In the

Supreme Court of Virginia

At Richmond

Record No. 091180

ADVANCED TOWING COMPANY, LLC, et al.,

Appellants,

– v. –

FAIRFAX COUNTY BOARD OF SUPERVISORS,

Appellee.

OPENING BRIEF OF APPELLANTS

ROBERT L. TOMLINSON, II, VSB# 23037
ATTORNEY AT LAW
2009 14th Street North
Suite 509
Arlington, Virginia 22201
T: (703) 841-9400
F: (703) 524-8533
roberttom@aol.com

Counsel for Appellants

COUNSEL PRESS • VA – (800) 275-0668

SUBJECT INDEX

TABLE OF CITATIONS ii

ASSIGNMENTS OF ERROR 1

COMBINED STATEMENT OF FACTS, THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW 3

QUESTIONS PRESENTED 9

APPLICABLE PRINCIPLES OF LAW & AUTHORITIES 10

ARGUMENT 12

1. THE AMENDED COMPLAINT STATED A CAUSE OF ACTION FOR DECLARATORY RELIEF AND THE DEMURRER SHOULD HAVE BEEN OVERRULED 12

2. THE TRIAL COURT IMPROPERLY DECIDED THE CASE ON THE MERITS 12

3. THE DILLON RULE PRECLUDES FAIRFAX COUNTY FROM IMPOSING A GEOGRAPHICAL LIMITATION IN ITS TOWING ORDINANCE IN CONTRAVENTION OF ENABLING LEGISLATION 16

CONCLUSION 17

CERTIFICATE PURSUANT TO RULE 5:26(D) 19

TABLE OF CITATIONS

Cases

First National Trust & Savings Bank, Trustee, etc. v. Louise G. Raphael, *et al*.,
113 S.E.2d 683, 201 Va. 718 (1960).....11

Hubbard v. Dresser, Inc.,
271 Va. 117, 624 S.E.2d 1 (2006).....11

Verzi v. Baltimore County Maryland,
635 A.2d 967 333 Md. 411,
Court of Appeals of Maryland (1993) 13, 14, 15

Yukon Pocahontas Coal Company, a Corporation, et als .v. F. M. Ratliff,et als.,
175 Va. 366 (1940).....11

Yuzefovsky v. St. John's Wood Apts.,
261 Va. 97, 540 S.E.2d 134 (2001).....10

Rules, Statutes and Other Authorities

Fairfax County Code § 82-5-32(e) 3

Va. Code § 8.01-184.....2, 3

Va. Code § 46.2-1231.....4, 5

Va. Code § 46.2-1232.....passim

Va. Code § 46.2-2800.....14

United States Constitution, Fourteenth Amendment 3, 5, 7, 12

IN THE SUPREME COURT OF VIRGINIA

ADVANCED TOWING COMPANY LLC, and
ROADRUNNER WRECKER SERVICE, INC, and
KINGS TOWING, INC.
Appellants

vs.

FAIRFAX COUNTY BOARD OF SUPERVISORS
Appellee

COME NOW the Appellants, by counsel, and represent that they have been aggrieved by a ruling of the Circuit Court for Fairfax County and the Petition for Appeal having been granted, respectfully submit this brief in support of their position.

ASSIGNMENTS OF ERROR

1. The Trial Court erred in sustaining the Demurrer to the Amended Complaint because the Amended Complaint set forth a cause of action for declaratory judgment by alleging facts sufficient to establish an actual controversy between proper parties within the

contemplation of §8.01-184, Code of Virginia, 1950, as amended. [1]

2. The Trial Court improperly decided the case on the merits.

3. The Trial Court erred by failing to apply the Dillon Rule and strike down a Fairfax County Code provision enacted *ultra vires* because it imposed a geographical limitation that contravenes the enabling legislation of §46.2-1232, Code of Virginia, 1950, as amended. [2]

---

[1] In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

[2] "In the event that a vehicle is towed from one locality and stored in or released from a location in another locality, the local ordinance, if any, of the locality from which the vehicle was towed shall apply."

