In The

Supreme Court of Virginia

RECORD NO. _____

C. ROBERT JOHNSON, III, LISA LAWSON JOHNSON, THOMAS A. HAZELWOOD, JOHNSON AND SONS SEAFOOD, LLC, and HAZELWOOD OYSTER FARMS, INC.,

Petitioners – Appellants,

v.

CITY OF SUFFOLK and HAMPTON ROADS SANITATION DISTRICT,

Respondents – Appellees.

PETITION FOR APPEAL

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STATEMENT OF THE CASE

This is an appeal of a final judgment of the Suffolk Circuit Court in an inverse-condemnation case. The appellants are oystermen who hold state-issued leases to oyster beds in the Nansemond River. They filed a declaratory-judgment petition, alleging that appellees the City of Suffolk and Hampton Roads Sanitation District operated and maintained sanitary-sewer and stormwater systems in such a way that untreated sewage and other effluents invaded the oyster beds. They sought a declaration that these and related acts effected a taking or damaging of their property for a public purpose without just compensation, violating Art. I, §11 of the Constitution of Virginia.

The City and HRSD each filed a demurrer and a plea in bar. After the parties briefed the issues, the court received oral argument before issuing a letter opinion, ruling that the claims were barred by *Darling v. Newport News*, 249 U.S. 540 (1919). The court entered a final order sustaining the demurrers and dismissing the action on September 24, 2019. The oystermen appeal.

ASSIGNMENT OF ERROR

The trial court erroneously sustained the demurrers, because the declaratory-judgment petition states a facially valid claim for inverse condemnation, and:

A. The trial court erroneously based its ruling on federal caselaw interpreting the United States Constitution, because the oystermen's claims are based on the Constitution of Virginia. [*Preserved*: letter submission (5-9-19) at 3-4; final order at 3]

B. The trial court erroneously ruled that the City and HRSD have the right to pollute the Commonwealth's waters and that they need not pay just compensation to the oystermen. In doing so, it erroneously relied on now-obsolete caselaw, and erroneously applied that caselaw. [*Preserved*: brief in opposition to demurrers (3-8-19) at 10-13; letter submission (5-9-19) at 3-4; hearing Tr. 42-44 (4-9-19)]

FACTS

Because the trial court decided this case on demurrer, the facts here are those set out in the declaratory-judgment petition. *Coward v. Wellmont Health Sys.*, 295 Va. 351, 358 (2018).

The oystermen hold valid leases for oyster grounds in the Nansemond River. Declaratory Judgment Petition, ¶24-43. The City and HRSD use, operate, and maintain sanitary sewer systems, and the City uses, operates, and maintains a stormwater management system, all for public purposes. *Id.*, ¶44. Because of the way in which these two entities use, operate, and maintain these systems, untreated sewage and

stormwater intermittently overflow, enter the Nansemond River, and damage the oystermen's grounds. *Id*., ¶¶46-48.

The City and HRSD have known of these intermittent releases for many years. Beginning in 2010, HRSD entered into a series of consent decrees with the Commonwealth and the United States to address these problems and to ensure compliance with state and federal clean-water laws. *Id*., ¶49 and Exhibit B. The City entered into a similar consent order with the Commonwealth's Water Control Board in 2014, also to address these problems and to ensure compliance with the State Water Control Law. *Id*., ¶50 and Exhibit C.

The actions of the City and HRSD have directly damaged the oystermen's property, and have from time to time prompted the Virginia Department of Health to close parts of the Nansemond River, including these grounds, to oyster harvesting, all as a result of repeated violations of the consent orders. *Id*., ¶¶51-58. Despite this damage, neither entity has paid just compensation to the oystermen.

ARGUMENT

Standard of review

This Court reviews the grant of a demurrer de novo, taking the facts as alleged in the declaratory-judgment petition, those impliedly alleged, and those that may reasonably be inferred from the pleading. *Ayers v. Shaffer*, 286 Va. 212, 216-17 (2013). A demurrer tests the sufficiency of a pleading, not proof; a trial court may not decide the merits of litigation on demurrer. *Assurance Data, Inc. v*. *Malyevac*, 286 Va. 137, 139 (2013).

Discussion

Without engaging in hyperbole, it is accurate to describe the trial court's ruling in these terms: The City of Suffolk and HRSD are at liberty to pollute the Nansemond River to any degree they wish, and are not answerable for the ensuing damage to private property.

