In The

Supreme Court of Virginia

RECORD NO. 191563

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

***Appellants*,**

v.

CITY OF SUFFOLK and HAMPTON ROADS SANITATION DISTRICT,

Appellees.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND OTHER AUTHORITIES

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 their oyster beds and took or damaged the oysters there. They claimed that these 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. The court received briefs and oral argument before issuing a letter opinion, ruling that the claims were barred by *Darling v. Newport News*, 249 U.S. 540 (1919). It entered a final order sustaining the demurrers and dismissing the case with prejudice. A. 272. This Court awarded the oystermen an appeal on May 18, 2020.

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*: A. 259-60, A. 274]

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 relied on now-obsolete caselaw, and erroneously applied that caselaw. [*Preserved*: A. 225-28, A. 241-43, A. 259-60]

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 and own the oysters there. A. 9-12, ¶¶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. A. 12, ¶44. Because of the way in which these two entities use, operate, and maintain these systems, untreated sewage

and stormwater intermittently overflow them, enter the river, and damage the oystermen's grounds and oysters. A. 13, ¶¶46-48.

Both leaseholds and the oysters grown in them have long been considered property under Virginia law. Code §25.1-100 ("'Property' means land and personal property, and any right, title, interest, estate or claim in or to such property"); *AGCS Marine Ins. Co. v. Arlington Cty.*, 293 Va. 469, 491 (2017) ("[O]ysters [are] the 'personal property' of the lessee 'and if taken or damaged in eminent domain proceedings, just compensation must be rendered therefor.'") (*citing Town of Cape Charles v. Ballard Bros. Fish*, 200 Va. 667, 673 (1959)).

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. A. 14, ¶49; A. 68-159. The City entered into a similar consent order with the State Water Control Board in 2014, also to address these problems and to ensure compliance with the State Water Control Law. A. 14-15, ¶50; A. 160-83.

The actions of the City and HRSD have directly damaged the oystermen's leased and personal property, and have from time to time

prompted the Virginia Department of Health to close parts of the river, including these grounds, to oyster harvesting, all as a result of repeated violations of the consent orders. A. 15-17, ¶¶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 reasonably 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

A. <u>The trial court applies the wrong body of law</u>.

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 letter opinion. At A. 276, the court cites two federal decisions for that premise. In both of those cases, the federal courts interpreted federal law, not the Constitution of Virginia. The oystermen's claims, in contrast, arise solely under Virginia law.

In *Darling v. Newport News*, 249 U.S. 540, 39 S.Ct. 371 (1919), the Court evaluated oyster-bed claims like the ones 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. The Court chose not to adjudicate any state-law issues, because this Court is the final arbiter of Virginia law. *Id*. at 544, 39 S.Ct. at 372 ("But upon that point we follow the Supreme Court of the State.").

In *Ancarrow v. Richmond*, 600 F.2d 443 (4th Cir. 1979), the Fourth Circuit reviewed a 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.

B. The oystermen pleaded a valid *Livingston/AGCS* claim.

In two recent decisions, this Court has held that 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 *Hampton Rds. Sanitation Dist. 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 ...." 284 Va. at 159. The 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 and oysters. A. 7, ¶¶11-12; A. 12-13, ¶¶44-48. Both entities knew the consequences of their purposeful acts and omissions; each had agreed to limit its sewage and stormwater overflows into the Nansemond River in consent orders. A. 14-15, ¶¶49-50. Their purposeful refusal to contain the sewage and stormwater damaged the oystermen's property rights. A. 15-17, ¶¶51-58.

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

C. Under federal-law analysis, this case presents a jury issue.

The City and HRSD asserted numerous grounds in their special pleas and demurrers. 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 ....

A. 270.

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

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 *Ancarrow* opinion repeats this exception to the 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*).

This is a physical-invasion case. The oystermen twice called this distinction to the trial court's attention. A. 218 and 259-60. 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.

D. Virginia-law analysis is more compelling.

Virginia law is even more decisively in the oystermen's favor. Our Constitution provides that "[t]he natural oyster beds ... shall be held in trust for the benefit of the people of the Commonwealth." Va. Const. art. XI, § 3. This Court ruled once, long ago, 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 ex rel Att'y Gen. v. Newport News*, 158 Va. 521, 556 (1932).

Following the Court's ruling in that case, two Constitutional Amendments took effect. 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 our Constitution, and the statutes and regulatory actions taken in the last century, show that the Commonwealth has not granted to anyone the right to pollute. Its 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.

E. The public-trust doctrine and public policy require reversal.

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 – the holder of the *jus publicum* – may grant rights to use the resources, so long as the right ultimately remains vested 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 had authorized 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. This 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 private property rights. Those entities have no more right to dump raw sewage

[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.

on private property than any other condemnor. The proper result here is not dismissal but a just-compensation trial.