COMBINED STATEMENT OF FACTS, THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Fairfax County Virginia enacted an ordinance (pursuant to the authority granted it by the legislature §46.2-1232, Code of Virginia, 1950, as amended) regulating the towing of trespassing vehicles which provides in pertinent part:

> 82-5-32 (e) "Every site to which trespassing vehicles and towed shall comply with the following requirements: (1) A tow truck operator must tow each vehicle to storage site located within the boundaries of Fairfax County"

On September 11, 2008, the Plaintiffs filed a declaratory judgment action pursuant to §8.01-184, Code of Virginia, 1950, as amended against Fairfax County seeking a determination that the ordinance was enacted in violation of the Plaintiffs' rights as secured by Fourteenth Amendment to the Constitution of the United States. [3]

---

[3] Constitution of the United States, Amendment XIV Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Complaint for Declaratory Judgment relief alleged:

1. The Plaintiffs are corporations authorized to conduct business in the Commonwealth of Virginia and engage in the business of, *inter alia*, removing trespassing vehicles from private property pursuant to §46.2-1231 Code of Virginia 1950 as amended.

2. Defendant Fairfax County Board of Supervisors is the governing body of Fairfax County.

3. Plaintiff Advanced Towing Company LLC has its principal place of business and vehicle storage facility in Arlington County, Virginia; Plaintiff Roadrunner Wrecker Service, Inc. has its principal place of business and vehicle storage facility in Loudoun County, Virginia; and Plaintiff King's Towing Inc. has its principal place of business and vehicle storage facility in the City of Fairfax, Virginia.

4. Several property management companies contract with the Plaintiffs to enforce their parking policies and to remove trespassing vehicles from properties located in Fairfax County.

5. Trespassing vehicles removed from the properties set forth above would be towed to the Plaintiffs' respective vehicle storage facilities in Arlington and Loudoun Counties and the City of Fairfax respectively.

6. The Fairfax County Board of Supervisors has adopted, as part of the County Code, the following provision:

> 82-5-32 (e) "Every site to which trespassing vehicles are towed shall comply with the following requirements: (1) A tow truck operator must tow each vehicle to storage site located within the boundaries of Fairfax County"

7. In order to fulfill their obligations under contracts under the contracts set forth in paragraph 4., above, Plaintiffs will be subjected to possible prosecution for the violation of the Fairfax County Code Section set forth in paragraph 6 above.

> 8. The foregoing facts establish an actual controversy between the parties.
>
> 9. The geographical limitation set by Fairfax County has no rational relationship to any proper governmental objective and violates the equal protection rights of the Plaintiffs as are secured by the Fourteenth Amendment to the Constitution of the United States and Article I § 11of the Constitution of Virginia.

In response to the claim, Fairfax County filed a demurrer asserting that the Complaint had "wholly fail[ed] to identify any improper classifications, how the ordinance has improperly classified the Plaintiffs, or indeed which group is even similarly situated to the Plaintiffs of persons who was being treated unfairly..." (as is required in a claim for a violation of the Equal Protection clause relied upon) (App. p.5, Demurrer). The Court sustained the Demurrer on that ground, and leave to amend was granted. (App. p.23, Order December 19, 2008)

The Plaintiffs, seeking the same relief, filed an Amended Complaint alleging:

> 1. The Plaintiffs are corporations authorized to conduct business in the Commonwealth of Virginia and engage in the business of, *inter alia,* removing trespassing vehicles from private property pursuant to §46.2-1231 Code of Virginia 1950 as amended.
>
> 2. Defendant Fairfax County Board of Supervisors is the governing body of Fairfax County. Fairfax County comprises a geographical territory of over 400 square miles.

3. Plaintiff Advanced Towing Company L.L.C. has its principal place of business and vehicle storage facility in Arlington County, Virginia; Plaintiff Roadrunner Wrecker Service, Inc. has its principal place of business and vehicle storage facility in Loudoun County, Virginia; and Plaintiff King's Towing Inc. has its principal place of business and vehicle storage facility in the City of Fairfax, Virginia.

4. Plaintiff Advanced Towing Company L.L.C., is located within three miles from the Fairfax County line.

5. Plaintiff Roadrunner Wrecker Service, Inc. is located within five and one-half miles of the Fairfax County line.

6. Plaintiff King's Towing Inc. is located within one-half mile of the Fairfax County line, in the City of Fairfax, a jurisdiction of six square miles completely surrounded by Fairfax County.

7. Several property management companies contract with the Plaintiffs to enforce parking policies on company properties and to remove trespassing vehicles from properties located in Fairfax County.

8. Trespassing vehicles removed from the properties set forth above would be towed to the Plaintiffs' respective vehicle storage facilities in Arlington and Loudoun Counties, and the City of Fairfax respectively.