While this description appears harsh, it is nevertheless faithful to the trial court's September 9, 2019 letter opinion, at 5. There, the court cited two federal decisions for that premise. In both of those cases, the courts interpreted federal law, not the Constitution of Virginia. The oystermen's claims, in contrast, arise under Virginia law.

In *Darling v. Newport News*, 249 U.S. 540, 39 S.Ct. 371 (1919), the Court evaluated oyster-bed claims much like the ones stated here. But there, the claims arose under the federal Constitution, specifically the Fourteenth Amendment and the Contract Clause of Art. I, §10. *Id*. at 542, 39 S.Ct. at 371.

In *Ancarrow v. Richmond*, 600 F.2d 443 (4th Cir. 1979), the Fourth Circuit Court of Appeals reviewed a district court's ruling in a case involving a marina. The district court found a valid Fourteenth Amendment claim but abstained from adjudicating supplemental state-law claims. *Id*. at 444, 446. The circuit court reversed, ordering dismissal of the claim under federal law. *Id*. at 448. This left the state-law claims unadjudicated. *Id*. and n.5.

This state-vs.-federal distinction matters. While the federal Constitution prohibits the taking of private property for public purposes without just compensation, Virginia's "damage or take" provision provides stronger property-rights protection. *Compare* U.S. Const. Amendments V and XIV with Va. Const. Art. I, §11. The trial court used the wrong legal standard, the wrong body of law, to decide this case.

* * *

In Virginia as elsewhere, a landowner may initiate inverse-condemnation proceedings where that owner's private property has been damaged or taken for public purposes without just compensation. The owner may file a declaratory-judgment action to establish its claim. If the trial court finds a damaging or taking, it empanels a condemnation jury to fix just compensation, just as if the condemnor had formally condemned the property. *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 600-01 (2004); Code §8.01-184.

While acknowledging that they have general condemnation powers, both the City and HRSD argued that they could not be liable in inverse condemnation for damage to oyster beds because a statute – Code §28.2-628 – forbids the taking of oyster grounds in ordinary condemnation proceedings. The trial court correctly rejected that argument, reasoning that the statute merely limited the exercise of existing powers over such property. Letter opinion (9-9-19) at 2-3.

Any other interpretation of the statute would render it unconstitutional because, as the trial court correctly observed on p. 3 of its opinion letter, it would authorize condemning entities to damage private property without paying anything. "In construing a statute, it is the duty of the courts so to construe its language as to avoid a conflict

with the constitution." *Kepalchick v. Catholic Diocese of Richmond*, 274 Va. 332, 340 (2007). The court here properly applied the statute to prohibit the exercise of eminent-domain powers over oyster grounds, and not to bar inverse-condemnation claims.

* * *

In two recent decisions, this Court has described how a condemnor's improper acts in using private property as a fall-back drainage system can create inverse-condemnation liability. In the first, *Livingston v. VDOT*, 284 Va. 140 (2012), the Department of Transportation chose not to maintain a drainage facility, thereby asking "private property owners ... to bear the cost of a public improvement ...." *Id*. at 160. The Court cited earlier decisions, including *HRSD v. McDonnell*, 234 Va. 235, 238-39 (1987), where HRSD decided to use "private property as a storage site for excess discharge from its sewage system ...." *Id*. at 159. There, this Court pointed to the very invasion alleged here as the basis for a valid inverse-condemnation claim.

More recently, in *AGCS Marine Ins. Co. v. Arlington County*, 293 Va. 469 (2017), the Court evaluated a claim that the county had intentionally under-built the capacity of its sewer and stormwater system, relying on overflow onto private property to keep the system

operational. *Id*. at 486. The Court concluded that these allegations were sufficient to state an inverse-condemnation claim. *Id*.

The oystermen's pleadings tracked these holdings. They alleged that the City and HRSD knew that their inadequate systems would result in the discharge of untreated sewage and stormwater onto the oyster grounds. Declaratory Judgment Petition, ¶¶11-12, 44-48. Both entities knew that they were required to contain the sewage and stormwater; they each agreed to do so in one or more consent orders. *Id*., ¶¶49-50. And their failure to contain the sewage and stormwater damaged the oystermen's property rights. *Id*., ¶¶51-58.

