “set the law of nuisance on the wrong track.”⁷⁰ In an anonymous case,⁷¹ an individual plaintiff sued a defendant for blocking the public highway.⁷² The court disallowed the private citizen’s suit for this public injury.⁷³ The majority opinion made an imprecise statement of law: The court reasoned an individual could not bring a cause of action, not only because the exclusive remedy was criminal, but also because a private remedy would provide a cause of action to every citizen.⁷⁴ The resulting proliferation of claims would subject a defendant to multiple causes of action

62. *Id.* For a South Carolina case discussing purpresture, see *Sloan v. City of Greenville*, 235 S.C. 277, 111 S.E.2d 573 (1959).

63. KEETON ET AL., *supra* note 4, § 86, at 617.

64. *Id.*

65. *Id.*

66. Newark, *supra* note 51, at 482–83.

67. *Id.*

68. *Id.* at 483.

69. *See id.* at 482.

70. *Id.* at 483.

71. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGICAL L.Q.* 755, 790 (2001).

72. Newark, *supra* note 51, at 483 (citing Y.B. 27 Hen. 8, fol. 26, Mich. pl. 10 (1536) (Baldwin, C.J.)).

73. *Id.* (citing Y.B. 27 Hen. 8, fol. 26, Mich. pl. 10 (1536) (Baldwin, C.J.)).

74. *Id.* (citing Y.B. 27 Hen. 8, fol. 26, Mich. pl. 10 (1536) (Baldwin, C.J.)).

stemming from one incident.⁷⁵ To address the problem of multiple actions, Justice Fitzherbert set forth the special injury rule.⁷⁶

Justice Fitzherbert wrote that an individual plaintiff may not sue in public nuisance because it is a criminal proceeding ““unless it be where one man has greater hurt or inconvenience than any other man had, and then he who had more displeasure or hurt, etc., can have an action to recover his damages that he had by reason of this special hurt.””⁷⁷ Justice Fitzherbert also gave the famous example of a rider on horseback falling into a trench on a public highway.⁷⁸ In the example, the entire public suffered injury from the trench in the road, but the rider suffered physical and, therefore, special injuries.⁷⁹ The hypothetical soon moved its way into the fabric of law, and shifted the character of public nuisance from a strictly criminal proceeding to one that allows a private action for special injury.⁸⁰

Public nuisance expanded incrementally, and soon began to cover any interference with public rights—land-based or otherwise.⁸¹ Public nuisance became a broad category of offenses, including interferences with public health, safety, or convenience.⁸² In addition, plaintiffs began pleading public nuisance when the underlying claims resembled ordinary negligence.⁸³ One commentator suggested that plaintiffs hoped courts would broadly construe nuisance claims when negligence was unworkable.⁸⁴ Concern about the blending of nuisance and negligence may have motivated the South Carolina Supreme Court’s ruling in

75. *Id.* *Overcash I* quotes the King’s Bench reasoning in its opinion:

“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.”

Overcash v. S.C. Elec. & Gas Co. (Overcash I), 356 S.C. 165, 172, 588 S.E.2d 116, 120 (Ct. App. 2003), *rev’d*, 364 S.C. 569, 614 S.E.2d 619 (2005) (quoting Antolini, *supra* note 71) (alterations in original).

76. See Newark, *supra* note 51, at 483 (citing Y.B. 27 Hen. 8, fol. 26, Mich. pl. 10 (1536) (Fitzherbert, J.)).

77. *Id.* (quoting Y.B. 27 Hen. 8, fol. 26, Mich. pl. 10 (1536) (Fitzherbert, J.)).

78. *Id.* (quoting Y.B. 27 Hen. 8, fol. 26, Mich. pl. 10 (1536) (Fitzherbert, J.)). The entire hypothetical reads:

“[I]f a man make a trench across the highway, and I come riding that way by night and I and my horse together fall in the trench so that I have great damage and inconvenience in that, I shall have an action against him who made the trench across the road, because I am more damaged than any other man.”

Id. (quoting Y.B. 27, Hen. 8, fol. 26, Mich. pl. 10 (1536) (Fitzherbert, J.)).

79. See *id.* (quoting Y.B. 27, Hen. 8, fol. 26, Mich. pl. 10 (1536) (Fitzherbert, J.)).

80. See Newark, *supra* note 51, at 483–84.

81. See William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998–99 (1966).

82. See *id.* at 1000–01.

83. See Newark, *supra* note 51, at 484–85.

84. *Id.* at 485.

