Carnival Cruise Ships in South Carolina: Nuisance and Cruise Control

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Introduction

Carnival Cruise Lines, in addition to other cruise lines, operates throughout the United States.1 Cruise ships, like many maritime vessels, burn diesel fuel to provide electric power and move the ship.2 Burning diesel fuel creates exhaust fumes that are harmful to people and property.3 Research conducted by the National Oceanic and Atmospheric Administration4 shows that the harmful sulfur found in commercial ships’ exhaust, including cruise ships, could lead to various cancers5 and heart problems.6 These health issues result in around

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60,000 premature deaths annually. Additionally, soot from the ships’ smokestacks can travel up to thirty miles, increasing the number of people and properties affected. The resulting healthcare costs from commercial shipping exhaust are also astronomical—premature deaths alone are estimated to cost $330 billion dollars annually.

Cruise ship electrical needs do not stop when they are docked; therefore, ships continue to burn fuel to provide electrical power while at port. Continuously burning diesel fuel in close proximity to port cities exaggerates health problems associated with exhaust emissions, and thus many port cities have moved toward providing an electrical infrastructure that allows cruise ships to attach to the city’s electrical grid and avoid burning fuel while at port. Cruise ships must also be specially modified in order to be able to connect to shore power, a task that costs the cruise lines a substantial amount of money. As a result of the cost to provide infrastructure and modify the ships, Charleston and Carnival have decided that the cost of installing shore power is not worth the reward.

In 2010, Carnival Cruise Lines began operating out of the South Carolina Ports Authority’s (SPA) Union Pier Cruise Terminal in Charleston. Currently, only the Carnival Fantasy uses Charleston as a port-of-call; however, the number of stops the ship has made in Charleston has increased steadily each year. With the initiation and subsequent increases in cruise traffic, the city has received an influx of cruise related visitors and economic boosts.

7. Lack et al., supra note 4 (citing James J. Corbett et al., Mortality from ship emissions: A global assessment, 41 ENVTL. SCI. & TECH. 8512, 8517 (2007)).
11. The current cities that are capable of attaching ships to shore power are Juneau, Seattle, San Francisco, San Diego, Los Angeles, and Brooklyn. Silverstein, supra note 2.
13. See id (“The measure is not needed today.”).
14. See Complaint at 2, Historic Ansonborough Neighborhood Ass’n v. Carnival Cruise, 407 S.C. 67, 753 S.E.2d 850 (2014) (No. 27355). Many of the damages claimed against Carnival in Charleston discussed here originate from this complaint. While the damages alleged in the complaint have not yet had a chance to be proven in court, they will be used as fact for the purposes herein. Many people and properties in port and other highly polluted cities face similar challenges, and this case study attempts to provide these individuals, and the municipalities which represent them, with some of the remedies available to protect their interests.
15. See id. at 2.
Unfortunately, Carnival Corporation ship operations have also resulted in various detriments to both the public and residents of the city.\textsuperscript{17}

With each embarkation and debarkation, hundreds of personally owned vehicles, cabs, buses, and delivery vehicles descend on the Charleston peninsula, closing public roads and causing gridlock.\textsuperscript{18} Additionally, Charleston cruise ships burn fuel while in port in order to run the ship’s electronics.\textsuperscript{19} The average cruise ship is capable of generating air pollution equivalent to 12,000 automobiles daily,\textsuperscript{20} which can lead to various public health problems, including cancer.\textsuperscript{21}

The SPA has recently submitted an application to the Army Corps of Engineers to renovate an old waterfront warehouse for use as a newer, larger cruise ship terminal.\textsuperscript{22} The new terminal would mean larger cruise ships servicing Charleston more frequently.\textsuperscript{23} Larger ships using the city as a port-of-call more frequently would exacerbate the problems the public and residents are already facing. Therefore, the state and property owners of affected property should assert their rights to use and enjoy Charleston peaceably before Carnival is given the green light to expand operations in the city.

Part II of this Note will discuss the background of the case filed against Carnival in Charleston and how the South Carolina Supreme Court has provided guidance for future litigation. Part III will examine the rights of the State of South Carolina to protect its citizens against public nuisances caused by cruise ship operations. In Part IV the focus will then shift to the private individuals’ rights to protect their own interests against Carnival through both public and private nuisance causes of action as well as trespass. Finally, Part V of this article will present a suggested compromise to allow Charleston to continue to grow economically without sacrificing the tranquility of the historic city.

