THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

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.

FINAL REPLY BRIEF OF APPELLANTS

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September 27, 2016

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES iii

I. APPELLANTS' INJURY DOES NOT STEM FROM THE LOSS OF USE OF WATERWAYS, BUT FROM THE LOSS OF RIPARIAN PROPERTY RIGHTS 1

II. RESPONDENT'S 'FAST LANDS LEFT UNINVADED' ARGUMENT IS INAPPLICABLE 1

III. RESPONDENT MISSTATES AND MISREPRESENTS APPELLANTS' DISCOVERY RESPONSES 3

IV. RESPONDENT IMPROPERLY RELIES UPON SAFE YIELD REQUIREMENTS AS A SUBSTITUTE FOR RIPARIAN PROPERTY RIGHTS 5

V. ALL NAVIGABLE WATER, NOT JUST TIDALLY INFLUENCED WATER, IS PART OF THE PUBLIC TRUST 8

VI. FUTURE GUIDANCE IS NEEDED BECAUSE OF THE SUBJECT OF THE LITIGATION 9

VII. CONCLUSION 10

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES

ATC S., Inc. v. Charleston Cty., 380 S.C. 191, 669 S.E.2d 337 (2008) 9

Baird v. Charleston Cty., 333 S.C. 519, 511 S.E.2d 69 (1999) 9, 10

Brownlee v. S. Carolina Dep't of Health & Envtl. Control, 382 S.C. 129, 676 S.E.2d 116 (2009) 8

Illinois Central R. Co. v. Illinois, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892) 2, 9

Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135 (1913) 6

McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) 2

McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 580 S.E.2d 116 (2003) 2

Omelvany v. Jaggers, 1835 WL 1419 (May 1835) 6

Rice Hope Plantation v. South Carolina Public Service Authority, 59 S.E.2d 132, 216 S.C. 500 (1950) 1, 2

Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 456 S.E.2d 397 (1995) 8, 9

State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972) 8

Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200 (4th Cir. 1986) 3

Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200 (4th Cir. 1986) 3

Thompson v. S. Carolina Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976) 9

White v. Whitney Mfg. Co., 60 S.C. 254, 38 S.E. 456, 461 (1901) 6

White's Mill Colony Inc. v. Williams, 363 S.C. 117, 609 S.E.2d 811, (Ct. App. 2005) 1, 6

STATUTES

South Carolina Surface Water Withdrawal, Permitting Use and Reporting Act, S.C. Code Ann.

§§ 49-4-10 to 49-4-180 (2010) 4-7

CONSTITUTIONS

S.C. Const. art. I, § 13 2

S.C. Const. art. XIV, § 4 8

OTHER AUTHORITIES

Dewsnup et al., *A Summary-Digest of State Water Laws* (National Water Commission, 1973) . . 5

Holman, *The Advent of Modified Riparianism in South Carolina*, 16 Southeastern Envtl. L.J. 291

(Spring 2008) 6

Moser, *Water Law in South Carolina* (South Carolina Water Resources Commission, 1978) . . . 5

The South Carolina Department of Health and Environmental Control's ("Department" or "Respondent") brief is infected with the same legal errors as the lower court's opinion: failure to recognize riparian rights as property and failure to treat navigable waters as public trust assets.

