1984 WL 249868 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
April 25, 1984

***1** The Honorable Isadore E. Lourie
Senator
District No. 7
Office No. 2
601 Gressette Building
Columbia, South Carolina 29202

Dear Senator Lourie:
By your letters dated April 11, 1984 and April 24, 1984, you have requested an opinion as to the constitutionality of S. 909 and the amendment thereto. Based on our Supreme Court's decision in Broome v. Truluck, 270 S.C. 227, 241 S.E. 2d 739 (1978), we would advise that a South Carolina court would probably find S. 909, in its present form, to be violative of the Equal Protection Clause of the Fourteenth Amendment; the amendment to S. 909 may help in part but does not appear to cure the constitutional problem entirely.

S. 909 provides for a statute of limitations of fifteen years for legal actions against architects, construction managers, professional engineers, or contractors for improper or negligent improvements to real property. The same fifteen-year statute of limitations is also given to owners and manufacturers of component parts. However, with respect to those persons in actual possession or control, the bill would provide that
[t]he limitation provided by Sections 15-3-640 through 15-3-660 may not be asserted as a defense by any person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control knows, or reasonably should have known, of the defective or unsafe condition.

In Broome v. Truluck, supra, our Supreme Court found unconstitutional a statute which also distinguished between owners and manufacturers of component parts on the one hand and architects, engineers and contractors on the other with respect to a statute of limitations as to those persons. There, the Court said:
While the General Assembly has the power in passing legislation to make a classification of its citizens, the constitutional guaranty of equal protection of the law requires that all members of a class be treated alike under similar circumstances and conditions, and that any classification cannot be arbitrary but must bear a reasonable relation to the legislative purpose sought to be effected. [Citation omitted.]

The question then is whether there is a sound basis for regarding architects, engineers, and contractors engaged in the improvement of real property as a distinct and separate class for the purpose of granting immunity from suit after the lapse of ten (10) years. Certainly, such classification must fall if the benefits (immunity) granted to them is denied to others similarly situated. The latter result clearly follows when we consider that architects, engineers, and contractors are not the only persons whose negligence in the improvement of real property may cause damage or injury to others. Neither the owners nor the manufacturers of components that go into the construction of the building are protected. In fact, the owner is specifically excluded from the protection of the statute. Section 15-3-670, 1976 Code of Laws. Only architects, engineers, and contractors are singled out for preferential treatment. While it is broadly stated that a vital distinction exists between architects, engineers, and contractors on the one hand, and owners and manufacturers, on the other, such vital distinction is no where pointed out such as to justify granting immunity to one group and not to the other. No rational basis appears for making such distinction. [Citations omitted.]

***2** Here, S. 909, in our view, still sets apart architects, engineers, contractors, and construction managers from owners of real property and the manufacturers of component parts; thus, we believe that, absent a showing of a rational distinction between these persons, not found in Broome, the same constitutional defect as in the old Section 15-3-670 would probably still exist.

The amendment to S. 909 does contain legislative findings which appear to distinguish the manufacturers of component parts from architects, engineers, contractors, and construction managers. Usually, courts give great weight to such legislative findings, cf., Bauer v. South Carolina State Housing Authority, 271 S.C. 219, 246 S.E. 2d 869 (1978) unless such findings are clearly irrational or erroneous. However, the proposed amendment does not attempt to make any distinction concerning owners (or those in possession or control of real property) and architects, engineers, contractors, etc.; moreover, S. 909, as originally drafted, while stating that it is 'reasonable and necessary to distinguish' between owners and those who make improvements to property (architects, engineers, contractors, etc.) does not say the specific reasons why such a distinction is necessary. We believe a court would find a rational distinction between these persons necessary in order to overcome those constitutional problems found by the Court as to Section 15-3-670 in Broome.

CONCLUSION

In summary, since our Supreme Court has stated that it can find no reason to distinguish between owners of property and manufacturers of component parts on the one hand and those who are otherwise involved in an improvement to real property on the other for purposes of a statute of limitations, we believe that S. 909, is of doubtful constitutionality under Broome. Of course, if enacted, the Court must presume that the statute is constitutional, University of South Carolina v. Mehlman, 245 S.C. 180, 139 S.E. 2d 771 (1964). Moreover, if the General Assembly made specific findings, showing clearly why a rational distinction exists between these persons in question, then a court might distinguish the Broome case. We would caution, however, that, in light of Broome, any distinction made between these persons must truly be a rational one. And only a court could conclusively determine the existence of a rational distinction. Thus, in light of Broome, we must advise that S. 909, in its present form, is of doubtful constitutionality.

Sincerely,

Patricia D. Petway
Staff Attorney

ATTACHMENT

SUMMARY

Application of § 16-17-210 et seq. in the circumstances presented raises serious First Amendment questions. In order to decide, however, whether First Amendment rights prevail would require a hearing before a court where the State would be given the opportunity to present facts which show overriding interests in enforcement of the statute. Such interests would include likely or threatened disorder in displaying the flag as well as the State's interest in preserving the flag's physical appearance and integrity.

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