ISSUES ON CROSS-ERROR

1. Assignments relating to the power to condemn.

Both appellees contend on cross-error that because they cannot affirmatively condemn oyster leaseholds, they cannot be liable in inverse condemnation for damaging this property.

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 below that they could not be liable in inverse condemnation for damage to oyster beds and oysters.

Ironically, they cite a statute – Code §28.2-628 – that was designed to protect oystermen from the seizure of their livelihood by localities. This statute forbids the taking of oyster grounds and oysters in ordinary condemnation proceedings. The trial court correctly rejected that argument, reasoning that the statute merely limited the exercise of condemnation powers over such property. A. 267-68.

Any other interpretation of the statute would render it unconstitutional because, as the trial court correctly observed at A. 268, that 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 direct eminent-domain powers over leased oyster grounds, but not to bar inverse-condemnation claims. To hold otherwise would allow the statute to countermand the constitution.

2. The City's remaining assignments.

A. The oystermen pleaded a public use.

In its cross-error 2, the City asserts that the declaratory-judgment petition is fatally defective because it "failed to allege a public use." This contention is demonstrably incorrect:

> The Respondents' aforesaid acts and omissions, and use of Petitioners' property were for a public use, and the taking and damaging of Petitioners' property was caused pursuant to a public use within the meaning of Article I, §11 of the Virginia Constitution.

A. 18, ¶64. Other allegations specify that the claim stems from the City's and HRSD's provision of sewage- and stormwater-management services. *See*, *e.g*., A. 12-13, ¶¶44-48. The City cannot seriously maintain that the provision of sewage control or stormwater management is not a public use.

This disposes of assignment 2, because the sole contention there, as the City chose to phrase it, is the absence of an allegation. Assignments "are the *core* of the appeal," *Forest Lakes Cmty. Ass'n v. United Land Corp. of America*, 293 Va. 113, 122 (2017), and limit the scope of the Court's review. *Id*. at 123. The merits of the pleading are beyond our reach here.

B. The City does not have an unfettered right to pollute.

In cross-errors 3 and 4, the City argues two sides of the same coin, claiming that the oystermen have a right to engage in aquaculture, but no right to the fruits of the harvest if the City chooses to pollute. They also claim a police-power right to pollute. This, of course, would defeat the purpose of the leases from the Commonwealth, making those leases valueless at the City's whim.

This Court has ruled that shellfish-bed leases also convey rights by necessary implication. *Working Waterman's Ass'n v. Seafood Harvesters, Inc*., 227 Va. 101, 111 (1984). The right to harvest is necessarily implied in the right to engage in aquaculture. The City's contention here leads to the absurd result that the oystermen have the right to plant oysters but no right to harvest them.

C. The oystermen sued within the limitations period.

Cross-error 5 contends that this action, filed in 2018, came too late. The City has asserted in this Court that the oystermen "have not been subjected to repeated, separate pollution discharge events that each cause specific individualized harm to their property." Brief in opposition at 23. They argue that this is a single injury for which the statute of limitations has run.

To reach this conclusion, one must rewrite the Declaratory Judgment Petition. That pleading asserts, A. 16, ¶54, that the polluting events have occurred "from time to time and intermittently." It also alleges that the Virginia Department of Health closed parts of the oyster grounds due to this pollution in 2016 and 2017 – evidence of damages well within the three-year limitations period. A. 16-17, ¶¶55-57.

Consistent with this Court's holding in *Hampton Rds. Sanitation Dist.*, 234 Va. at 239, each such intermittent discharge by the City "inflicts a new injury and gives rise to a new and separate cause of action." While the City's argument on this issue may raise an evidentiary decision for the circuit court during a trial, it is not an appropriate basis for a demurrer. The petition states a claim for which relief can be granted, and that is the only issue on demurrer. *Grossman v. Saunders*, 237 Va. 113, 119 (1989).

CONCLUSION

The Court should reverse the judgment below and remand the case for trial.

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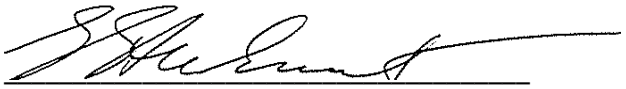
By: 

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CERTIFICATE

I hereby certify that on this 11th day of June, 2020, electronic copies of the Brief of Appellants and Appendix have been filed, via VACES, and served, via email, upon:

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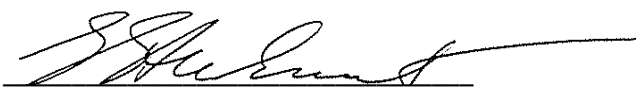

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