I. APPELLANTS' INJURY DOES NOT STEM FROM THE LOSS OF USE OF WATERWAYS, BUT FROM THE LOSS OF RIPARIAN PROPERTY RIGHTS

Respondent's brief emphasizes loss of use of the waterway as a requirement to show standing. (Resp. Br. 4-5.) Respondent cites no case law for this assertion and Appellants have found none. Moreover, Respondent's assertion is based on the erroneous assumption that riparian rights are not property. Riparian rights are property. (App. Br. 12-16.) Contrary to Respondent's assertions (Resp. Br. 10), White's Mill stands for the proposition that reasonable recreational and commercial consumptive use is a riparian property right, and **protection of that right is central to riparian property ownership**. White's Mill Colony Inc. v. Williams, 363 S.C. 117, 129, 609 S.E.2d 811, 817 (Ct. App. 2005) ("Under the common law, owners of land along rivers, streams, lakes and other bodies of water possess a property right incident to their ownership of the bank and bed of a watercourse that is distinct from those rights that may be enjoyed by the public at large. In general, these special rights allow abutting landowners to make 'reasonable use' of the body of water for any lawful purpose, whether for commerce or recreation."). Injury to individual real property rights is an actionable injury sufficient to demonstrate standing.

II. RESPONDENT'S 'FAST LANDS LEFT UNINVADED' ARGUMENT IS INAPPLICABLE

Respondent alleges that in order to show a taking for which the government must compensate property owners, Appellants' land must be invaded, citing Rice Hope Plantation v.

South Carolina Public Service Authority,[1] 59 S.E.2d 132, 216 S.C. 500 (1950). (Resp. Br. 9.) Rice Hope has been overruled and eroded in a few aspects, although it has been upheld for the proposition that public watercourses and lakes, like the surface waters at issue here, are held in trust for the benefit of the public.[2] See, e.g., McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003). The Rice Hope court held that the state can divert these public resources, but only if that diversion is deemed advantageous to the public. Rice Hope Plantation v. S. Carolina Pub. Serv. Auth., 216 S.C. 500, 529, 59 S.E.2d 132, 144 (1950)[3]. The defendant in Rice Hope, the Public Service Authority was "owned by and to be operated for the benefit of the people of South Carolina." Id. at 515. In contrast, the registration process in the Act does not require or confer any public benefit. It is a private taking, expressly prohibited under the South Carolina Constitution. S.C. Const. art. I, § 13. ("[P]rivate property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any

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[1] Rice Hope was "overruled to the extent that [it held] that an action may not be maintained against the State without its consent." McCall by Andrews v. Batson, 285 S.C. 243, 247, 329 S.E.2d 741, 743 (1985).

[2] Interestingly, Respondent ignores the express language of Rice Hope later in its brief, when it tries to argue that only tidal waterways are held in the public trust. (Resp. Br. 14-15.) Rice Hope defined public trust resources as "[t]he waters of the ocean and its bays, and of public watercourses and lakes, so far as they lie within the jurisdiction of a state, are part of the public domain." Rice Hope Plantation v. S. Carolina Pub. Serv. Auth., 216 S.C. 500, 529, 59 S.E.2d 132, 144 (1950) overruled on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) (internal quotations omitted). This definition of public trust resources was expressly upheld by this Court again in McQueen.

[3] See also Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892) (holding that the state can only give up control of public trust resources that promote the public interest or do not substantially impair the public interest).

purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.")

Moreover, cases subsequent to Rice Hope have held that physical invasion of real property is not a requirement to recover damages for a taking. See Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1205-06 (4th Cir. 1986) (holding that even a valid exercise of police power for public use must still be compensated if it is a taking pursuant to the South Carolina Constitution). (See also App. Br. 21.) Appellants do not allege physical invasion or inability to access the water, as in Rice Hope, but a loss of the right to protect reasonable consumptive use.

As for the analysis in Respondent's brief discussing reasonable use, Appellants agree that is the common law standard. (Resp. Br. 9-10.) Part of the basis of Appellants' claims is that the Act exempts registered users from that minimum common law reasonable use standard to Appellants' detriment because they are left with injured rights and no remedy. (App. Br. 22.)

