

Common Enemy Rule: Sometimes You  
Have to Help Your Neighbor

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”

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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

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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

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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

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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

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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

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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 and large, by Common Law, along with the costs, time, delay, and uncertainties of going to court

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Greenville County SW Ordinance

- 8-114 Corrective Action
- Any person in violation of this Ordinance, shall be required to comply with the Director’s Notice.
- Where a violation has not been corrected within the applicable time period
  - Greenville County, or its contractor, may enter upon the lot or parcel of land and correct the violation, including offsite impact, and the costs incurred as a result of such action, shall be collected from the remediation fee or other means sufficient to cover such costs, or shall become a lien upon the property
  - These costs shall be assessed in addition to any other penalty or injunctive relief

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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 (2005)*
- 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 terminating in road ROW, pointing at Bradford’s property

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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 (2005)*
- 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

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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

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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 fix the drainage, then the injured person can sue for actual damages

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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

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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

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Recent Court Cases

- *M&M v. Auto-Owners Ins., SC Sup Ct. (2010) on Certification from US Federal District Court*
- Questions concerning, classification of water, for purpose's 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 it's policy; Insurance company denied coverage, but terms "surface water" and "flood waters" not defined in Policy

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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

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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.

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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.”

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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 rights
  - Suit brought by Franklin Horse Enterprise, LLC (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

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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

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Conclusions

- The phrase "common enemy rule" doesn't really mean much anymore for stormwater
- If you concentrate and cast stormwater onto a neighbor's property, such that you cause damage, i.e., create a nuisance, you can be held liable
- It can be a nuisance *per se* if you violated a rule or regulation when you let loose the stormwater
  - And can be held liable for punitive damages in addition to actual damages

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Questions

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