Under Virginia law, the oystermen have a right to just compensation for this public use of their private property.

* * *

The City and HRSD asserted numerous grounds in their demurrers and companion special pleas. The trial court decided the case on only one issue:

> Simply put, the [oystermen] complain that the Respondents designed a sewage system and waste water system for public good that allowed overflow to flow into a public waterway. The Darling opinion would appear to bar recovery in inverse condemnation under those circumstances. For this reason, and this reason alone, the [Respondents'] demurrer is granted ....

Letter opinion (9-9-19) at 5.

As noted above, *Darling v. Newport News* adjudicated claims brought under the federal Constitution. The oystermen sought relief under the Constitution of Virginia, which affords greater property-rights protection than does its federal counterpart.

But even under the federal decisions, this case should have gone to trial. In *Darling*, the high court appended this caveat to its ruling that a locality was free to pollute: "Such at least would be its power unless it should create a nuisance that so seriously interfered with private property as to infringe Constitutional rights." 249 U.S. at 543. The Fourth Circuit's opinion in *Ancarrow* repeats this exception from the general federal rule: "It is important to note at the outset that plaintiffs do not allege that there was a nuisance-like physical invasion of their exclusive land space." 600 F.2d at 446 (citing *Darling*). The oystermen specifically called this distinction to the trial court's attention in their March 8, 2019 brief in opposition, at 11, and in their May 9, 2019 supplemental submission, at 3-4. Assuming for argument's sake that this action had been brought under the federal Constitution, both *Darling* and *Ancarrow* would allow these claims to proceed to trial.

Virginia law is even more decisively in the oystermen's favor. The Constitution of Virginia has stated for over a century that "[t]he natural oyster beds ... shall be held in trust for the benefit of the people of the Commonwealth." Va. Const. Art. XI Sec. 3. This Court has ruled that, as a result, "the General Assembly has the power to authorize, permit or suffer sewage to be discharged into Hampton Roads and its estuaries," with or without restriction, at its sole discretion. *Commonwealth v. City of Newport News*, 158 Va. 521, 556 (1932).

Following the Court's ruling in that case, two more Constitutional Amendments were ratified. Article XI, §1 protects the Commonwealth's "waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth." And Article XI, §2 states that "[i]n furtherance of such policy, the General Assembly may undertake ... the protection of its ... waters from pollution, impairment, or destruction, by agencies of the Commonwealth." The legislature created the Department of Environmental Quality, the Virginia Marine Resources Commission, and HRSD itself to prevent localities from dumping sewage into the Commonwealth's rivers.

Title XI of the Virginia Constitution, and the statutes and regulatory actions taken in the last century, demonstrate that the

Commonwealth has not granted cities and authorities the right to pollute. The Commonwealth's oyster beds are held in public trust; whatever license the City of Suffolk and HRSD may once have had to pollute them is long gone.

* * *

Before reaching the highest court in the nation, *Darling v. Newport News* paid a visit to this Court. 123 Va. 14 (1918). Under the law that existed at that time, localities were indeed free to use navigable waterways as a general sewer. But this Court limited that power: "... the legislature cannot be presumed to have intended to destroy this ancient and undoubted public right *in the absence of a clear and explicit statute indicating such purpose*." *Id*. at 20 (emphasis supplied).

This Court in *Darling* invoked the concept of *jus publicum* or public rights, also called the public trust doctrine. These are essentially equivalent. *Virginia Marine Res. Comm'n v. Chincoteague Inn*, 287 Va. 371, 383 (2014). Some resources, such as rights of navigation and oyster beds, are the realm of the Commonwealth to hold in trust for the people of Virginia. *Id.* at 382–83; *G. L. Webster Co. v. Steelman*, 172 Va. 342, 357 (1939); *see also Darling*, 123 Va. at 27 (Sims, J., dissenting).

The Commonwealth, as the holder of the *jus publicum*, may delegate or grant rights to use the resources so long as the right remains vested ultimately in the public. *G. L. Webster Co*., 172 Va. at 357. Given the state of the law, customs, and circumstances at the time, this Court ruled that the Commonwealth has granted the "disposal of human sewage and filth by a municipality, under legislative authority, into the salt, tidal, navigable waters of the State." *Id.* at 360. That grant immunized localities from property-rights liability arising from their polluting activities.