III. RESPONDENT MISSTATES AND MISREPRESENTS APPELLANTS' DISCOVERY RESPONSES

Respondent asserts that Appellants "do not allege any injury whatsoever tied to any withdrawals of water. In fact, [Appellants] admit that no injury has occurred to their property, their use thereof or to themselves, and that they have not lost use of the waterways." (Resp. Br. 1.) In support of this assertion, the lower court and Respondent cite admissions made during discovery. However, the assertion is inaccurate and misleading, and fails to acknowledge Appellants' discovery responses specifically tailored to clarify the nature of the property rights at issue. The discovery responses made by the Appellants are as follows:

> 7. Describe with particularity, including dates, any injury to your property, your use thereof or to you due to any withdrawal of water for agricultural purposes from any stream or river flowing past property that you own.
> ANSWER:
> Injury as defined by Defendant in its interrogatories, has not occurred to the Plaintiffs' property. The legal injury occurred the date that the Surface Water Withdrawal Act was passed, the injury being the loss of property rights and due process rights for riparian property owners, as well as violation of the public trust doctrine.
>
> . . .
>
> 9. Describe any alleged loss of use of the river or stream flowing past your property that you attribute to the matters at issue in this lawsuit, set forth why you believe that matters set forth in this lawsuit have contributed to that alleged loss of use, set forth the dates and locations of such alleged loss of use, and identify any witnesses that can verify that alleged loss of use.
> ANSWER:
> The loss of riparian property rights, violation of due process rights and violation of the public trust doctrine occurred the day that the Surface Water Withdrawal Act became effective, January 1, 2011.
>
> . . .
>
> Admit that you, your property and your use thereof have not have not[sic] been injured due to any withdrawal of water for agricultural purposes occurring on a river or stream flowing past the property that you own.
> ANSWER:
> Admitted.

(R. 347, 349.)

Furthermore, Appellants' discovery responses were made in the context of the Department's discovery requests, which specifically defined "injury" to exclude the very type of injury that Appellants allege. In both its Interrogatories and Requests for Admission, Respondent instructs as follows:

> The words "injury" or "injured" refer to actual physical injury, economic injury, or actual loss of use of waterways for any alleged beneficial purpose and the water therein and not to any claimed loss of alleged legal rights.

(R. 352, 357.)

Appellants maintain that the injury to their property occurred when the Surface Water

Withdrawal, Permitting Use and Reporting Act, S.C. Code Ann. §§ 49-4-10 to 49-4-180, ("Act") went into effect and bring a facial challenge to the constitutionality of the Act. The validity of such a claim has long been recognized, even before the Act was passed. "Since any type of appropriation law would, by necessity, extinguish or restrict riparian rights or would enable private interests to appropriate waters for uses outside the watershed, the strict interpretation of public use would be a formidable obstacle in meeting constitutional muster." Moser, *Water Law in South Carolina* (South Carolina Water Resources Commission, 1978), at 241-42, citing Dewsnup et al., *A Summary-Digest of State Water Laws* (National Water Commission, 1973). Although the disposal of vast amounts of navigable water should be considered to be a violation of the Public Trust Doctrine by this Court, it does not have direct bearing on the taking of individual property rights of Appellants. Appellants were injured when their riparian rights were changed into something inferior under the Act, as compared to their rights under common law.

Thus, Appellants do not "admit that no injury has occurred to their property," but allege the injury to their property occurred as a matter of law upon passage of the Act, and is not dependant upon withdrawals. Appellants' takings claim is a facial challenge, not an as-applied challenge, to the Act's registration process.

IV. RESPONDENT IMPROPERLY RELIES UPON SAFE YIELD REQUIREMENTS AS A SUBSTITUTE FOR RIPARIAN PROPERTY RIGHTS

Although Respondent cites the safe yield requirement of the Surface Water Withdrawal Act as a viable substitution for common law riparian rights, the two protections are very different. "'Safe yield' means the amount of water available for withdrawal from a particular surface water source in excess of the minimum instream flow or minimum water level for that

surface water source. Safe yield is determined by comparing the natural and artificial replenishment of the surface water to the existing or planned consumptive and nonconsumptive uses." S.C. Code Ann. § 49-4-20 (25). Reasonable use, on the other hand, is determined on a case-by-case basis, as to "whether, under all the circumstances of the case, the use of the water by one is reasonable and consistent with a correspondent enjoyment by the other." White v. Whitney Mfg. Co., 60 S.C. 254, 38 S.E. 456, 461 (1901). See also Holman, *The Advent of Modified Riparianism in South Carolina*, 16 Southeastern Envtl. L.J. 291, 310 (Spring 2008). The safe yield requirement is an inadequate protection for riparian owners losing their common law right to seek redress from unreasonable interference.