\textsuperscript{17} See Complaint, \textit{supra} note 14, at 1.
\textsuperscript{18} Id. at 5.
\textsuperscript{19} See Richardson, \textit{supra} note 10, at A1.
I. FACTUAL BACKGROUND

A. History of Carnival Operations in Charleston

Cruise ships began using Charleston as a homeport in 2008.24 A homeport is the location from which a cruise ship loads and unloads passengers and supplies instead of simply stopping for a brief visit.25 The process of loading and unloading passengers and supplies creates a large volume of people and traffic on the days that embarkation and debarkation occur.26 From 2009 to 2011, the number of stops cruise ships made in Charleston almost tripled, with ships docking thirty-three times in 2009 and ninety times in 2011.27 Currently, the number of times that cruise ships are allowed to dock is limited by the SPA to 104 times a year.28 Assuming that passengers do not embark the same day as the previous group of passengers debark the cruise ship, Charleston faces cruise traffic 208 days a year. However, this limit is not codified and is currently only complied with on a voluntary basis.29

Today, the only ship using Charleston as a homeport is the Fantasy.30 One of the smallest ships in Carnival’s fleet, the Fantasy has the capacity to carry 2,056 passengers serviced by 920 crewmembers.31 Despite being one of the smallest ships in the Carnival fleet, the Fantasy has led to a variety of problems for both the public at large and private property owners. As a result of cruise operations, the streets around Union Pier have experienced significant traffic congestion issues.32 At each embarkation and debarkation, passengers alone account for up to 2,056 incoming or outgoing people.33 The SPA has estimated that each time the Fantasy cruisers embark and debark, they bring between 500 and 1,000 personal vehicles to the area.34 Passengers, crew members, and service personnel overwhelm the local streets, resulting in traffic congestion and gridlock along the Charleston peninsula.35 Specifically, parts of Concord and Washington Streets are only open for cruise traffic despite being public streets.36 The usual traffic for these streets is displaced onto adjacent

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25. Id.
26. Id.
27. Id.
28. Severson, supra note 16.
29. This means that Carnival and the city could decide to increase this number at any time if they decided that it would be in their best interest. See id.
30. See Complaint, supra note 14, at 3.
31. Id.
32. Id. at 5.
33. See id. at 3, 5.
34. Id. at 5.
35. See id.
36. See id.
streets, causing additional congestion throughout the east side of the Charleston Peninsula.\textsuperscript{37}

In addition to traffic congestion, the \textit{Fantasy} and other cruise ships emit soot and other particulate matter that are harmful to health when inhaled and are deposited onto land surfaces including homes in the surrounding areas.\textsuperscript{38} Cruise ships are estimated to produce five times more air pollution than other ocean going vessels because of the high amount of electricity used onboard.\textsuperscript{39} According to Oceana, “[o]ne cruise ship can emit 1.5 tons of smog-forming nitrogen oxides (the equivalent of 12,000 automobiles), 1.3 tons of sulfur oxides (the equivalent of a large cement plant), 253 pounds of carbon dioxide, 100 pounds of volatile organic compounds, and 75 pounds of particulate matter” each day.\textsuperscript{40} These exhaust emissions can lead to serious cardiovascular health problems in port cities.\textsuperscript{41} Unfortunately, as the frequency of cruise ships docking in Charleston has grown, these issues are only getting worse, and will continue to get worse should Carnival bring larger ships.\textsuperscript{42}

Despite the negative impacts, Carnival brings economic benefits to the area. In fact, it has been estimated that due to the influx of people into the city, Carnival operations result in about $37 million worth of tourism related revenue for the city annually.\textsuperscript{43} As cruise operations increase, both the number and frequency of people coming into the city will increase, which should lead to a steady increase in tourism related revenue for local businesses.

In September 2010, the SPA created and submitted a proposal to the Army Corps of Engineers aimed at expanding cruise operations in Charleston.\textsuperscript{44} Although the plan was initially rejected, it was resubmitted in 2014 and is currently pending approval from state and federal agencies.\textsuperscript{45} The goal of the plan is to relocate the cruise ship terminal to building 322, a larger building still within Union Pier that is capable of supporting larger cruise ships.\textsuperscript{46} The plan

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item Id. at 10. In addition to the harms stated above, various other potential nuisances and problems are caused by cruise ship operations in and around Charleston. Some of the problems not discussed in the article include noise and light pollution, seawater pollution, ballast water discharges leading to the introduction of invasive species which could potentially outcompete native species, and the spreading of disease such as norovirus among the public.
\item Other Pollutants, OCEANA, http://usa.oceana.org/other-pollutants/ (last visited March 22, 2015).
\item See 2013 Cruise Ship Environmental Report Card, supra note 1.
\item See Severson, supra note 16.
\item See Union Pier Concept Plan, supra note 16, at I.1.
\item See Smith, supra note 22.
\item Union Pier Concept Plan, supra note 16, at III.3.
\end{enumerate}
\end{footnotesize}
details the projected characteristics of the potential ships.\textsuperscript{47} The recommended vessel size that could be supported by the new location at Union Pier would have a passenger capacity of up to 3,500 people supported by up to 1,200 crew members.\textsuperscript{48} Excluding the increase in crew size, the result would be up to 1,500 additional passengers when compared to the existing size,\textsuperscript{49} a significant increase from current passenger numbers. More passengers will mean more traffic on embarkation and debarkation, in addition to an increased need for supplies to be transported to the ship. The SPA has estimated that on the day of the embarkation, cruise traffic will consist of up to twenty semi-tractors, sixteen small trucks, thirty-two passenger coaches, ninety taxis, and eight hundred cars.\textsuperscript{50} A larger ship with more passengers will also correspond to more pollution.\textsuperscript{51} If this plan is accepted, cruise related traffic, exhaust, and ultimately health problems for the citizens and visitors of Charleston will increase.