9. The Fairfax County Board of Supervisors has adopted a geographical limitation upon towers as part of the County Code in Section 82-5-32 (e):

> "Every site to which trespassing vehicles are towed shall comply with the following requirements: (1) A tow truck operator must tow each vehicle to a storage site located within the boundaries of Fairfax County"

10. In order to fulfill their contractual obligations pursuant to contracts identified in paragraph (7) above, the Plaintiffs would be

subjected to possible prosecution for the violation of the Fairfax County Code Section set forth in paragraph (9) above.

11. The ordinance provision set forth above in paragraph (9) establishes an unconstitutional classification which impermissibly draws an unfair distinction between towers who have a storage facility in Fairfax County and towers who do not have a storage facility in Fairfax County.

12. The unreasonable, arbitrary and unconstitutional classification/distinction set forth in the ordinance results in severe adverse economic consequences upon your Plaintiffs, and upon other towers who do not have a storage facility in Fairfax County.

13. The said pernicious classification constitutes an unconstitutional residency requirement upon those "out of County" towers who would seek to conduct business in Fairfax County.

14. The geographical limitation set by Fairfax County bears no rational relationship to any proper governmental objective and violates the equal protection rights of the Plaintiffs as are secured by the Fourteenth Amendment to the Constitution of the United States and Article I § 11of the Constitution of Virginia.

15. The foregoing facts establish an actual controversy between the parties.

In response to the Amended Complaint, the County filed yet another Demurrer alleging that the ordinance at issue was rationally related to a legitimate governmental interest *inter alia*, in that the County could not enforce its ordinance outside the confines of Fairfax County. (App. p.29)

The Plaintiffs responded, on the merits of the case, that the enforcement of a local ordinance outside the confines of the enacting

jurisdiction was specifically envisioned and provided for by the legislation ("In the event that a vehicle is towed from one locality and stored in or released from a location in another locality, the local ordinance, if any, of the locality from which the vehicle was towed shall apply." Virginia Code §46.2-1232, Code of Virginia, 1950, as amended. Finally, the Plaintiffs proffered agreements entered into between Fairfax County and juxtaposed jurisdictions that provided for the authority of local law enforcement agencies to exercise authority outside of Fairfax County.

On February 13, 2009, the Court heard argument on the second demurrer and sustained the same, ruling that the Fairfax County Board of Supervisors has implemented a regulation that is rationally related to a legitimate governmental purpose, that being the ability of the County to enforce its ordinance, and sustained the Second Demurrer. (App. p. 56 Transcript of hearing February 13, 2009)

From this ruling, the Plaintiffs were aggrieved and this appeal ensued.

The Plaintiffs filed a Motion to Reconsider, (App. p. 63) asserting that the geographical limitation of the Ordinance was enacted in violation of the Dillon Rule and accordingly was *ultra vires* and unenforceable. Fairfax

County has the legislative grant under §46.2-1232, Code of Virginia, 1950, as amended, to enact a local towing ordinance. That grant however, does not allow the County to discriminate against non-residents of the County.

Argument on the Motion to Reconsider was heard by the Court on March 13, 2009. The Court ruled that it did not believe that "this is a Dillon Rule violation. I think the county's position with regards to that is correct and I do not find any reason to change my previous ruling with regards to reasonableness, so the motion to reconsider is denied." (App. p.115, Transcript March 13, 2009 Line 15)

From this ruling, the Plaintiffs were aggrieved and this appeal ensued. On September 2, 2009, this Court granted the Petition for Appeal.

QUESTIONS PRESENTED

1. Whether the Amended Complaint stated a cause of action for Declaratory Relief. (Assignment of Error 1) (App. p. 41 Reply memorandum to Second Demurrer; App. p. 52, transcript of proceedings February 13, 2009, line 4; App. p. 54, transcript of proceedings February 13, 2009 line 3)

2. Whether the trial court improperly decided the case on the merits. (Assignment of Error 2) (App. p.41 Reply Memorandum to Second Demurrer)

3. Whether the Dillon Rule precludes Fairfax County from imposing a geographical limitation in its private property-towing ordinance in contravention of its enabling legislation. (Assignment of Error 3) (App. p. 63 Motion to Reconsider)

APPLICABLE PRINCIPLES OF LAW AND AUTHORITIES

The principles of appellate review that govern the Court's consideration of this appeal are well-settled: "A demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations. A demurrer does not, however, admit the correctness of the pleader's conclusions of law." *Yuzefovsky v. St. John's Wood Apts*., 261 Va. 97, 102, 540 S.E.2d 134, 136-37 (2001). Upon review, the Court will consider the facts stated, and those reasonably inferred from the complaint, in the light most favorable to the plaintiff, and will review the sufficiency of the legal conclusions ascribed to those facts *de novo*. Id. at 102, 540 S.E.2d at 137. Additionally, upon appellate review of the sustaining of a

demurrer, the Court is required to address the same issue that the trial court addressed, namely whether the ... motion for judgment alleged sufficient facts to constitute a foundation in law for the judgment sought, and not merely conclusions of law. *Hubbard v. Dresser, Inc.*, 271 Va. 117, 122-23, 624 S.E.2d 1, 4 (2006).