Overcash II. However, the supreme court's ruling that the special injury rule does not apply to personal injury⁸⁵ does not necessarily promote doctrinal consistency.

C. *The Justification for the Special Injury Rule*

The special injury rule determines the plaintiff's standing to bring suit in public nuisance.⁸⁶ Commentators have posited two justifications for the rule: (1) to prevent plaintiffs from harassing defendants with multiple actions arising out of a single public wrong and (2) public injuries are generally minor inconveniences when viewed from the perspective of an individual.⁸⁷ These justifications imply broader concepts. For example, the special injury rule enhances judicial economy—multiple plaintiffs should not be allowed to clog courts' dockets with actions arising out of the same conduct.⁸⁸ Additionally, the law should not give a remedy for every insignificant injury that results from nuisance: Instead, the injury should have to reach some threshold level where a cause of action is appropriate.⁸⁹

IV. THE *Overcash II* RULE IS INCONSISTENT WITH THE COURT'S EXPRESSED CONCERNS

The *Overcash II* court's reasoning does not support the rule it announced. The supreme court announced doctrinal consistency in South Carolina nuisance law as the primary motivation for the bright-line rule.⁹⁰ Instead, the rule seems ill-advised because the majority misinterpreted both the development of the common law and the South Carolina precedent. A historical argument calls for the abolition of the private right of action, while an analysis of modern precedent suggests that South Carolina should permit recovery for personal injuries.

A. *The Historical Argument*

The *Overcash II* court spent two brief paragraphs discussing the development of nuisance under the English common law.⁹¹ The court misunderstood the development of public nuisance and improperly emphasized injury to real property rather than focusing on the differences between the assize of nuisance and purpresture.⁹² The court recounted how the two branches of nuisance were once

85. *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 574-75, 614 S.E.2d 619, 621-22 (2005).

86. See Prosser, *supra* note 81, at 1005.

87. RESTATEMENT (SECOND) OF TORTS § 821C cmt. a (1979).

88. See Prosser, *supra* note 81, at 1007. Perhaps this states an argument for class action.

89. See *supra* notes 81-84 and accompanying text.

90. *Overcash II*, 364 S.C. at 575, 614 S.E.2d at 622.

91. *Id.* at 573, 614 S.E.2d at 620-21.

92. Compare *Overcash II*, 364 S.C. at 573, 614 S.E.2d at 620-21 (distinguishing nuisance proceedings by the nature of the protected property rather than the nature of the protected right), with *supra* notes 50-69 and accompanying text (discussing assizes of nuisance and purpresture).

separate: one to protect private rights in real property, the other to protect the public rights in public land.⁹³ The court then noted the famous case that “derailed the course of nuisance law . . . which once dealt only with harm to real property.”⁹⁴ While technically correct, this statement does nothing to support the majority’s reasoning. The real property nexus only provides a possible explanation for confusion of the two causes of action.⁹⁵ Historically, the distinction rested in the difference between the nature of the civil action and the nature of the criminal action.⁹⁶

Therefore, maintaining doctrinal consistency based on the historical development of nuisance law should result in the restoration of the distinction between the civil cause of action for private nuisance and the criminal action for public nuisance.⁹⁷ The original error in the development of nuisance law was not the advent of the special injury rule—it was the judicial confusion between nuisance and purpresture.⁹⁸ The clarification of the two actions would lead to the consistency desired by the *Overcash II* court.⁹⁹

Additionally, South Carolina precedent offers support for the historical approach. In *Sloan v. City of Greenville*,¹⁰⁰ an individual plaintiff brought a cause of action against a municipality to enjoin it from issuing a building permit to a developer.¹⁰¹ The plaintiff alleged the proposed building would have created a purpresture.¹⁰² The citizen effectively forced the city—a public entity—to prevent the purpresture before the building existed.¹⁰³ The *Overcash II* court could have used *Sloan* to distinguish between private nuisance and purpresture and held that only the state may sue for purpresture.

Critics of this argument may claim that public nuisance is broader than purpresture and the state should not bar all private actions against public nuisance. A private action for public nuisance protects certain common rights that may not inhere in real property.¹⁰⁴ These critics may argue that because public nuisance includes a variety of wrongful behavior,¹⁰⁵ a one-size-fits-all remedy could not adequately address all wrongs.

