

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS  
IN THE SUPREME COURT

**RECEIVED**

APR 08 2016

**SC Court of Appeals**

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

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Appellate Case No. 2016-000428

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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.

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

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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.<sup>1</sup> 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

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<sup>1</sup> 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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Attorneys for the Appellants

Georgetown, South Carolina

March 29, 2016

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals  
In the Supreme Court

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APPEAL FROM BARNWELL COUNTY  
Court Of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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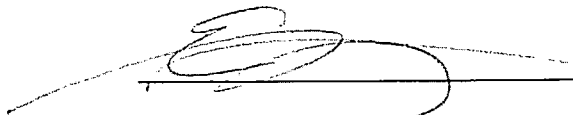
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**CERTIFICATE OF SERVICE**

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I hereby certify that I have served the Appellants with DHEC's Return to Appellants' Motion to Transfer by mailing copies to each of their attorneys at the address below via the United States Mail this April 8, 2016.

Amy E. Armstrong, Esquire  
Amelia A. Thompson, Esquire  
Jessie A. White, Esquire  
South Carolina Environmental Law Project  
Post Office Box 1380  
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J. EMORY SMITH, JR.  
Deputy Solicitor General  
Attorney for DHEC



ALAN WILSON  
ATTORNEY GENERAL

April 8, 2016

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
HAND DELIVERED

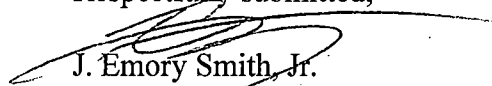
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Re: Jowers v. SCDHEC Appellate Case No. 2016-000428

Dear Ms. Kitchings:

Enclosed is the Return of DHEC to Appellant's Motion to Transfer in this case together with a copy of that Motion and a copy of DHEC's certificate of service. The originals are filed at the Supreme Court. If you need additional copies, please let me know, and I will provide them.

Respectfully submitted,

  
J. Emory Smith Jr.  
Deputy Solicitor General  
Counsel for Respondent DHEC

cc: Amy E. Armstrong, Esquire  
Amelia A. Thompson, Esquire  
Jessie A. White, Esquire



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