This Court decided *Darling* in the closing months of World War I. Twenty years later, the General Assembly enacted the "clear and explicit statute" that this Court's opinion foresaw:

> No county, city, town or other public body, or person shall discharge, or suffer to be discharged, directly or indirectly into any tidal waters of the [sanitation] district any sewage, industrial wastes or other refuse which may or will cause or contribute to pollution of any tidal waters of the district ....

Code §21-218. This statute is part of the Sanitation Districts Law of 1938. That Act created sanitation districts such as HRSD and declared their purpose to be "the relief of the tidal waters of the district from pollution and the consequent improvement of conditions affecting the

public health and the natural oyster beds, rocks and shoals." Code §21-169. The era of unfettered pollutant discharge was over.[1]

This brings the argument full circle: Assuming for argument's sake that this Court's *Darling* ruling permitted discharge of pollutants without consequence, the General Assembly overturned the precedent in Franklin Roosevelt's second term. Eight years later, it declared the discharge of pollutants into waterways to be against public policy. 1946 Va. Acts ch. 63B, §1514-b(4) (State Water Control Law). That public-policy declaration survives today as Code §62.1-44.2.

Our laws – the *jus publicum* and public-trust doctrines; our Constitution and Code – do not authorize the violation of declared public policy in this way. Now, unlike in 1918, localities and authorities have no power to pollute the Commonwealth's waters and damage its oyster beds with impunity. The actions of the City and HRSD damaged or took the oystermen's property rights in violation of these laws. The proper result here is not dismissal but a just-compensation trial.

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[1] Federal law was slower to modernize. Ten years after the General Assembly acted, Congress passed the Federal Water Pollution Control Act of 1948, later expanding its coverage in 1972 under the Clean Water Act, 33 U.S.C. §1251 et seq. But for 80 years before the oystermen filed this suit, the Commonwealth's waterways no longer served as its sewer.

CONCLUSION

The Court should award the oystermen an appeal and thereafter reverse the judgment below and remand the case for trial.

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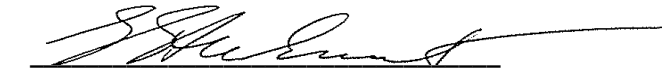
By: 
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CERTIFICATE

Pursuant to Rule 5:17(i) of the Supreme Court of Virginia, I hereby certify the following:

1. The appellants are C. Robert Johnson, III, Lisa Lawson Johnson, Thomas A. Hazelwood, Johnson and Sons Seafood, LLC, and Hazelwood Oyster Farms, Inc.

2. Counsel for the appellants are:

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3. The appellees are City of Suffolk and Hampton Roads Sanitation District.

4. Counsel for the City of Suffolk are:

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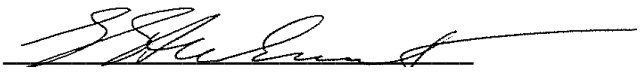
5. The declaratory-judgment petition below listed the affected real properties in the caption. They are set out here for the Court's reference:

43.83 Acres, more or less (VMRC lease 20442);
147.56 Acres, more or less (VMRC lease 20441);
129.20 Acres, more or less (VMRC lease9370);
14.45 Acres, more or less (VMRC lease 9363);
25.45 Acres, more or less (VMRC lease 11072);
30.86 Acres, more or less (VMRC lease 10425);
13.64 Acres, more or less (VMRC lease 20039);
53.76 Acres, more or less (VMRC lease 17208);
14.27 Acres, more or less (VMRC lease 9362);
21.90 Acres, more or less (VMRC lease 9366);
9.12 Acres, more or less (VMRC lease 10922);
3.51 Acres, more or less (VMRC lease 11609);
1.10 Acres, more or less (VMRC lease 9342);

64.60 Acres, more or less (VMRC lease 7085);
214.73 Acres, more or less (VMRC lease18758);
50.88 Acres, more or less (VMRC lease 18757); and
7.43 Acres, more or less (VMRC lease 7083).

6. Seven copies of the foregoing Petition for Appeal were hand-filed with the Clerk of the Supreme Court of Virginia and copies were served, via UPS Ground Transportation and email, upon counsel for the appellees this 22nd day of November, 2019.

7. Counsel for the appellants desire to state orally and in person to a panel of this court the reasons why this petition should be granted.



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