However, the tort-crime distinction dispels these criticisms. While the same act could be both a crime and a tort, the state has the power to craft the remedy for the

93. *Overcash II*, 364 S.C. at 573–74, 614 S.E.2d at 620–21.

94. *Id.* at 573, 614 S.E.2d at 621.

95. See *supra* notes 65–66 and accompanying text.

96. See *supra* notes 61–69 and accompanying text.

97. See *supra* notes 61–69 and accompanying text.

98. See *supra* notes 70–76 and accompanying text.

99. *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 575, 614 S.E.2d 619, 622 (2005).

100. 235 S.C. 277, 111 S.E.2d 573 (1959).

101. *Id.* at 279, 111 S.E.2d at 574.

102. *Id.* at 284, 289, 111 S.E.2d at 577, 579–80.

103. *Id.* at 284, 289, 111 S.E.2d at 577, 579–80.

104. See, e.g., Prosser, *supra* note 81, at 1000–01 (discussing various types of public nuisance, some of which are unrelated to real property).

105. See *id.*

act and may exclude tort liability.¹⁰⁶ While tort law is mainly compensatory, criminal law serves to “protect and vindicate the interests of the public as a whole.”¹⁰⁷ Therefore, the state could exclude private rights of action for public nuisance and leave criminal action as the sole remedy while still protecting the public welfare.

B. South Carolina Precedent

The *Overcash II* court could not justify its holding on a purely historical argument. As the court indicated, South Carolina has adhered to the special injury rule for decades.¹⁰⁸ The court may have felt bound by *stare decisis*¹⁰⁹ and, therefore, was unwilling to abolish the special injury rule.

The *Overcash II* court asserted that previous South Carolina cases have “avoided the uncertainty and confusion surrounding personal injuries in public nuisance actions.”¹¹⁰ The opinion did not state the source of the confusion, but perhaps the difficulty arises from determining whether a certain injury qualifies as a special injury. Scholars have recognized this difficulty.¹¹¹ Whatever the reason, the court implied that incorporating personal injury into South Carolina’s public nuisance jurisprudence would wreak doctrinal havoc, and offered a bright-line rule that disallows public nuisance actions based on a personal injury as a solution.¹¹²

The court cited three cases to support its choice of a property-only special injury rule.¹¹³ Because the court based its ruling on a policy of doctrinal consistency, the decisions that—in the court’s view—support consistency require closer scrutiny than they received in *Overcash II*.¹¹⁴ This investigation will show that the property-only rule does not necessarily follow from the precedent the *Overcash II* court relied on.

106. See *Ezell v. Ritholz*, 188 S.C. 39, 46, 198 S.E. 419, 422 (1938).

107. KEETON ET AL., *supra* note 4, § 2, at 7. Keeton further comments that the distinction between criminal law and tort law rests in the protected interests and the remedies available at law. *Id.*

108. See *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 573–74, 614 S.E.2d 619, 621 (2005) (citing *Burrell v. Kirkland*, 242 S.C. 201, 203, 130 S.E.2d 470, 470 (1963); *Huggin v. Gaffney Dev. Co.*, 229 S.C. 340, 342, 92 S.E.2d 883, 884 (1956); *Crosby v. S. Ry. Co.*, 221 S.C. 135, 136, 69 S.E.2d 209, 209 (1952)).

109. See *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446, (1996) (explaining consistency provided by *stare decisis*).

110. *Overcash II*, 364 S.C. at 573, 614 S.E.2d at 621 (citing *Burrell*, 242 S.C. at 203, 130 S.E.2d at 470; *Huggin*, 229 S.C. at 342, 92 S.E.2d at 884; *Crosby*, 221 S.C. at 136, 69 S.E.2d at 209).

111. KEETON ET AL., *supra* note 4, § 90, at 647 (“Once this rule is accepted, however, the courts have not always found it at all easy to determine what is sufficient ‘particular damage’ to support the private action . . .”).

112. *Overcash II*, 364 S.C. at 573–75, 614 S.E.2d at 621–22.

113. *Id.* at 573–74, 614 S.E.2d at 621 (citing *Burrell*, 242 S.C. at 203, 130 S.E.2d at 470; *Huggin*, 229 S.C. at 342, 92 S.E.2d at 884; *Crosby*, 221 S.C. at 136, 69 S.E.2d at 209).

