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## First Lady, LLC. v. JMF Props., LLC, 681 N.W.2d 94 (S.D. 2004)

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First Lady, LLC. v. JMF Props., LLC, 681 N.W.2d 94 (S.D. 2004)

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

dirt and debris left from the construction of the retaining wall. Three years later, Tramway began making improvements on its property. To prevent excessive erosion and vegetation loss, Tramway made cross-cuts, rolling dips, and hump swales across the road leading to its property. When heavy rains caused water and silt to run downhill and over the retaining wall towards First Lady, First Lady filed suit against Tramway claiming nuisance and requesting abatement of the nuisance. The Circuit Court of the Seventh Judicial Circuit entered judgment for First Lady and required Tramway to abate the nuisance. Tramway appealed to the South Dakota Supreme Court.

First Lady had to prove Tramway's acts constituted a nuisance. Furthermore, First Lady did not claim Tramway acted unlawfully. Instead, First Lady needed to prove Tramway failed to perform a duty. In order to determine whether Tramway failed to perform their legally required duties, the court began with an analysis of South Dakota's drainage law. Under South Dakota's civil law rule, property owners may drain water from their properties to natural or established watercourses and natural depressions. Under the reasonable use rule, a property owner may alter surface water flow so long as the alteration is reasonable. Although South Dakota codified the civil law rule with respect to water drainage, most courts apply the reasonable use rule when dealing with urban drainage of surface water. Because the trial court did not clearly state which drainage rule it applied when requiring Tramway to abate the nuisance, the court considered both the civil law rule and reasonable use rule.

The court previously stated that drainage under the civil law rule was conditioned upon accomplishing natural drainage without unreasonably injuring neighboring properties. Therefore, under both the civil law rule and under the reasonable use rule, Tramway could legally drain its property subject so long as its actions were reasonable. Because reasonableness was a question of fact and the trial court did not consider any findings of fact related to natural discharge or the reasonableness of Tramway's actions, the court reversed and remanded the trial court's decision to reconsider the evidence in light of the reasonable test.

*Aimee Wagstaff*

## TEXAS

**Herrmann v. Lindsey, 136 S.W.3d 286 (Tex. App. 2004)** (holding: (1) the contract to sell land was illegal because it reserved to seller more than one-half the irrigation pumping rights in violation of state law, which required one-half the irrigation pumping rights remain with the land; (2) where seller of land who owned irrigation pumping rights entered into an illegal contract with purchaser of land, purchaser was entitled to deed reformation; and (3) affirmative contract defenses did not apply).