

Common Enemy Rule Update

SCASM
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Outline

- Historical Background
- Evolution and Modern Interpretation
- SC Reg. 72-300
- SC Code 5-31-450
- Recent Court Case
- Conclusions

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Historical Background – Common Law

- *Edwards v. Charlotte, Columbia, & Augusta R.R., SC Sup. Ct. (1893)* established what is called the common-enemy rule to deal with diffused surface water, i.e., stormwater,
 - Every landowner has a right to take any measure necessary to the protection of his own property from the ravages of surface water.
 - “surface water is regarded as a common enemy, and every [landowner] has the right to take any measure necessary to the protection of his own property...even if in doing so he throws it back upon a coterminous proprietor to his damage”

Historical Background (cont'd)

- *Baltzeger v. Carolina Midland RY., SC Sup. Ct. (1899)* reaffirmed the common-enemy rule,
 - But distinguished diffused water from a watercourse, which flows in a definite channel; has a bed, sides, or bank; and usually flows in a particular direction
 - The application of SC common law for diffused water controversies was considered extreme and was criticized

Modernization of the Common Enemy Rule

- South Carolina's rule has been modified by recognition of two exceptions:
 - First - A landowner must not deal with his diffused surface water in a manner so as to constitute a nuisance
 - But in, *Johnson v. Southern Ry., SC Sup Ct. (1905)*, court found an embankment constructed by RR and ponded water allegedly emitted gases which poisoned and killed plaintiff's daughter, was standing water and not a nuisance under common enemy rule

Modernization of the Common Enemy Rule

- South Carolina's rule has been modified by recognition of two exceptions:
 - Second - diffused surface water cannot be collected into an artificial channel and cast upon another's land in concentrated form
 - *Branderberg v. Zeigler., SC Sup. Ct. (1901),*
 - Distinguished diffused water from a watercourse, which flows in a definite channel; has a bed, sides, or bank; and usually flows in a particular direction

Modern Interpretation

- *Irwin v. Michelin Tire Corporation, SC Sup. Ct. (1986)* - the court modified the exception to reflect the reality of increasing development in the State
 - "New Jersey Rule"- imposes liability on an upper proprietor if he/she installs an artificial drain that decreases natural processes on his property, and increases the the flow onto the property of a lower proprietor, causing damage
 - SC Rejected "New Jersey Rule" and adopted "Virginia Rule"- where no greater drainage occurs than resulting from reasonable development by an upper landowner, liability will not be imposed merely due to the presence of an artificial drainage system

Modern Interpretation cont'd

- *Johnson v. Phillips*- SC Supreme Court, SC Ct. App. (1993) applied the "Virginia Rule"
 - Diversion of stormwater from the construction of a residential subdivision
 - "Common Enemy" rule does not apply when,
 - The rule is subject to the general law of nuisance
 - Except by contractual or prescriptive right, upper landowner cannot by means of an artificial structure "collect" surface water and "cast" it in concentrated form upon the lower adjacent landowner

Modern Interpretation cont'd

- *Johnson v. Phillips*- Continued
 - The lower court found that upper proprietor had an easement, but damaged lower by development that unreasonably increased the volume of water draining upon the lower property, but awarded \$0 for damages
 - Sup. Ct. Reversed and sent it back for new trial
- Diffused water controversies still governed by Common Law, along with the costs, time delay, and uncertainties of going to court

Modern Interpretation cont'd

- *Bradford v. City of Mauldin (Defendant and Third-Party Plaintiff) and Arbor Engineering (Third-Part Defendant), Court of Common Pleas [so not Precedent]*
- *1988 Mauldin contracted with Arbor to design and construct a sports/recreational complex across the street and upgradient from Bradford's house;*
- *installed a Big pipe in road ROW, pointing at Bradford's house*

Modern Interpretation cont'd

- *Bradford v. City of Mauldin (Defendant and Third-Party Plaintiff) and Arbor Engineering (Third-Part Defendant), Court of Common Pleas, so not Precedent*
- *1999 Tried before Judge Watson and jury; Judge found Carter grading not liable; Jury found \$175,000 actual damages with 70% against City and 30% against Arbor, and \$25,000 in punitive damages against Arbor*
- *Arbor released by Plaintiff upon payment of \$50,000*
- *Mauldin asked judge for new trial and reduction of verdict to \$50,000; the judge reduced verdict to \$50,000*
- *Plaintiff appealed; Mauldin filed a third party claim to bring Arbor back in*
- *Settled by all parties in 2005*