114. This Note discusses *Burrell* and *Huggin* in detail. *Crosby* does not warrant discussion because the stated injury is similar to the injury at issue in *Huggin*.

1. *Burrell v. Kirkland*¹¹⁵

In *Burrell*, the plaintiff claimed the defendant obstructed a public road that connected the plaintiff's property to a public highway.¹¹⁶ The plaintiff sued under a public nuisance theory, using the classic example of an obstructed highway, but the court disposed of the case without ruling on the existence of a nuisance.¹¹⁷ The court recited a version of the special injury rule, stating that no private right of action exists for a public nuisance absent special damages.¹¹⁸ Because no special damages existed, the plaintiff had no cause of action for public nuisance.¹¹⁹

The *Overcash II* court used *Burrell* to justify the property-only special injury rule despite the holding in *Burrell* that no special injury existed. The parenthetical explanation of *Burrell* in *Overcash II* strained to make *Burrell* fit the public nuisance mold.¹²⁰ The *Overcash II* majority stated that *Burrell* "requested [an] injunction for his neighbors' obstruction of [a] public road."¹²¹ However, the *Burrell* court was clear in noting the road in question was a private road—not a public one—because only a limited class of people, as opposed to the general public, used the road.¹²²

Further, *Burrell* was an adjoining property owner and asserted rights that are generally indicative of private nuisance.¹²³ While a nuisance can be both public and private,¹²⁴ *Burrell*'s status as a landowner, his assertion of an individual real property right in the right to ingress and egress,¹²⁵ and the obstruction of a private road makes *Burrell* a private nuisance case, though the plaintiff did not characterize it as such.¹²⁶ The *Overcash II* court provided no analysis of *Burrell*.¹²⁷ Upon closer inspection, *Burrell*, in which the court found no special injury or public nuisance, does little to further the assertion that only an injury to property qualifies as a special injury.¹²⁸

115. 424 S.C. 201, 130 S.E.2d 470 (1963).

116. *Id.* at 203, 205, 130 S.E.2d at 470, 472.

117. *Id.* at 205, 130 S.E.2d at 472.

118. *Id.* at 204–05, 130 S.E.2d at 471–72.

119. *Id.* at 205, 130 S.E.2d at 472.

120. *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 573, 614 S.E.2d 619, 621 (2005).

121. *Id.* at 573, 614 S.E.2d at 621.

122. *Burrell*, 242 S.C. at 208, 130 S.E.2d at 473.

123. *Burrell v. Kirkland*, 242 S.C. 201, 205–06, 130 S.E.2d 470, 472 (1963).

124. KEETON ET AL., *supra* note 4, § 90, at 648.

125. *See Brown v. Hendricks*, 211 S.C. 395, 402, 45 S.E.2d 603, 606 (1947) (stating that a property owner's right to access an adjacent street is appurtenant to the property).

126. *See Burrell*, 242 S.C. at 203, 130 S.E.2d at 470.

127. *See Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 573, 614 S.E.2d 619, 621 (2005).

128. *Id.* at 575, 614 S.E.2d at 622.

2. *Huggin v. Gaffney Development Co.*¹²⁹

Huggin centered on the obstruction of a public highway.¹³⁰ The supreme court recited the special injury rule, and unlike *Burrell*, held that *Huggin* met the special injury requirement.¹³¹ However, *Huggin* is problematic because the court confused the nature of the protected right with the particular injury to the individual.¹³² As stated above, a private nuisance action alleges injury to a private property right, which is a right that is appurtenant to land.¹³³ A public nuisance action alleges injury to a right common to the public.¹³⁴ To sue for public nuisance, an individual must "have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."¹³⁵ The *Huggin* court confused these concepts in its analysis.

The *Huggin* court quoted *Brown v. Hendricks*:

"The right of the abutting property owner to access over the street adjacent to his property as an appurtenance to his property, and to have such access protected from material obstruction, has been recognized by many of the courts, including our own. And it has been held that an obstruction which materially injures or deprives the abutting property owner of ingress and egress to and from his property is a 'taking' of his property, for which recovery may be had. And the fact that other means of access to the property are available affects merely the amount of damages, and not the right of recovery."¹³⁶

Thus, the *Huggin* court seemed to discuss a private property right, particularly the ingress and egress from one's own property.¹³⁷ If *Huggin* was suing to protect this right, then the cause of action should have sounded in private nuisance. The right to enter and leave one's own property is by nature not a right held in common with the public.¹³⁸

The *Huggin* court further noted:

"These authorities are in line with the generally recognized principle that a property owner has an easement in a street upon

129. 229 S.C. 340, 92 S.E.2d 883 (1956).