The Historic Ansonborough Neighborhood Association, Charleston Neighborhood Association, Coastal Conservation League, and the Preservation Society of Charleston filed a lawsuit against Carnival Corporation in 2011 in response to the growing problems associated with the cruise industry in the city.\textsuperscript{52} The plaintiffs advanced nine claims against Carnival including, in relevant part, private nuisance, public nuisance, and violation of the Pollution Control Act claims.\textsuperscript{53}

The South Carolina Supreme Court appointed Judge Clifton Newman as a Special Referee to present recommendations on each claim.\textsuperscript{54} Judge Newman issued a Report and Recommendation suggesting that the court dismiss all ordinance violation claims and the claim that Carnival had violated the Pollution Control Act.\textsuperscript{55} Judge Newman also recommended that the public and private nuisance claims go forward.\textsuperscript{56} Ultimately, the court dismissed the nuisance claims because the historic societies lacked standing to bring suit.\textsuperscript{57} However, the court provided a roadmap for future lawsuits against Carnival Corporation in

\textsuperscript{47} \textit{See id.} at III.2.

\textsuperscript{48} \textit{See id.}

\textsuperscript{49} \textit{See supra} note 30 and accompanying text.

\textsuperscript{50} \textit{See Union Pier Concept Plan, supra} note 16, at III.16 tbl. III.1. Note that this represents the high end of their estimations. However, SPA plainly admits that this evidence is merely an estimate and has conducted “no surveys, counts, or other historic information” to generate the chart and that it will require “confirmation of accuracy before proceeding”. \textit{Id.}

\textsuperscript{51} \textit{See Environmental Issues, supra} note 42.

\textsuperscript{52} \textit{Complaint, supra} note 14, at 1.

\textsuperscript{53} \textit{Id.} at 15–23.


\textsuperscript{55} Report and Recommendation of Special Referee at 1, Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n, 407 S.C. 67, 73, 753 S.E.2d 846, 849 (2014) (No. 27355).

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{See Carnival}, 407 S.C. at 81, 753 S.E.2d at 853.
Charleston by giving an opinion of which potential future parties would have standing if they decided to bring the same causes of action.\(^{58}\)

II. **THE ROADMAP PROVIDED BY THE SOUTH CAROLINA SUPREME COURT**

The South Carolina Supreme Court did not discuss the merits of the case, instead dismissing the case because the plaintiffs, as historic preservation societies, failed to show damages suffered by the societies.\(^{59}\) However, the court did suggest that other parties, both public and private, could bring suit for nuisance and trespass.\(^{60}\)

First, Justice Hearn wrote that the plaintiffs did not assert a particularized injury, instead only alleging injuries suffered by the public.\(^{61}\) While there is a cause of action for public nuisance, “typically only the State may bring this cause of action.”\(^{62}\) Additionally the court wrote that “it is incumbent upon the public to seek reform through their elected officials” instead of the judicial system when it comes to public nuisances.\(^{63}\) Thus, only the state or a state agency, such as DHEC, may ordinarily bring suit for any nuisance which limits the rights of the public at large.

Second, the court also suggested that private individuals could bring suit.\(^{64}\) In order to bring suit for public nuisance, a private individual must suffer a “special injury” in addition to the injury suffered by the public as a whole.\(^{65}\) Typically, this will mean that the individual suffered a particularized injury to his real or personal property.\(^{66}\) Here, the court is pointing individual property owners in the direction that could provide them with a remedy for the damages caused by Carnival, which are separate and distinct from the injuries caused to the public.

While *Historic Ansonborough* did not provide a remedy for anyone who has suffered a nuisance at the hands of Carnival in Charleston, the court chose to keep the door open to future litigation and legislative controls.\(^{67}\) Both the state and individuals could implement these controls so that Carnival is not allowed to have free reign in Charleston at the expense of the citizens and visitors to the

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58. *Id.* at 81, 753 S.E.2d at 853 (“[T]he claims asserted by Plaintiffs could be brought by other parties who can show the required injury”).
59. See *id.* at 76, 753 S.E.2d at 851. ("Plaintiffs fail to allege a particularized injury either to themselves or their members. Rather, they assert only generalized grievances suffered by the public as a whole which are insufficient to establish standing.").
60. See *id.* at 81, 753 S.E.2d at 853.
61. *Id.* at 76, 753 S.E.2d at 851.
62. *Id.* at 78, 753 S.E.2d at 852.
63. *Id.* at 81, 753 S.E.2d at 853.
64. See *id.* at 78, 753 S.E.2d at 852.
66. *Id.*
67. See generally *id.* (suggesting that a private party or the state may have sufficient standing to bring a nuisance action).
city, which could strain relations between the city and a major source of revenue—tourism. With a pending proposal to increase the cruise industry in Charleston, both parties should seek a compromise that will allow the city, citizens, and Carnival to have a mutually beneficial, instead of detrimental, relationship.