There is a large gap in protection afforded by these respective systems. Riparian rights allow a user to bring a claim for unreasonable interference with their use and enjoyment of the watercourse abutting their property. See Omelvany v. Jaggers, 1835 WL 1419 (May 1835); 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). This use and enjoyment standard is broad, encompassing such values as recreational and aesthetic use. Whites Mill Colony Inc. v. Williams, 363 S.C. 117, 129, 609 S.E.2d 811, 814 (Ct. App 2005) (citing Lowe v. Ottaray Mills, 93 S.C. 420, 421-22, 77 S.E. 135, 136 (1913)). By contrast, the safe yield protections in the Act do not prevent unreasonable uses, safe yield is only reviewed at the time of the application, and only acts as a restriction for the first year of the registration. S.C. Code Ann. § 49-4-35.[4]

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[4] Prior to constructing or installing a water intake, a proposed registered surface water withdrawer must report its anticipated withdrawal quantity to the department for determination as to whether that quantity is within the safe yield for that water source at the time of the request. Upon making a determination, the department must send

The safe yield provision does nothing to protect the consumptive rights of other riparians. The Act allows registered users to claim the entire amount of the river up to the safe yield determined at the time of registration. S.C. Code Ann. § 49-4-35. The registered amount based on safe yield does not account for other future withdrawals by registrants, permittees or other riparian owners. Nor does it account for future changes in water flow within a given water body. If one, or several, registered users deplete the river to the very cusp of the safe yield amount, no other riparians would be allowed a permit for withdrawals and exempted small users would be allowed to continue to drain the river below the safe level. Yet, registrations are issued in perpetuity and, as long as the registrant stays within its registered limit, there is no remedy under the Act.

Even if the registrant exceeds its registration limit and safe yield, only the Department may enforce that limit, at its discretion. Such enforcement may only occur if the Department finds that "the registered surface water withdrawer withdraws substantially more surface water than he is registered for or anticipates withdrawing, as the case may be, and the withdrawals

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> a detailed description of its determination to the proposed registered surface water withdrawer by registered mail. A proposed registered surface water withdrawer may not begin his proposed withdrawals until he notifies the department of his anticipated withdrawals and the department provides written notification to the proposed registered surface water withdrawer that authorizes him to proceed, if the anticipated withdrawals are within the safe yield at the time of the request. If the department provides a proposed registered surface water withdrawer with written notification that the anticipated withdrawals are not within the safe yield, then the proposed registered surface water withdrawer may not proceed with the construction or installation of a water intake. Proposed registered surface water withdrawers are authorized to make withdrawals up to the department approved anticipated withdrawal amounts during the first year of registration and are authorized to make withdrawals in the amounts permitted by subsection (A) during subsequent years.

S.C. Code Ann. § 49-4-35(C).

result in detrimental effects to the environment or human health." S.C. Code Ann. § 49-4-35(E). Therefore, safe yield pursuant to the Act is not an adequate substitute for the rights and protections afforded to riparian property owners under common law.