130. *Id.* at 342, 92 S.E.2d at 884.

131. *Id.* at 344-45, 92 S.E.2d at 884-85.

132. *See id.* at 345, 92 S.E.2d at 885.

133. *See supra* Part III; KEETON ET AL., *supra* note 4, § 87, at 619.

134. *See supra* Part III; KEETON ET AL., *supra* note 4, § 90, at 643.

135. RESTATEMENT (SECOND) OF TORTS § 821C (1979).

136. *Huggin*, 229 S.C. at 344, 92 S.E.2d at 885 (quoting *Brown v. Hendricks*, 211 S.C. 395, 402, 45 S.E.2d 603, 606 (1947)).

137. *Id.* at 345, 92 S.E.2d at 885.

138. *See Prosser, supra* note 81, at 1001-02 (distinguishing a public right from a private right).

which his property abuts, which is special to him and should be protected. While the owner of a lot on a public street has the same right to the use of the street that rests in the public, he at the same time has other rights which are special and peculiar to him; and the right of ingress and egress is one of them. This right of access is appurtenant to his lot, and is private property. To destroy that right is to damage that property."¹³⁹

Again, the court upheld the public nuisance action while protecting a private property right.¹⁴⁰ Although the defendant obstructed a public street, by quoting *Brown*, the court framed the argument in terms of the plaintiff's private property right of ingress and egress.¹⁴¹ If *Huggin* simply confused the public and private rights of the plaintiff, then *Huggin* provides no support for the special injury rule announced in *Overcash II* because *Huggin* should have been a private nuisance action.

Another possible reading of *Huggin* exists. The obstruction of a highway is a public nuisance.¹⁴² *Huggin* claimed a special injury from the obstruction of the highway in the form of economic damage.¹⁴³ *Huggin* also claimed that the obstructed highway prevented him from procuring labor to pick his crops and cost him \$150.00 in crop loss.¹⁴⁴ *Huggin* also claimed a diminution in value to his property.¹⁴⁵ At first glance, this economic injury seems to satisfy the special injury rule. However, even if *Huggin* satisfied the special injury rule, this decision does not support the property-only rule from *Overcash II*.¹⁴⁶

When considering the nature of *Huggin*'s injury, *Huggin* weakens the *Overcash II* court's argument rather than strengthening it. *Huggin* claimed a diminution in value in his land.¹⁴⁷ Economic loss rests on the outer boundaries of compensable injury in tort action. Indeed, "some states use the 'economic loss' rule to prohibit all recovery of purely economic damages in tort."¹⁴⁸ South Carolina allows recovery for purely economic damages in tort, as long as the liability arises in tort and is independent of a contractual duty.¹⁴⁹ Allowing recovery for purely economic injuries, as in *Huggin*, expands the scope of tort recovery, while *Overcash II*'s

139. *Huggin v. Gaffney Dev. Co.*, 229 S.C. 340, 345, 92 S.E.2d 883, 885 (1956) (quoting *Brown*, 211 S.C. at 404, 45 S.E.2d at 607).

140. *Id.* at 345, 92 S.E.2d at 885.

141. *Id.* at 345, 92 S.E.2d at 885 (quoting *Brown*, 211 S.C. at 402, 45 S.E.2d at 606).

142. See KEETON ET AL., *supra* note 4, § 86, at 617.

143. See *Huggin*, 229 S.C. at 343, 92 S.E.2d at 884.

144. *Id.* at 343, 92 S.E.2d at 884.

145. *Id.* at 343, 92 S.E.2d at 884.

146. *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 575, 614 S.E.2d 619, 622 (2005).

147. *Huggin v. Gaffney Dev. Co.*, 229 S.C. 340, 343, 92 S.E.2d 883, 884 (1956).

148. See *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc.*, 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995) (citing *Blake Constr. Co. v. Alley*, 353 S.E.2d 724, 726 n.4 (Va. 1987) (noting that some states do not allow recovery for economic damages in tort)).

149. See *id.* at 54–55, 463 S.E.2d at 88.

property-only special injury rule narrows the scope by foreclosing recovery for personal injuries. This dichotomy seems unjust.