III. PUBLIC NUISANCE

At its core in common law, a public nuisance is “an activity that interferes with the rights of the public,” by injuring public health, safety, or morals. Activities that can constitute a public nuisance vary greatly. Some activities that have been held to be public nuisances in other jurisdictions include interfering with traffic flow on public streets, excessive noise, rock processing plant emissions, and various other claims that affect public rights. The injury in a public nuisance is to the community instead of an individual, private landowner. South Carolina follows the common law, which states that because of the nature of the injury to public health, safety, or morality, the state can regulate public nuisances through its police powers by seeking to enjoin the activity.

Carnival Cruise operations in Charleston result in a large increase in traffic due to incoming and outgoing passengers as well as loading and unloading the goods and services required to stock the ship around the Charleston peninsula on days of embarkation and debarkation. If the Fantasy stops in Charleston 104 times a year, then the Charleston peninsula is subject to cruise traffic up to a maximum of 208 days a year. Public access to two public streets is virtually

73. See JUERGENSMEYER & ROBERTS, supra note 68, at § 14.2.
74. See Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 78, 753 S.E.2d 846, 852 (2014) (“While a public nuisance cause of action can be used to remedy harms suffered by the public generally, typically only the State may assert this cause of action.”).
75. JUERGENSMEYER & ROBERTS, supra note 68, at § 14.2 (citing Lawton v. Steele, 152 U.S. 133, 138 (1894)); see also Lane v. City of Mount Vernon, 342 N.E.2d 571 (1976) (discussing the state’s exercise of police power to abate a public nuisance).
76. See Complaint, supra note 14, at 5.
77. This is the maximum number of stops that the current agreements allow ships to stop in Charleston each year. See supra note 28 and accompanying text.
78. Assuming that passengers do not embark the same day as the previous group of passengers debarks.
eliminated, and the diverted traffic increases gridlock among the remaining streets in the area while the passengers embark or debark.\textsuperscript{79}

While South Carolina has not yet addressed traffic as a public nuisance, various other states have found substantial interference with traffic to be a public nuisance. The state of Georgia enjoined a nightclub from operations due in part to the traffic congestion caused by its nighttime activities.\textsuperscript{80} Similarly, North Carolina has held that individuals obstructing motor vehicle traffic in a manner that does not allow traffic to proceed on public roads constitutes a nuisance.\textsuperscript{81} More recently, Alabama determined that a proposed quarry would result in an unacceptably large increase in traffic from commercial trucks.\textsuperscript{82} The court in \textit{Hall} decided that not only would the trucks degrade the surface of the road, but they would also increase traffic levels beyond the capabilities that the road in question was designed to support.\textsuperscript{83} Ultimately, the court enjoined the defendant from creating a public nuisance, finding that the defendant would be depriving the public of their intended use of the public road.\textsuperscript{84}

Carnival operations in Charleston are similar to these aforementioned cases. Carnival not only forces the closure of two public roadways, but it also overburdens other public roadways in the area with the displaced traffic, ultimately restricting and limiting the public from using the roads as they were intended to be used.\textsuperscript{85} Private players who cause significant vehicle traffic congestion and deprive the public of the use of public roadways, like Carnival has done, have created a public nuisance.\textsuperscript{86} Thus, the State could elect to bring an action for public nuisance to enjoin Carnival from causing gridlock in the Charleston peninsula.

In addition to traffic, Carnival also produces a level of pollution that constitutes a public nuisance.\textsuperscript{87} The Carnival \textit{Fantasy} does not have the capability to connect to shore power and, therefore, must run its diesel engines in order to generate electricity while it is in port.\textsuperscript{88} The result is a constant plume of exhaust fumes and soot particulate pollution in close proximity to tourist destinations and historic homes.\textsuperscript{89}

South Carolina has delegated regulatory authority to control pollution to the Department of Health and Environmental Control (DHEC) under the Pollution

\textsuperscript{79} See Complaint, \textit{supra} note 14, at 5.
\textsuperscript{80} Morehead \textit{v.} Cheney 479 S.E.2d 745, 745–46 (Ga. 1997).
\textsuperscript{81} State \textit{v.} Fox, 136 S.E.2d 761, 762 (N.C. 1964).
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.} at 180–81.
\textsuperscript{86} See \textit{supra} notes 80–84 and accompanying text.
\textsuperscript{87} See Complaint, \textit{supra} note 14, at 5.
\textsuperscript{88} Richardson, \textit{supra} note 10, at A1.
\textsuperscript{89} Baldwin Jr. \& Ball Jr., \textit{supra} note 5.
Control Act. Additionally, DHEC has the authority to declare any act that is deemed to be a danger to public health as a public nuisance and enjoin the offender from continuing to operate a public health nuisance. DHEC has flexed its authority in the past in furtherance of abating a public nuisance caused by the Suffolk Chemical Company, whose pollution was negatively impacting the public health. Therefore, DHEC could choose to regulate the pollution Carnival is responsible for producing in Charleston.

In Historic Ansonborough, the plaintiff’s complaint stated that the Pollution Control Act had been violated. However, the plaintiffs focused on pollution into state waters, ignoring potential claims of air pollution. In Judge Newman’s Report and Recommendation in that case, he recommended that the Court dismiss multiple claims, including the claim stating a violation of the Pollution Control Act had occurred. However, because Judge Newman was only addressing ballast water discharge, airborne exhaust pollution caused by the Carnival Fantasy is still an issue South Carolina courts have not addressed.

