

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

Van's Camp, LLC,

Plaintiff,

v.

The State of South Carolina; and Upstream Property Owners: Naturaland Trust, South Carolina Department of Natural Resources, Lonnie E. Alverson, L. Denise Alverson, J. Gary Barbare, Sr., Mark E. Bunner, Brenda E. Bunner, Jennifer McGovern and Elizabeth Skahen, Trustees of the Springdale Trust, Brenda P. Brooks, Alma Jean Cisson, William B. Hardin, Jr., Mitchell Jones, Ray Jones, Daniel M. Phillips, Roseanne R. Phillips, Elizabeth Yokley Tickle; and John Doe and Richard Roe as Representatives of the General Public, American Whitewater and Foothills Paddling Club,

Defendants.

C.A. No. 2013-CP-23-06719

**ORDER GRANTING SUMMARY
JUDGMENT**

This matter is before the Court upon the motion for summary judgment or, in the alternative, to dismiss of the State of South Carolina (“the State”) and the South Carolina Department of Natural Resources (“SCDNR”) (collectively, the “Defendants”). The Court heard this matter on June 9, 2016 and has considered fully the motion and materials presented in support, the memoranda submitted by the parties, and the arguments presented by counsel at the hearing. For the reasons set forth in this Order, the Court grants the motion.

INTRODUCTION

S.C. Const. art. XIV, §1 directs that “[a]ll navigable waters shall forever remain public highways free to the citizens of the State. . . .” Similarly, S.C. Code Ann. §49-1-10 requires that “all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State” This case challenges these directives as to a short length of the South Saluda River (“River”).

The River flows from Table Rock past property owned by Van’s Camp, LLC (“Van’s Camp”), eventually joining other tributaries to form the Saluda River, which ultimately merges with the Broad River at Columbia to form the Congaree River. Through this action, Van’s Camp asks this Court to declare a section of the River a “non-navigable” stream. In particular, Van’s Camp notes two features of the River as it flows through the property, Blythe Shoals at the North end and a “boulder garden” to the South.

DISCUSSION

I. This case does not present a justiciable case or controversy.

“South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached.” *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417-18, 498 S.E.2d 906, 908 (Ct. App. 1998); *see also Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 373 (2013) (“[T]he parties cannot by consent or agreement confer jurisdiction on the court to render a declaratory judgment in the absence of an actual justiciable controversy.”). In this case, Van’s Camp lacks standing and has failed to articulate an active case or controversy.

It is not enough to ask a court for a declaration to state a claim for a declaratory judgment. Instead, a plaintiff must allege an active case or controversy. *S. Bank & Trust Co. v.*

Harrison Sales Co., 285 S.C. 50, 51, 328 S.E.2d 66, 67 (1985). “A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.” *People’s Fed. Sav. & Loan Ass’n of S.C. v. Res. Planning Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) (internal citations omitted); see *Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981) (holding the function of a court is “to decide actual controversies injuriously affecting the rights of some party to the litigation.”).

The most recent South Carolina appellate opinions addressing the navigability of bodies of water have been for a variety of reasons and justiciable controversies as follows:

- ***State ex rel Medlock v. S.C. Coastal Council***, 289 S.C. 445, 346 S.E.2d 716 (1986). The justiciable controversy was whether a body of water was navigable in connection with a permit which allowed a party to impound 660 acres which blocked the use of a marsh by the general public.
- ***State v. Head***, 330 S.C. 79, 498 S.E.2d 389 (Ct. App. 1997). The justiciable controversy was whether a river was navigable as a defense in a criminal charge against a fisherman for trespassing on a lake.
- ***Jones v. SCDHEC***, 384 S.C. 295, 682 S.E.2d 282 (Ct. App. 2009). The justiciable controversy was whether a river was navigable in connection with a claim of an adjoining landowner who brought an action against DHEC for the issuance of a permit granting the construction of a dock on adjoining land.
- ***Brownlee v. SCDHEC***, 382 S.C. 129, 676 S.E.2d 116 (2009). The justiciable controversy was whether a body of water was navigable in connection with an action against DHEC for the denial of a dock permit.