In sum, the historical argument suggests foreclosing the private right of action for public nuisance because of its criminal nature.¹⁵⁰ South Carolina precedent, namely *Burrell* and *Huggin*, does not justify the property-only rule because a proper analysis shows these cases have only a tenuous link to public nuisance. A critical analysis of the cases shows they promote rather than curtail “uncertainty and confusion surrounding personal injuries in public nuisance actions,” and therefore do not support the doctrinal consistency that the *Overcash II* court sought.¹⁵¹

V. LIABILITY AND USE OF A PRIVATE RIGHT OF ACTION IN PUBLIC NUISANCE

Although the *Overcash II* court couched its decision in doctrinal consistency, perhaps the court was hiding the driving force of the opinion in its short analysis of *Drews v. E. P. Burton & Co.*¹⁵² *Drews* explores the interplay between nuisance and negligence.¹⁵³ The *Overcash II* court’s motivation may have come from a concern that nuisance would subsume negligence if *Overcash* prevailed.¹⁵⁴ This part explores the proper role of a private action for public nuisance in conjunction with negligence.

A. A Discussion of *Drews*

The plaintiff in *Drews* brought two causes of action: a nuisance claim and a negligence claim.¹⁵⁵ The plaintiff accused the defendants of negligently leaving a log in navigable waters causing injury to the plaintiff’s schooner.¹⁵⁶ The plaintiff’s nuisance action arose out of a statute which read: “If any person shall obstruct the same [navigable waters], otherwise than as hereinafter provided, such person shall be deemed guilty of a nuisance.”¹⁵⁷ The court declared a plaintiff could recover for both common law and statutory nuisance if he “sustain[ed] a special injury.”¹⁵⁸ Thereafter, the court stated that if a person has an actionable nuisance claim, then he need not prove negligence because the nuisance is “itself a wrongful act.”¹⁵⁹

150. See Prosser, *supra* note 81, at 999.

151. *Overcash II*, 364 S.C. at 573, 614 S.E.2d at 621.

152. *Overcash II*, 364 S.C. at 574, 614 S.E.2d at 621 (citing *Drews v. E. P. Burton & Co.*, 76 S.C. 362, 57 S.E. 176 (1907)).

153. *Drews*, 76 S.C. at 365–67, 57 S.E. at 177–78.

154. See *supra* notes 81–84 and accompanying text.

155. *Drews*, 76 S.C. at 366, 57 S.E. at 178.

156. *Id.* at 365, 57 S.E. at 177.

157. *Id.* at 366, 57 S.E. at 178 (citing S.C. CODE § 1335 (1902)).

158. *Id.* at 366, 57 S.E. at 178.

159. *Drews v. E. P. Burton & Co.*, 76 S.C. 362, 366, 57 S.E. 176, 178 (1907).

B. Liability Principles

The *Drews* court provided that a person may recover for a public nuisance even without negligence by the defendant.¹⁶⁰ Theoretically, a plaintiff could recover for injuries in a private right of action for public nuisance predicated on a strict liability standard. Generally, strict liability attaches when an activity's abnormally high risk outweighs its social value, or when even acting with due care does not reduce an activity's inherent risk.¹⁶¹ In response to *Drews*, the *Overcash II* court should have framed the issue differently. Instead of focusing on the nature of the injury, a better reasoned opinion would have established the proper use of a public nuisance action.

Prosser noted that liability in public nuisance may come from a statute, as well as the other bases for general tort liability, "intent, negligence, or strict liability."¹⁶² "Nuisance, in short, is not conduct, nor is it even a condition. It is the invasion of an interest, a type of harm or damage, through any conduct which falls within the three traditional categories of liability."¹⁶³ Prosser's comments provide the proper framework in which to analyze the usefulness of public nuisance.

Overcash sued because of an invasion of two types of interests: a personal interest and a public interest. The court acknowledged that Overcash could vindicate his personal interests though "well developed tort-based doctrines which can redress wrongs resulting in personal injuries sustained by an individual."¹⁶⁴ For example, Overcash could have pled battery, and argued that SCE&G was substantially certain that erecting the dock would cause a boater to collide with the dock and suffer unwanted harmful contact.¹⁶⁵ Similarly, Overcash pursued a negligence claim and argued that SCE&G breached a duty to him by allowing the dock to be built and, therefore, proximately caused his injuries.¹⁶⁶ However, these doctrines could only vindicate Overcash's personal interests. The dock also violated a public interest, and public nuisance doctrine provides the mechanism to address the violation of the public interest.

