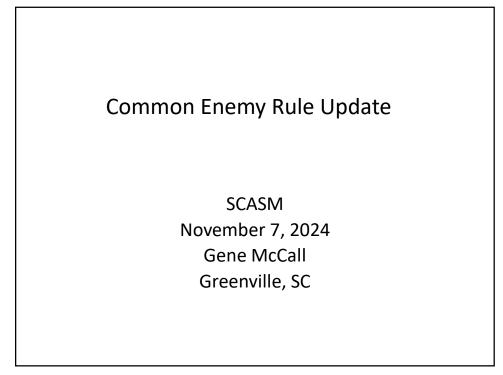
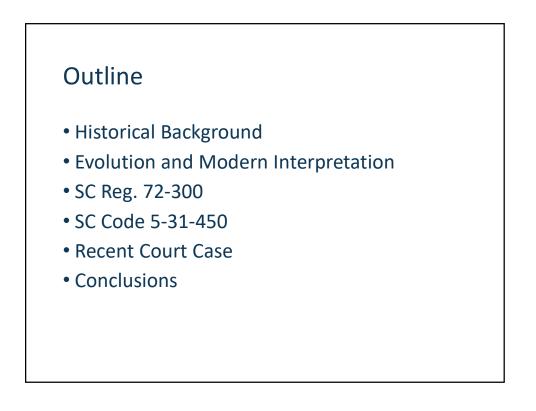
The information provided here is for informational and educational purposes and current as of the date of publication. The information is not a substitute for legal advice and does not necessarily reflect the opinion or policy position of the 11/6/2024 Municipal Association of South Carolina.

Consult your attorney for advice concerning specific situations.



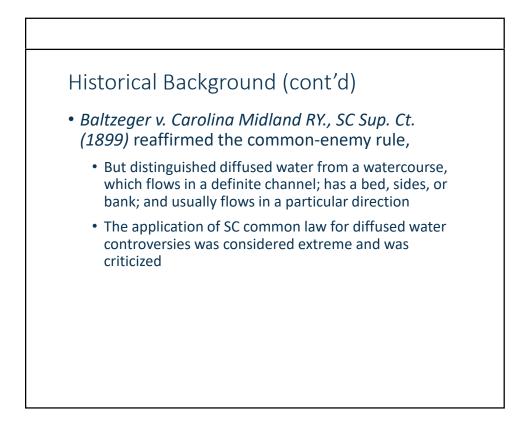


# Outline

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

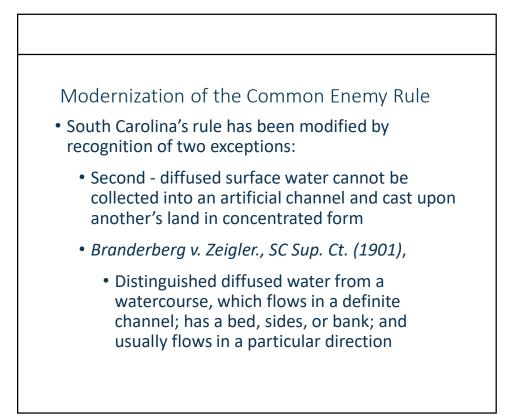
## Historical Background – Common Law

- Edwards v. Charlotte, Columbia, & Augusta R.R., SC Sup. Ct. (1893) established what is called the common-enemy rule to deal with <u>diffused surface</u> <u>water</u>, 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"



#### 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



## 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



- 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

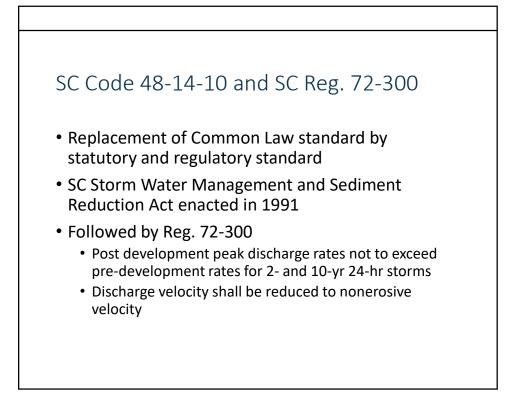
- Johnson v. Phillips- Continued
  - The lower court found that upper proprietor had an easement, but damaged lower by development that unreasonably increased the volume of water draining upon the lower property, but awarded \$0 for damages
  - Sup. Ct. Reversed and sent it back for new trial
  - Diffused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



- 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

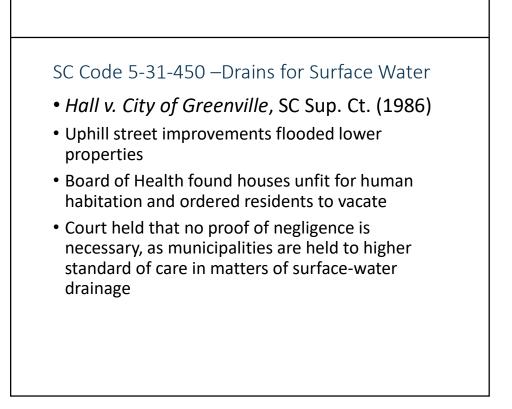
## Modern Interpretation cont'd

- 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 5-31-450 – Drains for Surface Water

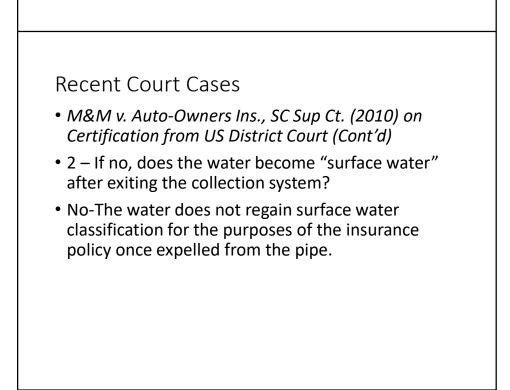
- Authorizes a civil action against a municipality for actual damages sustained by draining surface water from public streets across private property
- Requires the landowner to demand that the municipality provide proper drainage through city property before such landowner may bring suit
- City through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



- 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

- *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

- 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



- 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."

- 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 Gaspe 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

- 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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