In this case, a determination of whether the River is navigable would not settle any legal rights between the parties and would only be an advisory opinion and “therefore beyond the intended purpose and scope of a declaratory judgment.” *Pee Dee Elec. Coop., Inc. v. Carolina Power and Light Co.*, 279 S.C. 64, 301 S.E.2d 761 (1983). Van’s Camp has neither applied for any permit nor been denied a permit in connection with the River. No party has been denied

access to the river, and Van's Camp had not sought an injunction against any specific party. Whether a ruling in favor of Van's Camp would be or could be binding against the general public or an individual who uses the river and was not a party to the action is questionable but need not be decided now. For the above reasons, the Court finds that Van's Camp has not presented the Court with an active case or controversy.

II. The River is navigable.

In the alternative, assuming this case presents a justiciable controversy, the Court finds the River is navigable as a matter of law for purposes of S.C. Const. art. XIV, §1 and S.C. Code Ann. §49-1-10. Van's Camp concedes that the public is using this segment of the River. In addition, the Defendants have presented videos and affidavits showing that the River is passable by canoes and kayaks.

A. Summary Judgment Standard.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). To determine whether any material fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001).

“Once the party moving for summary judgment meets the initial burden of showing the absence of a genuine issue as to any material fact, the nonmoving party may not simply rest on the mere allegations contained in the pleadings.” *Grant v. Mt. Vernon Mills, Inc.*, 370 S.C. 138, 142, 634 S.E.2d 15, 17 (Ct. App. 2006). “Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” *Id.* (quoting *Peterson v. W. Am. Ins.*

Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)). “A complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” *Gauld v. O’Shaughnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008). “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

B. There is no dispute that the River has long been open for recreational use.

The Supreme Court discussed navigability most recently and comprehensively in *Brownlee v. S.C. Dep’t of Health & Env’tl. Control*, 382 S.C. 129, 138-42, 676 S.E.2d 116, 121-23 (2009). Given the depth and breadth of the discussion there, the following lengthy quote is useful in the analysis here:

In determining navigability, “[t]he true test to be applied is whether a stream inherently and by its nature has the capacity for valuable floatage, irrespective of the fact of actual use or the extent of such use.” *State ex rel. Medlock v. South Carolina Coastal Council*, 289 S.C. 445, 449, 346 S.E.2d 716, 719 (1986). “Valuable floatage is not necessarily commercial floatage.” *Id.* Commercial use of the waterway is not required for it to be navigable; and pleasure traffic is entitled to protection in using the waterway. *Hughes v. Nelson*, 303 S.C. 102, 399 S.E.2d 24 (Ct.App.1990).

“Valuable floatage” is a term that has been used as the standard in this state for many years. *See Heyward v. Farmers’ Mining Co.*, 42 S.C. 138, 19 S.E. 963 (1894) (applying this term). “Valuable floatage” is not determined by what specific size or class of vessel or object can achieve buoyancy in the waterway; rather, the term is defined broadly to include any legitimate and beneficial use, whether commercial or recreational. *White’s Mill Colony, Inc. v. Williams*, 363 S.C. 117, 125, 609 S.E.2d 811, 815 (Ct.App.2005). . . .

As we have previously stated:

Section 49–1–10 of the South Carolina Code does not change the definition of navigable waters, but merely emphasizes the law already declared and set out in *Heyward v. Farmers’ Mining Company*, 42 S.C. 138, 19 S.E. 963 (1894). The Court in *Heyward* rendered a thorough pronouncement of the law of navigability. As

noted in *Heyward*, the common law doctrine that the navigability of a stream is to be determined by the ebb and flow of the tide was repudiated in South Carolina in the case of *State v. Pacific Guano Co.*, 22 S.C. 50 (1884).

The Court clarified in *Heyward v. Farmers' Mining Company*, 19 S.E. at 971, that *neither the character of the craft nor the relative ease or difficulty of navigation are tests of navigability*. The surroundings (e.g. marshland) need not be such that it may be useful for the purpose of commerce nor that the stream is actually being so used. The Court points out a distinction between navigable waters of the United States and navigable waters of the State. In order to be navigable under the United States, the water must connect with other water highways so as to subject them to the laws of interstate commerce. This is not a requirement for navigability of waters under the control of the State.

State ex rel. Medlock, 289 S.C. at 449, 346 S.E.2d at 719 (emphasis added). Nelson blocked the opening to the canal and argued it was not navigable because “the canal cannot sustain boat traffic or be fished for certain periods during the year because of insufficient depth.” *Id.* at 106, 399 S.E.2d at 26.