A public nuisance action allows Overcash to act as a private attorney general.¹⁶⁷ The private attorney general concept has appeared in several articles championing the viability and liberalization of public nuisance.¹⁶⁸ While a state has limited resources and cannot possibly prosecute all crimes, allowing citizens to act as a

160. *Id.* at 366, 57 S.E. at 178.

161. See KEETON ET AL., *supra* note 4, § 75, at 536–38 (discussing strict liability generally).

162. Prosser, *supra* note 81 at 1003.

163. *Id.* at 1004.

164. *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 575, 614 S.E.2d 619, 622 (2005).

165. The trial court dismissed Overcash's general intentional tort claim. See Order Granting Motion to Dismiss at 6.

166. Overcash also pled ordinary negligence. See Third Amended Complaint, *supra* note 17, at 12.

167. See Antolini, *supra* note 71, at 765.

168. See, e.g., *id.* ("Because public nuisance is a uniquely powerful tort, embodying a private attorney general concept, courts adhere to the special injury rule as a way to limit access to this unusual remedy.").

private attorney general gives the state a dual benefit: crimes are prosecuted and the state expends fewer resources to prosecute them. The special injury rule satisfies the necessary standing requirement and ensures the plaintiff is a true adversary of the criminal.

However, a problem may arise if a court requires a defendant to compensate a private plaintiff-attorney general for individual injuries under a liability standard less than negligence. Limiting recovery to a violation of a negligence standard in a personal injury action while permitting recovery based on a strict liability standard in a public nuisance action arising out of the same injuries could eviscerate negligence law and undermine basic tort principles.

Conceivably, the state may have trouble fixing the liability standard because of the interplay between negligence and intent in public nuisance actions. Prosser discussed such an example in his article on public nuisance,¹⁶⁹ and the court could have applied his ideas in *Overcash II*. In *Overcash II*, SCE&G may have acted with intent in allowing the construction of the dock. To the extent SCE&G participated in constructing the dock, it was substantially certain the dock would obstruct the navigable waterway and thus cause a public nuisance.¹⁷⁰ However, SCE&G would have had to foresee Overcash's particular incident.¹⁷¹ Of course, creating the risk may amount to negligence by SCE&G.¹⁷²

Prosser noted that a court could determine the proper balance of liability resulting from the combination of a negligent violation of a private right and an intentional conduct violation of a public right.¹⁷³ This balance becomes important because it affects the availability of certain defenses. While comparative negligence is a defense in a negligence action,¹⁷⁴ it is not a defense to an intent-based tort.¹⁷⁵ The court, having read the Prosser article,¹⁷⁶ likely realized that several states have barred contributory negligence as a defense in similar cases because of the existence of intent.¹⁷⁷ If the *Overcash II* court did not want to adopt a similar rule, it could have adopted a negligence standard of care for public nuisance actions and allowed SCE&G to claim the comparative defense. Other states have held standard negligence principles exist in a common law nuisance action, which would presumably permit a comparative negligence defense.¹⁷⁸ However, the *Overcash II*

169. See Prosser, *supra* note 81, at 1023–24.

170. See generally KEETON ET AL., *supra* note 4, § 8, at 34–37 (discussing the meaning of intent in an intentional tort).

171. See *id.*

172. See Prosser, *supra* note 81, at 1024.

173. See *id.*

174. See generally KEETON ET AL., *supra* note 4, § 67, at 468–79 (discussing comparative negligence).

175. See generally *id.* § 67, at 478 (discussing intentional conduct).

176. See *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 573, 614 S.E.2d 619, 620 (2005).

177. See Prosser, *supra* note 81, at 1024–25.

178. See, e.g., *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 646 N.W.2d 777, 792–93 (stating that liability can originate in negligence).

court did not address the liability question but framed the discussion in terms of the special injury rule.¹⁷⁹

VI. SOUTH CAROLINA SHOULD ALLOW RECOVERY FOR PERSONAL INJURY

South Carolina's version of the special injury rule should allow recovery for personal injuries. The special injury rule protects the defendant from defending multiple actions based on the same claim, while allowing the plaintiff to recover for a personal injury.¹⁸⁰ If many plaintiffs attempt to recover individually for common injuries, those injuries may not represent the full extent of the public injury or adequately protect the general public's rights and interests. However, requiring a special injury ensures that any potential claim for harm is real and that the plaintiff can properly assert a common right because of his interest in the individual right.¹⁸¹ The special injury rule ensures that the individual plaintiff will also act competently as a private attorney general.¹⁸²

