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.

REPLY BRIEF OF APPELLANTS

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DISCUSSION

1. The appellees misstate the oystermen's claims.

In describing the claims that the oystermen bring here, both the City of Suffolk and the Hampton Roads Sanitation District use language not found in the petition for declaratory judgment (A. 1 et seq.). Those entities recast the claims as being for a guarantee of pure water, as though this litigation were an effort to make the City and HRSD insurers of the water quality at these oyster beds.

The oystermen's claims have nothing to do with naturally occurring variations in water quality. They stem instead from periodic physical invasions by raw sewage intermittently discharged across the oyster beds by a city and a sanitation district that under-built their waste and stormwater systems. A. 6, ¶66. These actions forced the oystermen to bear the cost that the public, through the City and HRSD, would otherwise have borne. *See AGCS Marine Ins. Co. v. Arlington County*, 293 Va. 469, 483 (2017).

The Court's prior condemnation jurisprudence bears out this distinction:

• In *Tidewater Ry. Co. v. Shartzer*, 107 Va. 562, 572-73 (1907), the Court ruled that a diminution in property value "by reason of the noise, smoke, cinders, vibration, smells, etc.," is a damaging of that property for which just compensation is due. If the City and HRSD were correct here, the railroad company could evade such liability by claiming that it never guaranteed that its neighbor would enjoy clean air, quiet, and the like.

• *Heldt v. Elizabeth River Tunnel Dist.*, 196 Va. 477 (1954), involved a claim of damage from water intrusion incident to the construction of a tunnel. The trial court held the claim to be non-compensable, but this Court reversed. In doing so, it never described the tunnel district as a guarantor that no water would ever affect Heldt's construction.

• In the same vein, the landowner in *HRSD v. McDonnell*, 234 Va. 235 (1987) could proceed to trial without claiming a guarantee of unpolluted land; the plaintiffs in *Livingston v. VDOT*, 284 Va. 140 (2012) needed not assert a guarantee of dry houses; and the insurer in *AGCS Marine* could state a claim without pleading a guarantee against fouled groceries.

In each of these cases, as here, the condemnor caused damage to private property by physically invading that property while advancing a public use. In each, the condemnor's actions caused harm – damaged property – for that public use.

2. The depuration issue is not ripe for this Court's consideration.

Both the City (brief of appellee at 24, n.11) and HRSD (brief of appellee at 15-16, 30, 32) contend that the oystermen can mitigate their losses via the depuration process – transplanting them from polluted water to clean water to remove the effects of pollution. The trial court did not rule on this issue, so the only way for this Court to do so is through the right-for-a-different-reason doctrine.

This case is not in a posture where this Court may employ the doctrine: "[T]he proper application of this rule does not include those cases where, because the trial court has ... confined its decision to a specific ground, further factual resolution is needed before the right reason may be assigned to support the trial court's decision." *Whitehead v. Commonwealth*, 278 Va. 105, 115 (2009).

Before any court can evaluate this issue, a factfinder will have to ascertain if any clean-water sites are available to the oystermen; what

the cost of transportation and transplantation will be; and whether that cost will exceed the market value of the oysters. If the oystermen can salvage some value through this process, the City and HRSD will have damaged the oystermen's property by the cost of depuration, so just compensation will still be due – a concession that this argument necessarily entails.

3. Code §28.2-628 does not bar inverse-condemnation liability for damage to property.

In their assignments of cross-error, the City and HRSD continue to urge that the statutory ban on affirmative condemnation of leased oyster beds exonerates them from liability here. The trial court struck the proper balance by ruling that the statute does not impair a condemnor's general condemnation authority; "it simply limits the exercise of that right." A. 268, citing Code §28.2-628.

The position that the City and HRSD urge this Court to adopt would rescind the trial court's deference to the Constitution. It would place the statute into conflict with a document of higher dignity than the Code. The Constitution of Virginia forbids the taking or damaging of private property for a public use without just compensation. No statute can countermand this provision. By arguing that this statute prohibits

application of a self-executing constitutional provision (*AGCS Marine*, 293 Va. at 477), the City and HRSD implicitly challenge the constitutionality of the statute that they claim shields them.

The oystermen argued below that if the court adopted the City's and HRSD's interpretation of §28.2-623, the statute would be unconstitutional as applied to inverse condemnation. The court properly interpreted the statute in such a way as to preserve its constitutionality, a ruling that the City and HRSD seek to reverse. *Commonwealth v. Doe*, 278 Va. 223, 229–30 (2009) ("courts have a duty when construing a statute to avoid any conflict with the Constitution.").

This Court cannot rule for the City and HRSD on their cross-error relating to the statute without reviving the constitutional question. The Court would then face the choice of affirming the circuit court on this issue, or declaring §28.2-623 unconstitutional as applied to inverse condemnation.

4. Invoking the police power does not exonerate the City.

In its brief at 27, n.15, the City disavows any claim that it possesses "a police power to pollute." Its cross-error 4 seeks to invoke instead the Commonwealth's police power.

But the oystermen have not sought just compensation from the Commonwealth, because the state has not invaded their oyster beds with raw sewage. The City and HRSD did that.

The Commonwealth's closure of oyster beds recognizes that the oysters and oyster beds are in fact damaged. The oystermen have never claimed that the Commonwealth acted wrongfully in protecting oyster consumers from ingesting what the City and HRSD have discharged. The wrongful act was the discharge of raw sewage that led to the closure.

A simple analogy illustrates this distinction. Suppose an arsonist sets fire to a building. Because of the fire damage, the local government closes – condemns – the building. If the building's owner sues the arsonist for the fire damage, the perpetrator cannot claim the protection of the government's police-power defense. The closure of the building is evidence of the damage that the arsonist caused; it is not a protection against the arsonist's liability.

CONCLUSION

The Court should reverse the judgment below and remand the case for trial. The Court should also affirm the circuit court on the assignments of cross-error.

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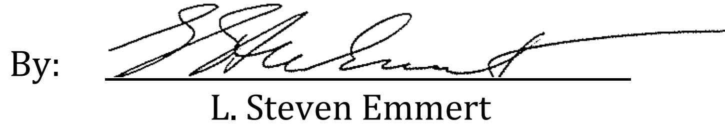
By: 
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CERTIFICATE

I hereby certify that on this 24th day of July, 2020, an electronic copy of the Reply Brief of Appellants has been filed, via VACES, and served, via email, upon:

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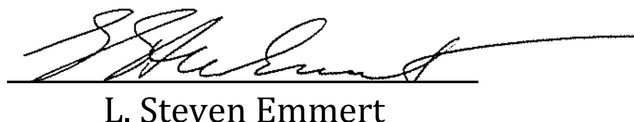

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