DHEC also allows the governing body of a county to establish and enforce air pollution control programs consistent with DHEC standards. Therefore, the state, DHEC, and Charleston county administrators have the power to either bring suit for public nuisance or regulate Carnival’s operations in Charleston.

Despite the public authorities’ ability to protect the public, conflicting interests makes government action unlikely to occur. Carnival brings in an estimated $37 million dollars in tourism revenue to the city each year, a significant amount for local businesses. If the state were to come out against Carnival too strongly, it is possible that Carnival would discontinue the use of Charleston as a port and deprive the city of the economic stimulus the cruise line


91. S.C. CODE ANN. REGS. 61-46 (2011) (“Whatever is dangerous to human health, whatever renders the ground, air, or food a hazard or injury to human health... are each and all of them hereby declared to constitute a public health nuisance”); S.C. CODE ANN. § 44-1-140 (2002) (“The Department may make separate orders and rules to meet any emergency not provided for by general rules and regulations, for the purpose of suppressing nuisances dangerous to the public health and communicable, contagious and infectious diseases and other danger to the public life and health”).


93. See Complaint, supra note 14, at 22–23.

94. Id. at 23.

95. Report and Recommendation of Special Referee, supra note 55, at 18–23 (internal citations omitted).

96. Id. Ballast water discharge is still an issue, which could be revisited, as Judge Newman only suggested it should be dismissed for plaintiff’s lack of standing. Id. at 18.


98. See Severson, supra note 16.
provides. Additionally, city officials seem to support the cruise industry in the city. Charleston Mayor Joe Riley has gone so far as to say that Carnival actions in the city are “clearly not a public or private nuisance.” While a stout, purely administrative solution may appear to be the quickest route to relief for Charleston residents and visitors, it may be the least likely to occur for understandable economic reasons.

Although it is unlikely that a public entity will bring a private nuisance claim against Carnival, the cause of action is not lost completely. In South Carolina, private citizens are sometimes allowed to seek relief from a public nuisance when there is a “special injury.” A special injury is an “injury to himself differing in kind, and not merely in degree, from that suffered by the general public.” So, “the private party must have suffered a particularized injury” in order to bring a public nuisance claim. Therefore, the property owners could not bring a public nuisance suit for air pollution because they have a higher degree of exposure to it. Typically, any “interference with the use and enjoyment of the plaintiff’s own property will be deemed a ‘special injury.’” More specifically, “damage to an individual’s real or personal property” will satisfy the special injury requirement. In addition to being harmful to health, exhaust also settles onto the local residents’ homes. Consequently, the exhaust interferes with local residents’ use and enjoyment of their real property, and should satisfy the South Carolina requirement for a special injury. Therefore, area property owners should be able to bring suit for public nuisance in the place of the State.

A second special injury would arise if property owners could show that Carnival traffic was obstructing the roads used to access their homes. South Carolina courts have allowed private individuals to bring a public nuisance claim when a public street is being obstructed to the detriment of their real property. In Crosby v. Southern Railway Co., the South Carolina Supreme Court allowed damages for the diminution in value of the plaintiff’s house when he was intermittently unable to get to his house due to a train blocking a public

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102. Id. (quoting Woods v. Rock Hill Fertilizer Co., 102 S.C. 442, 450, 86 S.E.2d 817, 820 (1915)).
104. Wyche, supra note 101, at 346.
106. See Complaint, supra note 14, at 10.
highway. However, the affected property must actually touch the public road, and access to the property must be blocked on occasion, or the injury is not different in kind than that suffered by the public.

IV. PRIVATE NUISANCE AND TRESPASS

Private nuisance and trespass are grounded in the protection of an individual’s property rights instead of protection of their person. Trespass traces its origins to medieval times, from the assize of novel disseisin, which protected a landowner’s right to exclusive possession of his real property. The assize of nuisance developed from the assize of disseisin during the medieval period. The assize of nuisance resembled the modern private nuisance cause of action, “providing redress for interference with the use and enjoyment of plaintiff’s land resulting from acts committed on the defendant’s land.” Both nuisance and trespass law in South Carolina developed from the common law traditions founded in medieval history.

A. Private Nuisance

Under South Carolina common law, when a nuisance “interferes with both a public right and the use and enjoyment of the plaintiff’s own land, the nuisance is both a private and public one.” Generally speaking, it is in a plaintiff’s best interest to bring both a public nuisance and a private nuisance claim because the statute of limitations does not run on a public nuisance, preserving a plaintiff’s right to recover for an injury. However, private nuisance can operate and exist distinctly from public nuisance.

