

Bay Journal

MD high court to rule if MDE is co-defendant in Lake **Bonnie** suit

Case could set precedent on whether state must enforce its environmental laws and consent orders.

Rona Kobell | May 17, 2015



In this photo from 2011, former MDE Secretary Robert Summers holds a sample of water from Lake Bonnie as former Gov. Martin O'Malley, center, and the lake's new owner, Johnathan Merson, look on. The lake has been closed to swimming for 17 years because of contamination from failing septic systems in the nearby town of Goldsboro. (Jay L. Baker /Governor's Press Office)

Maryland's highest court has again agreed to hear arguments in the case of a Caroline County resident who lost the use of her lake because of pollution.

The Court of Appeals granted the petition of Gail Litz, the woman who once owned the Lake Bonnie Campground, to hear her request to make the Maryland Department of the Environment a defendant along with the town of Goldsboro. Litz argued in her petition that the state failed to enforce its environmental laws and halt the pollution that ruined her lake. A lower court, the Court of Special Appeals, had ruled the case could proceed against Goldsboro, but not the state.

If the Court of Appeals, the state's highest court, rules that the state should be a party to the lawsuit, it could set a precedent that Maryland is expected to enforce its consent orders. Maryland officials have said in the past that the state has discretion over what orders it enforces, and how.

The finding, called a writ of certiorari, was cause for celebration for Litz and her lawyer, Chestertown attorney Phil Hoon. The pair, along with Towson lawyer Macy Nelson, has been trying to have their day in court for six years. It is relatively rare for the highest court to grant writs of certiorari; in the Lake Bonnie case, it has done so twice.

"Here the state is trying to clean up the Bay and they've got a cesspool dumping into the Choptank river. And (the state of Maryland) is so responsible," Hoon said. "We're looking after Gail's interest, sure, but we're also looking after the public's interest."

The saga of Lake Bonnie and the potential liability for Goldsboro and the state began nearly 20 years ago. Litz operated a thriving campground, the centerpiece of which was 28-acre Lake Bonnie, fed by Choptank River water. In 1995, the county health department closed the lake to swimming because of contamination from fecal coliform that was entering the lake through two public drainage ditches polluted with Goldsboro residents' waste and stormwater.

The following year, Goldsboro signed a consent order with the MDE. In that order, the state asserted the septic systems were failing and outlined a schedule for the town to construct and connect residents to a public sewer system. The order said that it would fine Goldsboro \$100 a day if it did not comply. But the state never enforced its order and never fined the city's 84 residents. If it had, Hoon argued, the pollution could have been halted and Litz might not have lost everything.

Nearly 20 years later, the treatment plant is still not built.

Litz stayed involved in the local efforts to bring the treatment plant to Goldsboro. She has said she considered a lawsuit early on, but thought the state would honor its commitment.

In 2010, as she faced foreclosure on her family's beloved property, Litz filed her lawsuit against the town and the state. Her complaint alleged that the town and the county created a nuisance that condemned her property, and that the MDE could have stopped the pollution, but didn't. She asked for \$7 million in damages – enough, she said, to leave something to her grandchildren.

Attorneys for the state and the town never disputed that the septic tank pollution fouled the lake and contributed to Litz losing property that had been in her family since the 1950s. They simply argued that Litz had waited too long to file her action. The statute of limitations on permanent nuisance claims is three years; the state and the town said the nuisance was created in 1996, when the town entered into its consent decree.

Two lower courts agreed with that argument. But Hoon and Nelson argued that the pollution is ongoing and petitioned the highest court to hear the case.

The highest court affirmed that Litz had an ongoing nuisance. It sent the case back to the lower appellate court, the Court of Special Appeals, which dealt with the question of whether the state also was liable. That court ruled the state was not, and the case could proceed only against Goldsboro. Hoon and Nelson appealed that, and in April, they got the writ.

Now, Hoon said, he and Nelson will go back to the Court of Appeals and try to convince the judges that the state should remain a defendant. The case will be heard in November.

When the appeals process is over, and the parties to the suit finally settled, the case may go to trial in Caroline County Circuit Court – with Goldsboro as the sole defendant or joined by the state. The case also could settle.

Steven Johnson, the assistant attorney general for the MDE, is ready to argue, as he has in the past, that the state should not be a party to the lawsuit.

“There was nothing that the state actively did to stop the pollution, but it didn't cause it,” Johnson said. “You can't sue the state for the pollution to the lake. You have to sue the parties that were responsible for the pollution.”

When it became clear that Goldsboro could not afford to put in a sewage treatment plant, Johnson said, the state worked with the town, and it will have one.

The MDE has committed several million dollars to its construction and expects it to be operational by 2017.

Asked if he felt the state was responsible for allowing pollution to continue the last 20 years, Johnson said no; even if the state had enforced the order, all it could do was collect fines of \$100 a day, and that would have put Goldsboro in worse financial shape to solve the problem.

“One of the key elements in a taking case is that the alleged wrongful act by the state is the proximate cause (for the loss of the property), and (in this case) nothing the state did caused the damage,” Johnson said. “We enforce the environment laws and we do it through consent orders and we enforce them all the time. What we cannot be is financially responsible for environmental pollution caused by third parties.”

Johnson said he expects that when the case goes to trial, the nature of the pollution will also be examined. It has been stipulated that Lake Bonnie’s pollution came from septic systems in the town, but others in Caroline County have suggested agriculture may be part of the problem.

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