SC Code 48-14-10 and SC Reg. 72-300

- Replacement of Common Law standard by statutory and regulatory standard
- SC Storm Water Management and Sediment Reduction Act enacted in 1991
- Followed by Reg. 72-300
 - Post development peak discharge rates not to exceed pre-development rates for 2- and 10-yr 24-hr storms
 - Discharge velocity shall be reduced to nonerosive velocity

SC Code 5-31-450 –Drains for Surface Water

- Authorizes a civil action against a municipality for actual damages sustained by draining surface water from public streets across private property
- Requires the landowner to demand that the municipality provide proper drainage through city property before such landowner may bring suit
- City through condemnation may acquire a ROW
- If city fails or refuses to do injured person can sue for actual damages

SC Code 5-31-450 –Drains for Surface Water

- *Hall v. City of Greenville, SC Sup. Ct. (1986)*
- Uphill street improvements flooded lower properties
- Board of Health found houses unfit for human habitation and ordered residents to vacate
- Court held that no proof of negligence is necessary, as municipalities are held to higher standard of care in matters of surface-water drainage

Recent Court Cases

- *Lucas v. Rawl, SC Sup. Ct. (2004)*
- Intent to divert water from its natural course is not necessary; clearing property and result of heavy rains is flooding of downgradient property is sufficient to demonstrate a nuisance

Recent Court Cases

- *M&M v. Auto-Owners Ins., SC Sup Ct. (2010) on Certification from US District Court*
- Questions concerning, classification of water, for purposes of insurance coverage that has been collected, concentrated, and cast onto adjoining property
- SCDOT drainage system under construction; 4" rainfall; 15.9 acres drained to system; pooled in parking lot and inside hotel, damaging property
- Hotel made a claim under its policy; Insurance company denied coverage, but terms "surface water" and "flood waters" not defined in Policy

Recent Court Cases

- *M&M v. Auto-Owners Ins., SC Sup Ct. (2010) on Certification from US District Court (Cont'd)*
- 1 - Does "surface water" encompass rainwater collected and channeled in a stormwater collection system?
- No-Once contained, concentrated and cast, it is no longer naturally flowing, diffuse water

Recent Court Cases

- *M&M v. Auto-Owners Ins., SC Sup Ct. (2010) on Certification from US District Court (Cont'd)*
- 2 – If no, does the water become “surface water” after exiting the collection system?
- No-The water does not regain surface water classification for the purposes of the insurance policy once expelled from the pipe.

Recent Court Cases

- *M&M v. Auto-Owners Ins., SC Sup Ct. (2010) on Certification from US District Court (Cont'd)*
- 3 – Is the water flood water?
- No-Flood waters are those waters that breach their containment, either as a result of a natural phenomenon or a failure in a man-made system, such as a levee or a dam.
- “Therefore, we find the water at issue is neither surface water nor flood water for the purposes of the Policy.”

Recent Court Cases

- *Franklin Horse Enterprise, LLC v. City of Easley, US District Court, Settled, so not Precedent (2016)*
 - Stormwater caused sinkholes in neighborhood
 - City obtained easements in 2014 from most property owners to fix problem; three did not agree, finally in 2015 just one holdout; city condemned property right
 - Suit brought by Franklin Horse (de Gaspé Beaubian) as Clean Water Act Citizen Suit in Federal Court, alleged water quality degradation due to poor stormwater system maintenance
 - Suit asked for \$1 million in fines under CWA

Recent Court Cases

- *Franklin Horse Enterprise, LLC v. City of Easley, US District Court, Settled, so not Precedent (2016) (Cont'd)*
 - Can't obtain private damages in a Citizen Suit
 - Judge refused to dismiss suit at Motion Hearing
 - City agreed to pay \$250,000 attorney's fees
 - City agreed to hire a stormwater engineer
- Hurricane Helene - raises more questions about flood plain, return interval, proper design standards, and liability

Questions

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