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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS
IN THE SUPREME COURT

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MAR 31 2016

SC Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-000428

James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and
Anthony Ruhlman,

Appellants,

vs.

South Carolina Department of Health and Environmental Control,

Respondent.

**MOTION FOR ORDER TRANSFERRING
CASE TO THE SUPREME COURT**

TO: THE SUPREME COURT OF SOUTH CAROLINA, THE COURT OF APPEALS AND
THE RESPONDENT:

PLEASE TAKE NOTICE that James Jefferson Jowers, Sr., Andrew J. Anastos, Ben
Williamson, Melanie Ruhlman and Anthony Ruhlman (collectively "Appellants"), hereby move
the Supreme Court and the Court of Appeals, pursuant to SCACR 204, for an order certifying
this case for review by the Supreme Court before it has been determined by the Court of
Appeals. Appellants' counsel have consulted with counsel for the South Carolina Department of
Health and Environmental Control ("Respondent" or "DHEC"). DHEC consents to transfer, and
in fact submitted a letter request for transfer; however, DHEC does not consent to many of the
arguments in this motion, and the agency will file a brief return.

The reasons that the Appellants seek Supreme Court review are that this case involves: 1) an issue of significant public interest; and 2) a legal principle of major importance, namely a challenge to the constitutionality of a state law. In support of this motion, the Appellants submit the following:

BACKGROUND

The Appellants are bringing a facial challenge to the constitutionality of the South Carolina Surface Water Withdrawal, Permitting Use and Reporting Act of 2010, S.C. Code Ann. §§ 49-4-10 to 49-4-180 (“the Act”). The Appellants are citizens of South Carolina and property owners, whose land is traversed or bounded by a natural watercourse, otherwise known as riparian owners.¹ Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913). Riparian owners are endowed with riparian rights, which are important and valuable property rights and include the right to consumptive use of the fresh water in navigable rivers. Id.; Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913); White v. Whitney Mfg. Co., 38 S.E. 456, 461 (1901); see also Mathewes v. Port Utilities Comm'n of Charleston, S.C., 32 F.2d 913, 914 (E.D.S.C. 1929) (listing riparian rights as a type of property). Under the common law, each riparian owner is entitled to take an uncapped amount of water for consumptive use, subject to three important limitations. The salient limitation in this case is the that riparian owners cannot take water for

¹ Since South Carolina became a state in 1788, those who own land traversed or bounded by a natural watercourse have held common law riparian rights. Omelvany v. Jagers, 1835 WL 1419 (May 1835). Riparian rights are property rights and include the right to consumptive use of the fresh water in navigable rivers. Id.; Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913); White v. Whitney Mfg. Co., 38 S.E. 456, 461 (1901); see also Mathewes v. Port Utilities Comm'n of Charleston, S.C., 32 F.2d 913, 914 (E.D.S.C. 1929) (listing riparian rights as a type of property).

consumptive such that it unreasonably interferes with downstream riparian owners' right to consumptive use. McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915).

The Respondent is the agency charged with the implementation and enforcement of the Act. The Act establishes two mechanisms authorizing withdrawal of surface waters – a permitting system and a registration system. Significantly for this case, the Act allows riparian owners who are consuming water for agricultural uses to simply “register” their water use, rather than seek a permit. The Act does not restrict the amount of water that any one agricultural user can consume on a daily, annual, or total basis and the registration never expires. The Act does not require notice, either to the public or to adjacent riparian owners. The Act also does not provide any opportunity for objection from adjacent owners when those registrations would unreasonably interfere with adjacent owners' riparian rights.

The Appellants allege that the Act is unconstitutional, first, because it has effectively rendered the prior common law property right meaningless by severely limiting riparian property owners' ability to protect that right. The ability to protect the right is severely limited because the Act restricts Appellants' recourse in the event that registered surface water withdrawers' use unreasonably interferes with their consumptive use. By analogy, if the legislature eliminated all landowners' rights to bring trespass cases, land ownership without the right to exclude would be unrecognizable. It matters not whether a trespass has actually occurred, the loss of the right to bring an action for trespass is the elimination of that right. Similarly, in this case, the loss of the right to protect their consumptive use is an elimination of a property right, making riparian ownership unrecognizable. Second, by making the agricultural registrations permanent in

duration, the Act has dramatically altered the Appellants' prior common law rights to access all of the water in the watercourse. The Act relegates riparian owners who are ineligible for registration to a second-class status as compared to their pre-Act status, vis a vis water flows.

The Appellants allege that by adopting and implementing the Act, the state of South Carolina has unconstitutionally taken the riparian owners' water rights and given them to others for their private use. By issuing registrations, and thus taking riparian rights, without notifying the Appellants, who hold property rights in adjacent rivers, the state has violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution. It is also a violation of the Due Process Clause to issue such registrations without notice or opportunity for a meaningful hearing for the Appellants (or the public). Finally, in establishing and granting agricultural registrations, the state has violated the Public Trust Doctrine, which prohibits the state from permanently divesting itself of public trust property, including water. Thus, the state violated, and continues to violate, the Constitution both: 1) upon passage of the Act, and 2) upon the issuance of registrations pursuant to the Act.