A private nuisance is defined as the substantial interference with the use and enjoyment of property. Nuisance, by its nature, is a cause of action grounded in property rights; therefore, the damages that a property owner can recover for a nuisance are “strictly limited to one’s property interests, and thus, the only proper measure of damages is the value of the property.” The value of one’s

110. Id. (citing George E. Woodbine, The Origins of the Action of Trespass, 33 YALE L.J. 799, 807 (1924)).
111. Id. at 138, 472 S.E.2d at 473.
114. Wyche, supra note 101, at 343.
115. Id. at 344 (quoting RESTATEMENT (SECOND) OF TORTS § 821C cmt. e (1979)).
117. Id. at 141, 472 S.E.2d at 474.
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property interest is measured as lost rental value for a temporary nuisance or full market value of the property for a permanent nuisance.\textsuperscript{118} In order to recover for a private nuisance claim in South Carolina, there must be “proof of actual and substantial injury”\textsuperscript{119} and “the interference or inconvenience must be unreasonable.”\textsuperscript{120}

There are multiple examples of actual entry of particulate matter on a plaintiff’s property rising to the level of nuisance in South Carolina. In \textit{Woods v. Rock Hill Fertilizer Co.}, a fertilizer company’s operations resulted in dust and particles settling on both the home and garden of the plaintiff.\textsuperscript{121} Because the dust and particles interfered with the use and enjoyment of the plaintiff’s property, the court granted an injunction and a monetary sum for past damages.\textsuperscript{122} In another case, work at a stone quarry resulted in dirt, dust, and rocks being deposited on the plaintiff’s property.\textsuperscript{123} This interference with the plaintiffs’ property not only caused them annoyance, but also depreciated the value of the affected property; consequently, the actions of the stone quarry constituted a nuisance.\textsuperscript{124} A third case involved a truck terminal operating on an unpaved, red clay lot in proximity to the plaintiff’s property.\textsuperscript{125} The ingress and egress of the trucks and tractor-trailers onto the lot periodically cast red dust onto the plaintiff’s property.\textsuperscript{126} The red dust invaded the plaintiff’s property, forcing him to clean and repaint his house constantly and to keep his doors and windows shut in order to prevent more dust from entering his home.\textsuperscript{127} Ultimately, the defendant was enjoined from operating his business in a way that caused red dust to be cast onto the plaintiff’s property.\textsuperscript{128} More recently, pollution from the Georgetown County Steel plant resulted in soot settling onto residents’ homes to the extent that the houses had begun to be dyed.\textsuperscript{129} Georgetown County Steel ultimately settled with the residents of Georgetown County for nuisance damages caused by soot.\textsuperscript{130} As the aforementioned cases show, South Carolina courts are especially likely to find a defendant liable for nuisance when there is an actual entry onto the land, even if the entry is only by particulate matter, which interrupts and inconveniences a property owner’s use of his land.

\begin{itemize}
\item \textsuperscript{118} Id. at 137, 472 S.E.2d at 472.
\item \textsuperscript{119} Id. at 145, 472 S.E.2d at 476.
\item \textsuperscript{120} Id. (citing Winget v. Winn-Dixie Stores, Inc., 242 S.C. 152, 159, 130 S.E.2d 363, 367 (1963)).
\item \textsuperscript{121} Woods v. Rock Hill Fertilizer Co., 102 S.C. 442, 442, 86 S.E. 817, 818 (1915).
\item \textsuperscript{122} Id. at 442, 86 S.E. at 819.
\item \textsuperscript{123} Davis v. Palmetto Quarries Co. 212 S.C. 496, 498, 48 S.E.2d 329, 330 (1948).
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Dill v. Dance Freight Lines, 247 S.C. 159, 161, 146 S.E.2d 574, 574–75 (1966).
\item \textsuperscript{126} Id. at 161, 146 S.E.2d at 575.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id. at 164–65, 146 S.E.2d at 576.
\item \textsuperscript{130} Id.
\end{itemize}
particularly when the defendant’s actions result in a diminution in property value.

Carnival, like the defendants in the previously mentioned cases, produces particulate matter, which is embedded on properties in the area.131 Like the homeowner in Dill v. Dance, homeowners in Charleston will be faced with soot on and in their homes and it will impair their ability to use and enjoy their property.132 The soot will also drive the values of the properties down, as washing historic homes can potentially damage the old wood, and Charleston requires historic homeowners to acquire permits to repaint homes.133

A property owner who is subjected to a temporary nuisance can recover up to “lost rental value” of the property affected.134 Lost rental value is defined by the “difference between the rental value absent the trespass or nuisance and the rental value with the trespass or nuisance.”135 A property owner who is subjected to a permanent nuisance is able to recover up to the full market value of his property.136 South Carolina courts have not yet defined what will rise to the level of a permanent nuisance. One possible meaning of “permanent nuisance” is a physical object that is incapable of being removed or impractical to remove that interferes with the use and enjoyment of property. Another possibility of what rises to the level of permanence would be a nuisance that is continuous in nature. Property owners who succeed in establishing a permanent nuisance and recovering full market value do not also get to keep the property in question.137 Therefore, seeking to establish a permanent nuisance may not be in the private property owners’ best interests, especially where homeowners own property in desirable areas like Charleston historic districts. Property owners in the area should follow the precedent of other South Carolina plaintiffs who have asserted successful nuisance claims and obtained both monetary rewards for past damages and injunctions against future damages.138

B. Trespass

In South Carolina, a trespass is defined as an interference with “‘one’s right to the exclusive, peaceable possession of his property.’”139 The South Carolina Supreme Court recently held that South Carolina follows the traditional view of