V. ALL NAVIGABLE WATER, NOT JUST TIDALLY INFLUENCED WATER, IS PART OF THE PUBLIC TRUST

"In South Carolina, the state owns the property below the high water mark of a navigable stream. This property is part of the Public Trust." Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972)). See also Brownlee v. S. Carolina Dep't of Health & Envtl. Control, 382 S.C. 129, 138, 676 S.E.2d 116, 121 (2009) ("Navigable water is protected under state law to ensure public access."). Water is navigable when it has the capacity to be navigated by "valuable floatage," even if such a waterway is not actively used or would require removal of obstructions before such navigation could occur. Id. All of the navigable waters of the state of South Carolina are within the surface waters regulated by the Act . See S.C. Code Ann. § 49-4-20(27) (broadly defining surface water). All of Appellants' riparian property abuts navigable waterways. (App. Br. 7-10.) All of the registered surface water withdrawers are drawing water from navigable waterways. (App. Br. 6-7.) Thus, they are all part of the public trust.

Respondent asserts that only tidally influenced waters are part of the public trust. (Resp. Br. 14-15.) However, such an argument is contrary to the plain language of the South Carolina Constitution, the Public Trust Doctrine and case law interpreting the Public Trust Doctrine. S.C. Const. art. XIV, § 4 ("All navigable waters shall forever remain public highways free to the citizens of the State . . . .")

VI. FUTURE GUIDANCE IS NEEDED BECAUSE OF THE SUBJECT OF THE LITIGATION

Analysis of whether future guidance is needed for public importance standing is tied to how much impact the subject of litigation will have on the public. Since the Act regulates all surface water withdrawals of over three million gallons per month in the state, and the constitutionality of the registration process is at issue, Appellants argue that public impact is significant. (App. Br. 38-40.) The disposal of vast amounts of navigable waters, which are public trust resources, is an issue of great public importance. Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) ("The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.") (citing Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892)).

Respondent relies upon ATC as a comparable case (Resp. Br. 5), but that litigation involved private cell phone towers, not a public trust resource such as the surface waters at issue here. ATC S., Inc. v. Charleston Cty., 380 S.C. 191, 199–200, 669 S.E.2d 337, 341 (2008) ("There is nothing public about ATC's concern with a competing cell-phone tower.") The Baird case, which Respondent also cites for the assertion that future guidance is needed (Resp. Br. 5), specifically finds that the need for future guidance is triggered when the issue is of great public importance. Baird v. Charleston Cty., 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) ("Thus, by virtue of the immense public interest at stake here, Doctors have standing to bring the present action . . . ."). See also Thompson v. S. Carolina Comm'n on Alcohol & Drug Abuse, 267 S.C.

463, 467, 229 S.E.2d 718, 719 (1976) ("the questions involved are of such wide concern, both to law enforcement personnel and to the public, that the court should determine the issues in this declaratory judgment action.") Similarly, in this case, the questions involved as to the constitutionality of the Act, the state of riparian rights, and the disposal of public trust assets are of wide concern to riparian property owners, agricultural users and the public.

Respondent does not cite to any case, and Appellants are unaware of any case, that looks to whether other lawsuits have been brought as a criteria for determining public importance standing. Thus, Respondent's reliance on such an argument is flawed. (Resp. Br. 6-7.) Furthermore, Respondent asserts in its public importance standing analysis that Appellants "have no property interests upon which to base their claims and they have suffered no loss of use." (Resp. Br. 6.) This analysis applies to Article III standing, and not to public importance standing. The analysis for public importance standing focuses on the public importance of the issue(s) being litigated. Baird, 333 S.C. at 531.

VII. CONCLUSION

In sum, the Act is unconstitutional as a matter of law because it violates due process rights, the takings clause, and the public trust doctrine, for both riparian owners and the people of South Carolina. Thus, Appellants James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman request that this Court issue an opinion

overturning the ruling of the lower court, granting summary judgment in their favor, and striking down the registration provisions of the Act as unconstitutional, effective immediately.

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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.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Appellants' Final Brief and Final Reply Brief upon counsel for the Respondent by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

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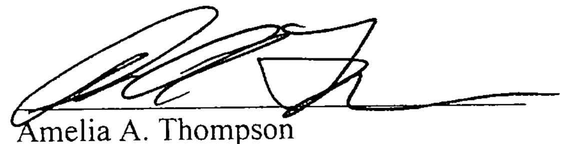

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