In reversing a trial Court's decision in sustaining a demurrer in a declaratory judgment action (construction of a deed) this Court observed that:

> "Many pages, in fact most of the pages, of the briefs are taken up in argument on a proper construction of the language of the deed. That is the main issue in the case, and will be developed when the case is heard upon its merits. It is obvious that this court cannot now, upon the present pleadings, pass upon the merits." *Yukon Pocahontas Coal Company, a Corporation, et als .v. F. M. Ratliff,et als*. 175 Va. 366 at p. 372.

However, in addressing a similar issue (review of a decision sustaining a demurrer in a declaratory judgment action involving the interpretation of an easement) this Court opined:

> "When the demurrer challenged the right of the plaintiff to this relief, the case was before the lower court on its merits and it was entirely proper that it be finally disposed of. Consequently, if the lower court has correctly decided the case on the merits, it would be quite useless to say now that the demurrer should be overruled and the case remanded for a mere declaratory judgment as to what the rights of the parties are." First National Trust & Savings Bank, Trustee, etc. v. Louise G. Raphael, et al. 113 S.E.2d 683, 201 Va. 718 1960 at p. 687.

For this reason, the Appellants will also argue herein the merits as decided by trial Court.

ARGUMENT

1. THE AMENDED COMPLAINT STATED A CAUSE OF ACTION FOR DECLARATORY RELIEF AND THE DEMURRER SHOULD HAVE BEEN OVERRULED.

In the present case, the Amended Complaint alleges: first, that the County has drawn a distinction between "in County" towers and "out of County" towers; that the distinction alleged bears no rational relationship to any proper governmental objective and violates the equal protection rights of the Plaintiffs as are secured by the Fourteenth Amendment to the Constitution of the United States; and that the operation of the Plaintiffs' respective businesses would subject them to prosecution for violation of the ordinance.

Since the requisite factual allegations properly set forth a claim for Declaratory Judgment the Demurrer should have been overruled.

2. THE TRIAL COURT IMPROPERLY DECIDED THE CASE ON THE MERITS.

The County filed a demurrer asserting that it would not be able to enforce its ordinance if the challenged geographical limitation were held to

be invalid. In response the Plaintiffs argued that "While the Demurrer filed does, technically assert that the underlying Complaint fails to state a cause of action, it really seeks to argue the case on the merits" (App. p.9 Response to Demurrer, paragraph 3) and summarized their position: "In short, the Defendant should not be permitted to argue the case on the merits on Demurrer." (App. p.11 Response to Demurrer, Summary).

Legislated geographical limitations have been subject to extensive litigation under equal protection challenges in Maryland. The Fairfax County Ordinance under review here is essentially, a residency requirement.

In *Verzi v. Baltimore County Maryland* 635 A.2d 967 333 Md. 411 Court of Appeals of Maryland (1993), the Court observed that "[a]lthough we have traditionally accorded legislative determinations a strong presumption of constitutionality [citations omitted] we have also required that a legislative classification rest upon 'some ground of difference having a fair and substantial relation the object of the legislation'" [citations omitted] *Verzi*, id at p 419.

The present case is factually indistinguishable from the case of *Verzi*. There, the Appellant had been denied a defined tow area assignment for

the “sole reason that his business [was] not in Baltimore County” *id* at p. 425. The Court defined its duty as: “In applying the rational basis test in this case, we must determine whether the distinction in Baltimore County ordinance between in-county towers and out-of-county towers is rationally related to a legitimate governmental objective, *Ibid.* There, as here, the County advanced the argument that, *inter alia*, the distinction was necessary to protect the public from fraud, deception, and abuses. The Court found that Baltimore County’s need to supervise and administer the towers was met by the comprehensive plan. The Court observed that Maryland, as does Virginia, had a statewide law with comprehensive powers to address the concerns set forth by Baltimore County. Similarly, the concerns set forth by Fairfax County with respect to its abilities to enforce their ordinance remains a red herring. See §46.2-2800 *et seq* Code of Virginia, 1950 as amended.