133. See id.
135. Id. at 142, 472 S.E.2d at 475.
136. Id. at 152, 472 S.E.2d at 480.
137 See id. at 154, 472 S.E.2d at 481.
138. See supra notes 121–130 and accompanying text.
trespass, which “requir[es] an invasion by a physical, tangible thing”.140 In South Carolina, the right to the exclusive possession of property is regarded as fundamental and absolute.141 Without protecting the right of exclusive possession, other rights in property would be reduced and diluted to the point of worthlessness.142 Thus, unlike nuisance, courts do not expect homeowners to deal with a reasonable level of trespass. Therefore, once an invasion occurs, the trespass cause of action is available to the landowner even when the trespass is small and insignificant.143 South Carolina does not recognize odors as a trespass because they are not physical or tangible.144 However, the court in Babb used dust as an example of a physical trespass,145 so soot particulate that is significant enough to visibly build up on historic homes is likely to meet the requirement of being physical and tangible.

The average cruise ship is capable of producing seventy-five pounds of particulate matter from burning fuel each day.146 Carnival in Charleston operates in close proximity to multiple historic residential districts, which inevitably results in the particulate matter settling on the exterior of homes in the area.147 Adding to the problem, historic homeowners cannot easily pressure wash their homes without damaging them.148 Even if homeowners in the area could pressure wash their homes without damaging them, the pressure washing would remove old paint and Charleston requires historic homeowners to obtain city permission before being allowed to repaint their homes.149

Trespass is an attractive route to pursue for a homeowner because he will only be required to prove a physical entry onto his property.150 Recovery for trespass depends on the nature and extent of the trespass. Unlike a nuisance claim, a property owner subjected to trespass is entitled to nominal damages, even if no damage occurs.151 Like nuisance, a property owner who is subjected to a temporary trespass may recover up to the “lost rental value” of the property affected.152 Also like nuisance, a property owner who is subjected to a permanent trespass is able to recover up to the full market value of his affected property.153

140. Id. at 145, 472 S.E.2d at 476.
141. Id. at 151, 472 S.E.2d at 480.
142. Id.
143. Id.
144. Id. at 152, 472 S.E.2d at 480.
145. Id. at 144, 472 S.E.2d at 476.
146. Other Pollutants, supra note 40.
148. Id.
149. Id.
150. Babb, 405 S.C. at 152, 472 S.E.2d at 480.
151. Id. at 145, 472 S.E.2d at 476.
152. Id. at 137, 472 S.E.2d at 472.
153. Id. at 152, 472 S.E.2d at 480.
South Carolina courts have also not yet defined what will rise to the level of a permanent trespass. Two possible meanings of “permanent trespass” are a physical object that is unable or impractical to remove, or a trespass that is continuous in nature. If courts accept the latter definition and Carnival continues to pollute the environment with particulate matter—coupled with the difficulty of removing the trespassing materials from historic homes—it becomes more likely that the properties affected are subjected to a permanent trespass, and that the owners of these properties will be more likely to succeed in recovering the full market value of their homes. But, property owners who succeed in a suit to recover full market value do not also get to keep the property in question.\textsuperscript{154} Therefore, seeking to establish a permanent trespass may not be in the private property owners’ best interests.

Typically, courts issue injunctions when trespasses are continuous or repeated.\textsuperscript{155} South Carolina courts have also held that the proper legal remedy for continuous trespass is an injunction.\textsuperscript{156} The South Carolina Supreme Court has said that injunctive relief is available when other legal remedies prove to be inadequate.\textsuperscript{157} Because of the historic nature of the houses, even full market value can be viewed as an inadequate measure of relief. An injunction on its own is also incapable of righting past wrongs, as actual property damage has already been done. Fortunately, South Carolina allows for property owners to seek an injunction and damages for past trespass.\textsuperscript{158}

V. A POTENTIAL FOR COMPROMISE

As it stands now, Carnival operations in Charleston are a direct detriment to public and private health and welfare. But, Carnival also provides an economic boost to the city, resulting in an estimated $37 million worth of tourism related revenue.\textsuperscript{159} Undoubtedly, local businesses would miss the revenue if the situation resulted in Carnival’s exit from the city. However, it is unreasonable to expect local residents and the public to accept the status quo.

Easing traffic problems should be the easiest step. The city should ensure that the infrastructure on the peninsula is equipped to handle the high level of

\textsuperscript{154} Id. at 154, 472 S.E.2d at 481.
\textsuperscript{155} DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, THE LAW OF TORTS § 56 (2d ed. 2014).
\textsuperscript{159} Severson, supra note 16.
cruise traffic. Predicting the level of traffic will not be difficult, as Carnival ships operate in many locations, and the information should be readily available.