The Appellants filed their Complaint in the Barnwell County Court of Common Pleas on September 4, 2014. On November 13, 2014, the Respondent filed a motion to dismiss. On November 21, 2014, the Appellants filed a motion for preliminary injunction. Both motions were heard and denied at a hearing on January 15, 2015. On January 28, 2015, the Defendant answered the complaint. On February 13, 2015, the Defendant filed a petition for extraordinary relief including removal and original jurisdiction in the South Carolina Supreme Court. That petition was denied on April 9, 2015, and discovery proceeded thereafter. The parties filed cross-motions for summary judgment on September 14, 2015. Both motions were heard on

November 17, 2015. By order dated January 4, 2016, the Circuit Court entered an order granting summary judgment for the Respondent. On February 24, 2016, the Appellants filed an appeal of that order in the Court of Appeals, which is the subject of this motion to transfer.

ARGUMENT

Appellate Court Rule 204 governs the transfer of cases to the Supreme Court. Appellants move to transfer under both Rule 204(a) and 204(b). Rule 204(a) authorizes transfer “[i]n the event that the notice of appeal is filed in the wrong appellate court.” The Appellants submit that because this case involves a final judgment from the circuit court in which the principal issue is the constitutionality of a state statute, the notice of appeal should have been filed with the Supreme Court in the first instance pursuant to Rule 203(d)(1)(A)(ii).

As additional grounds for transfer, appellate Court Rule 204(b) states that the Supreme Court may certify any case for review before it has been determined by the Court of Appeals, and that certification is “normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance.” The Appellants respectfully submit that this case presents an issue that is of sufficient public interest and legal significance to warrant certification by the Supreme Court pursuant to Rule 204(b).

The Act challenged as unconstitutional in this case governs the use and distribution of all of the state’ surface waters, which are held in trust for the benefit of all of the people. McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (Under the Public Trust Doctrine the State holds presumptive title to land below the high water mark in trust for the benefit of all the citizens of this State). The waterways, and riparian property owners

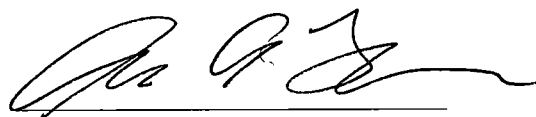
living alongside them, cover the state, and this case impacts all of them. Especially significant to the public interest is the Appellants' challenge pursuant to the Public Trust Doctrine. Under the Public Trust Doctrine the "State has the exclusive right to control land below the high water mark for the public benefit, Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (citing Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995)). The Act disposes of vast amounts of public trust resources through the registration process, without sufficient protections to preserve the waters for the people of this state. Thus the public interest in this case is significant.

This case also is of legal significance to warrant certification. Under the Appellants' theory, the Act takes common law riparian rights, violates the public trust, and unconstitutionally deprives the Appellants and the people of South Carolina of due process. A challenge to the constitutionality of a state law is recognized as one which may warrant this Court's review in Appellate Court Rule 203(d)(1)(A)(ii). Furthermore, if the registration process is unconstitutional, as alleged, then the legal significance of such a ruling would be to invalidate at least a portion of the Act. This would result in the restoration of riparian property and due process rights, and serve to protect an invaluable public trust resource - the waters of South Carolina. While this issue remains unresolved, DHEC continues to issue unconstitutional registrations disposing of more public trust resources. A final resolution from this Court as to the facial validity of the registration process within the Act is, thus, legally significant as well.

CONCLUSION

By reversing the erroneous decision made by the lower court in this case, the Supreme Court can affirm the public's right to navigable waters pursuant to the Public Trust Doctrine, and the Appellants' property rights as riparian owners.

For the above reasons, the Appellants respectfully request that the Supreme Court grant their Motion to Transfer.



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March 29, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE COURT OF COMMON PLEAS,
BARNWELL COUNTY

The Honorable R. Markley Dennis, Jr., Judge

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James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and
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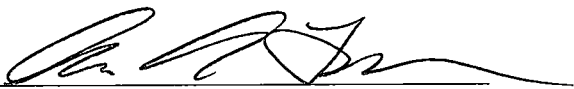
South Carolina Department of Health and Environmental Control, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Appellants' Motion for Order Transferring Case to the Supreme Court upon counsel for the Respondent by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

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Lisa Reynolds
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Amelia A. Thompson

March 29, 2016



The South Carolina Environmental Law Project
Lawyers for the Wild Side of South Carolina

March 29, 2016

a 501c3
non-profit organization

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SC Court of Appeals

RE: Jowers, et al. v. South Carolina Department of
Health and Environmental Control
Appellate Case No. 2016-000428

Dear Mr. Shearouse:

Enclosed for filing please find the original and seven
(7) copies of the Appellants' Motion for Order Transferring
Case to the Supreme Court, along with my certificate of
service and filing fee in the above-referenced case.

Please return a clocked-in copy of the Motion in the
enclosed postage-paid envelope.

Thank you very much for your kind cooperation and
assistance.


Sincerely,

Amelia A. Thompson

cc: J. Emory Smith, Esquire
Lisa Reynolds, Esquire

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