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## Lucas v. Rawl Family Ltd., 598 S.E.2d 712 (S.C. 2004)

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guideline. The court disagreed, stating the Oregon's water law required that water was appropriated for beneficial use in a timely manner. The text of the statute exempted municipal uses from the one year start time, but applied the five year limit to all diversions. The court found no municipal exemption for the completion requirement existed in the statute. The CBNB argued it could get an extension for good cause shown, however, the text stated extensions only apply after the issuance of a permit and after delays occur. The CBNB also argued if it was in the public interest for CBNB to obtain the permit for municipal use, the permit should be issued regardless of the statutory terms. The court held that because the statute did not allow for this, the five year restriction still applied.

For the reasons above, the court concluded the CBNB could not exercise due diligence in the construction of the diversion and that the Commission erred as a matter of law. The court reversed the Commission's decision and remanded to the Commission for further proceedings.

*Kathleen Booth*

### SOUTH CAROLINA

**Lucas v. Rawl Family Ltd., 598 S.E.2d 712 (S.C. 2004)** (holding the common enemy rule applies regardless of a landowner's intent to cause a nuisance to an adjacent, lower landowner's property).

Franklin Lucas brought action against adjacent landowner Rawl Family Limited Partnership ("Rawl") in the Lexington County Court for negligence, trespass, and nuisance. Lucas sought damages for repeated flooding to his land that resulted after Rawl cut down trees and removed stumps from forty acres of the land in order to prepare the land for farming. Rawl's land sat at a higher elevation than Lucas' land. Water naturally flowed from Rawl's land onto Lucas' land. After Rawl cleared the land, Lucas' land flooded after every heavy rain, preventing Lucas from growing crops.

The trial court granted Rawl a directed verdict for negligence, but allowed the jury to consider the trespass and nuisance claims. The jury rejected the trespass claim, but awarded damages to Lucas for nuisance. On appeal, the South Carolina Court of Appeals held that the trial court should have entered a directed verdict for Rawl on the nuisance claim because the common enemy rule did not apply. The court of appeals found that the common enemy rule only applied when landowners take "direct action" regarding surface water on their properties that obstruct or alter natural flow and, as a result, harm adjoining landowners. Rawl had no intent to influence the natural flow of the surface water because Rawl cleared the land only in preparation for farming, not to alter the flow of surface water. Thus, the court of ap-

peals concluded that without intent to alter the surface water's natural course, the common enemy rule did not apply.

The Supreme Court of South Carolina found two errors in the court of appeals' ruling. First, the court of appeals erred in addressing whether the common enemy rule applied. Appellate courts are restricted to determining issues raised and ruled upon by the trial court. Neither party appealed the trial court's ruling that the common enemy rule applied, so the court of appeals had no jurisdiction to consider the issue. Second, the court of appeals erred in holding that the common enemy rule merely extended the common law rule. The court held that according to case law, the common enemy rule and the common law rule were the same rule.

Additionally, the court ruled that a directed verdict on the issue of nuisance was not appropriate. The test for nuisance, the court held, was whether the nuisance had become "dangerous at all times and under all circumstances to life, health, or property." Because Lucas' land flooded in every heavy rain and he was unable to grow crops on a portion of his land, ample evidence existed for a jury to decide whether Rawl's actions amounted to a nuisance *per se*.

In dissent, Justice Pleicones stated the common enemy rule applies, but that nuisance *per se* did not exist. To find nuisance, he argued, evidence that the surface water accumulated, rather than merely ran from higher land onto adjacent lower land, needed to be present. Justice Pleicones found Lucas' situation to lack such evidence and characterized the situation as *damnum absque injuria*—not caused by a wrongful act. Justice Pleicones also found that Rawl's clearing of his land for farming did not amount to nuisance *per se*.

Because the court's majority concluded that the court of appeals erred in determining that the common enemy rule did not apply and the trial court was correct in refusing to issue a directed verdict on the nuisance claim. The court upheld the jury award of damages for nuisance.

*Kathryn Garner*

## SOUTH DAKOTA

**First Lady, LLC. v. JMF Props., LLC, 681 N.W.2d 94 (S.D. 2004)** (holding both the civil use rule and the reasonable use rule for water drainage required a test of reasonableness).

Both First Lady Motel ("First Lady") and JMF Properties, L.L.C. ("Tramway") were located at the base of a 300-foot mountain in Keystone, South Dakota. Originally built in 1991, First Lady sat at the base of the mountain. Tramway, originally built in 1965, was situated adjacent and above First Lady. In 1997, First Lady built a retaining wall around its property leaving a steep embankment directly behind the wall. First Lady also created a berm on Tramway's property by piling