In summary, the *Verzi* Court concluded: “By requiring all of its towers to be located within the county boundaries, Baltimore County has, in effect, conferred the monopoly of a profitable business upon certain Baltimore County Businesses. The location requirement... is wholly unrelated to any legitimate objective, and thus it violates the Equal Protection guarantees ...

of the Maryland Declaration of Rights." (construed in accordance with federal equal protection analyses) *Verzi*, supra at p 428.

Further, the County's assertion that "enforcement of this Ordinance would fall to officials over whom the Board has no authority or control" is fallacious. First, as was pointed out in the response to the First Demurrer, §46.2-2800 *et.seq.,* Code of Virginia, 1950 as amended, establishes the Board of Towing and Recovery Operators and provides a comprehensive scheme for the enforcement of all local towing ordinances. As pointed out below, §46.2-1232, Code of Virginia, 1950, as amended specifically provides that towing companies that tow vehicles from Fairfax County and store them in locations outside of the County are subject to the Fairfax County Ordinance. Of course, this makes sense; people who commit crimes in Fairfax County are apprehended in other jurisdictions and prosecuted in Fairfax County. The County's argument that it loses jurisdiction over a towing company that tows trespassing vehicles Fairfax county and stores them in an Arlington County, Loudoun County, or the City of Fairfax is without merit.

The Court in *Verzi* specifically found that Baltimore County's need to supervise and administer the towing companies was appropriately

addressed and met because Maryland, as does Virginia, had a statewide law with comprehensive powers. Here, the concerns set forth by Fairfax County with respect to its ability to enforce its Ordinance are not realistic.

Finally, to the extent to which any merit may be given to the County's position that it can not enforce its ordinance beyond the county line, it is significant to note that when the County perceived a need to extend the authority of its police department beyond the bounds of the County it had absolutely no difficulty in arriving upon a solution by entering into an agreement with an abutting jurisdiction to do so. (App. p.68, Joint Agreements Between Fairfax County and the City of Fairfax)

3. THE DILLON RULE PRECLUDES FAIRFAX COUNTY FROM IMPOSING A GEOGRAPHICAL LIMITATION IN ITS TOWING ORDINANCE IN CONTRAVENTION OF ENABLING LEGISLATION.

The Dillon Rule is a rule of strict statutory construction which construes grants of power to localities very narrowly and provides that local governments have only three types of powers: those granted in express words; those necessarily or fairly implied in or incident to the powers expressly granted; and those essential to the declared objects and purposes of the grant, not simply convenient, but indispensable. Generally, if there is a question about a local government's power or authority, then it

must be assumed that the local government does not have the authority in question.

The Virginia Code (§46.2-1232, Code of Virginia, 1950, as amended) grants authority to the County to enact a local towing ordinance. Significantly, the grant provides, in pertinent part:

> "In the event that a vehicle is towed from one locality and stored in or released from a location in another locality, the local ordinance, if any, of the locality from which the vehicle was towed shall apply."

Clearly, the General Assembly envisioned a situation where cars would be towed from one locality to another and provided for appropriate regulation of the same. As Fairfax County has exceeded the scope of its legislative grant, the ordinance is invalid as having been enacted in violation of the Dillon Rule.

CONCLUSION

For the foregoing reasons: (1) the Demurrer should have been overruled because the Amended Complaint alleged facts sufficient to support a claim for Declaratory Judgment; (2) The trial court improperly and incorrectly ruled on the merits of the case; and (3) The Dillon Rule should have been observed.

The ruling of the Trial Court must be reversed and the case should be remanded for trial on the merits of Amended Complaint, or, alternatively, remanded with directions to declare the Fairfax County Code provision invalid because it is in violation of the Plaintiffs' Constitutional Rights or otherwise enacted *ultra vires* in violation of the Dillon Rule.

Respectfully submitted
ADVANCED TOWING COMPANY LLC, and ROADRUNNER WRECKER SERVICE, INC, and KINGS TOWING, INC.

/s/ Robert L. Tomlinson, II
Robert L. Tomlinson II
Attorney for the Appellants
2009 14th Street, North, Suite 509
Arlington, Virginia 22201-2514
(703) 841-9400 Fax 703.524.8533

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Opening Brief and of the Joint Appendix have been mailed or delivered to:

Cynthia A. Bailey, Esq.
Office of the County Attorney
1200 Government Center Parkway
Suite 549
Fairfax, Virginia 22035

On this the 9th day of October, 2009.

This same date, fifteen copies of the same were hand delivered to the clerk's office and a copy of each were filed electronically on CD.

/s/ Robert L. Tomlinson, II
Robert L. Tomlinson II