Steps have already been taken that will ease the pollution problems caused by the cruise industry in Charleston. The International Maritime Organization (IMO) is an agency of the United Nations that regulates international shipping for member nations.160 In March of 2010, IMO designated the waters off the North American coast to be an emission control area (ECA) in which certain international emission standards would apply.161 The next month, the Environmental Protection Agency (EPA) adopted standards and published rules to begin implementation of IMO standards in United States maritime activities.162 The published rules included two phases for new emission standards, the first beginning in 2012 and the second in 2015, which would require large ships to burn cleaner fuel while in the North American ECA.163

Carnival, anticipating the higher costs of cleaner burning fuel, applied for flexibility from the EPA.164 In addition to multiple other shipping companies, Carnival proposed that it be allowed to develop and install a new type of exhaust gas cleaning system for its ships.165 According to the shipping companies, not only would this be a cost saving method, but it would also exceed the fuel standards required by the EPA.166 Ultimately, Carnival’s proposal was accepted on a trial basis, pending the results once they become available.167 As part of the agreement, Carnival will install engine exhaust cleaning systems, or scrubbers, on thirty-two of their ships on a staggered schedule.168 Carnival agreed to install the systems on nine ships in 2014, sixteen in 2015, and the remaining seven in 2016.169

The Carnival Fantasy is one of the ships scheduled to be outfitted with pollution scrubbers in October of 2015.170 In addition to lowering toxic fumes, the scrubbers are designed to take some particulate out of the exhaust.171 The State Ports Authority has also announced that it will monitor air quality at the

162. Id.
163. Id.
164. Id.
165. Id.
166. Id.
168. Id.
169. Id.
171. Id.
Charleston port to monitor the effect the scrubbers have on pollution.\textsuperscript{172} While the steps being taken by both Carnival and SPA are beneficial to the community, they do not go far enough in protecting the rights of residents and visitors in Charleston. Ultimately, the scrubbers are untested, their effectiveness is unknown, and regulators are awaiting results before they approve them as a permanent substitute for cleaner burning fuels.\textsuperscript{173} Unfortunately, the city has chosen to be reactive instead of proactive.

In many West Coast ports, Carnival ships have the ability to attach to the city electrical grid while docked.\textsuperscript{174} This action lowers or eliminates the need to burn diesel fuel while at port, which reduces or eliminates exhaust related pollution.\textsuperscript{175} The \textit{Fantasy}, as the oldest ship in Carnival’s fleet, is currently not equipped to connect to shore power.\textsuperscript{176} It has been estimated that the cost to retrofit the ship for shore power would cost around $1.5 million.\textsuperscript{177} However, it is also estimated that the ability to connect to shore power would save Carnival up to $500,000 in fuel costs yearly, meaning they could more than make up for the cost over time.\textsuperscript{178} Environmental and conservation groups suggest that scrubbers in conjunction with shore power would maximize the efforts to reduce pollution in the city.\textsuperscript{179} Unfortunately, city administrators have taken the position that they will wait to determine the effectiveness of scrubbers before they press for shore power.\textsuperscript{180} Again, it seems the city is content with a reactive approach.

As the city and the SPA seek to expand cruise operation with a $30 million capital investment in the cruise industry in Charleston,\textsuperscript{181} they should seek to do so in a responsible way. While protecting business interests is important, they should be mindful to not do so at the expense of the people who live in and visit the city. Should the pending application to renovate the warehouse be approved, the city and SPA should ensure that they include the infrastructure necessary to accept increased traffic and shore power. Additionally, they should require Carnival to remedy any damages already done, and ensure that the \textit{Fantasy} or any other Carnival ship that uses Charleston as a cruise homeport or destination is equipped to use shore power. While this compromise may put a lot of financial burden on the public and Carnival, it will create a mutually beneficial

\textsuperscript{172} \textit{Id.}
\textsuperscript{173} EPA Letter, \textit{supra} note 168.
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} Richardson, \textit{supra} note 10, at A1.
\textsuperscript{177} \textit{Id.}
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.; Segrist, supra} note 174.
\textsuperscript{181} Segrist, \textit{supra} note 174.
relationship that protects the health and welfare of the public and allows Carnival and the city to continue to benefit financially.  

Not only are ships coming into Charleston more frequently, but the SPA proposal would also make it so that the ships coming in are larger. With the possible expansion of Carnival in Charleston, all parties should be proactive in solving existing problems before they deteriorate and solving new problems before they arise. The city and state have bargaining power with Carnival, and should seek guarantees in return for the investment they plan to make which will benefit the cruise line. Should the city and state fail to protect the rights of the citizens, private citizens should step in and seek relief through the judicial system following the roadmap provided by the South Carolina Supreme Court.

VI. CONCLUSION

Carnival has had the opportunity throughout its existence to seek ways to operate in an environmentally responsible way. However, Carnival made the decision to maintain its dismal performance until it was mandated that it change.182 Even now, no one knows whether or not Carnival’s scrubbers are going to be effective against pollution.183 Following the new standards for fuel that are scheduled to begin in 2015, it is still estimated that ships will still pollute harmful sulfur exhaust equivalent to that of 34,000 tractor trailers idling.184 However, we know that shore power will significantly lower harmful exhaust and soot immediately.185 Instead of continuing to be reactive, city and state officials should take a proactive step against Carnival and ensure that people’s health is placed first.

183. See EPA Letter, supra note 168.
184. Agnew, supra note 178.
185. Id.