The special injury rule is a necessary standing tool which provides for proper vindication of public rights.¹⁸³ Holding that a plaintiff can properly assert his rights only when his property interests are injured and not when he suffers personal injury is not doctrinally consistent. Thus, the *Overcash II* holding runs counter to its own justification.¹⁸⁴

The court of appeals began its analysis by stating that the special injury rule is deeply rooted in American jurisprudence.¹⁸⁵ While the court of appeals noted that South Carolina had no bright-line rule regarding standing by way of personal injury, it found other jurisdictions' rules allowing such recovery persuasive.¹⁸⁶ The court of appeals also emphasized the special injury rule's requirement that the injury must be different in kind than the general harm.¹⁸⁷ The court of appeals reviewed earlier cases and concluded that *Overcash*'s personal injuries differed in kind from the general injury of obstruction of a public waterway.¹⁸⁸ Additionally, the court of appeals noted the trial court's improper emphasis on prior cases involving only injury to property.¹⁸⁹ Though other cases involved only property injury, recovery for personal injury should not necessarily be foreclosed; rather, a court should simply approach the personal injury issue as novel.¹⁹⁰

179. *Overcash II*, 364 S.C. at 573–75, 614 S.E.2d at 620–22.

180. See Prosser, *supra* note 81, at 1007.

181. See *id.*

182. See *supra* notes 167–68 and accompanying text.

183. See Prosser, *supra* note 81, at 1007.

184. See *id.*

185. See *Overcash v. S.C. Elec. & Gas Co. (Overcash I)*, 356 S.C. 165, 175, 588 S.E.2d 116, 122 (Ct. App. 2003), *rev'd*, 364 S.C. 569, 614 S.E.2d 619 (2005).

186. *Id.* at 175–76, 588 S.E.2d at 122–23.

187. *Id.* at 175, 614 S.E.2d at 122.

188. *Id.* at 177–81, 588 S.E.2d at 123–25.

189. *Id.* at 179–81, 588 S.E.2d at 124–25.

190. See *id.* at 175–76, 588 S.E.2d at 122 (“[O]nly a limited body of South Carolina case law exists which even tangentially discusses the issue now before us.”)

Nevertheless, the supreme court disagreed and ruled a plaintiff can only show special injury by injury to property.¹⁹¹ However, the court of appeals decision presents an analysis that includes personal injury under the rule. The court of appeals recognized that other jurisdictions have workable models that allow recovery for personal injury¹⁹² and the special injury rule is merely a standing rule.¹⁹³ Therefore, the emphasis should not be on the nature of the injury but whether the individual injury differs from the general injury. Courts are free to “adopt that rule which in [their] judgment best conforms to the principles of equity and which will tend to the furtherance of justice.”¹⁹⁴ Even though the South Carolina Supreme Court was free to adopt a rule that includes personal injury, it chose not to do so.

VII. CONCLUSION

South Carolina adopted a special injury rule that is overly formalistic and inconsistent with the rule’s function as a tool to determine standing. The court’s logic is short, unobvious, and omits necessary discussion of the real underlying issue: liability. The court’s bright-line rule forecloses recovery under the doctrine of public nuisance for plaintiffs with actual personal injuries. While a rule including personal injuries is more doctrinally consistent and accepted in most jurisdictions, South Carolina chose to unnecessarily restrict the special injury test and, in this case, reward a wrongdoer.

J. Kevin Couch

191. *Overcash v. S.C. Elec. & Gas Co. (Overcash II)*, 364 S.C. 569, 575, 614 S.E.2d 619, 622 (2005).

192. *See Overcash v. S.C. Elec. & Gas Co. (Overcash I)*, 356 S.C. 165, 176–77, 588 S.E.2d 116, 122–23 (Ct. App. 2003), *rev’d*, 364 S.C. 569, 614 S.E.2d 619 (2005).

193. *See id.* at 175, 588 S.E.2d at 122.

194. *Johnson v. Johnson*, 194 S.C. 115, 119, 8 S.E.2d 351, 352 (1940).