Access at all times is not required for the waters to be navigable. In *Hughes v. Nelson*, the Court of Appeals held a canal was navigable despite the fact that, “[a]t certain times of the year, the canal has very little water in it, making access difficult.” *Hughes*, 303 S.C. at 104, 399 S.E.2d at 25. The canal was approximately fifteen feet wide and twelve feet deep and had been used by the public for fishing and recreation, but not commercial traffic.

In rejecting the argument the canal was not navigable, the Court of Appeals stated: “The test of navigability is not whether a waterway is accessible at all times. Rather, the test is whether it is accessible ‘at the ordinary stage of the water.’” *Id.* (quoting *State v. Columbia Water Power Co.*, 82 S.C. 181, 186, 63 S.E. 884, 888 (1909)).

Moreover, “[i]n order that the stream or body of water be classed as navigable, it need not be navigable in its entirety.” 65 C.J.S. Navigable Waters § 7 (2000). “In other words, a stream or body of water which is susceptible of being used in its ordinary condition as a highway of commerce may be navigable regardless of whether it admits the passage of boats at all portions thereof, and the general character of a stream as being navigable is not changed by the fact that at a particular place it is not in fact navigable by boats.” *Id.* . . .

“The navigability of water does not depend on its actual use for navigation, but on its capacity for such use.... [T]he definition of navigable water embraces, not only that which is actually used, but that which is susceptible of use for navigation in

its ordinary state.” *State ex rel. Lyon*, 82 S.C. at 187, 63 S.E. at 888. In *State ex rel. Lyon*, we held that the fact that a waterway ceased to be passable because a lock at the Broad River terminus had been so neglected that it could not be used did not render the waterway nonnavigable as the waterway was capable of navigation up to the lock. *Id.*

As the dissent noted in the current appeal, the test for navigability does not hinge on the existence of man-made impediments or other obstructions, and these impediments do not cause the waterway to lose its characterization as navigable. [footnote omitted] See 65 C.J.S. *Navigable Waters* § 8 (2000) (“As a general rule a stream or other body of water is not rendered nonnavigable because of occasional difficulties attending navigation. The existence of occasional natural obstructions do not destroy the navigability of a river. So, a stream may be navigable despite the obstruction of falls, rapids, sand bars, carries, or shifting currents. Artificial obstructions which are capable of being abated by the due exercise of public authority do not prevent a stream from being regarded as navigable....” (footnotes omitted)); see also *State v. Head*, 330 S.C. 79, 89, 498 S.E.2d 389, 394 (Ct.App.1997) (“[T]he existence of occasional natural obstructions to navigation, such as rapids or falls, or the construction of authorized or unauthorized artificial obstructions to navigation, such as dams, generally does not change the character of an otherwise navigable stream.”). . . .

The ALJ essentially found the tributary was navigable but for the Atkinson dock; however, our precedent establishes that the entire tributary did not lose its navigability merely because there was an impediment that made access at the mouth of the tributary where it joined the Bohicket River more difficult. See *State v. Head*, 330 S.C. at 91, 498 S.E.2d at 395 (holding the judge applied an erroneous test of navigability by agreeing that the creek in question was navigable except for a “stopping point” such as a dam that prevented navigability); see also 78 Am.Jur.2d *Waters* § 125 (2002) (“Once a waterway has been deemed navigable, it remains so; it retains its navigable status, even though it is ... presently incapable of use because of changed conditions or the presence of obstructions.”).

(additional emphasis added).

Given *Brownlee*, navigability for purposes of South Carolina constitutional and statutory law does not require that the waterway be used for commercial purposes. Nor does it require that it be navigable by vessels of a certain size. Nor does it require that a waterway be navigable in both directions. Nor does it require that it be passable at all points or all water levels. Nor does it require actual use. Nor is ease or difficulty of navigation or safety for all users a factor. Nor

does it matter that the River may have “occasional natural obstructions to navigation, such as rapids or falls.”

Instead, *Brownlee* clearly establishes that the standard for navigability rests on the potential for any public use, be it commercial or recreational. Under *Brownlee*, an established pattern of usage by kayakers, anglers, floaters, and swimmers establishes the required “valuable floatage” for navigability. In this case, Defendants went beyond demonstrating potential recreational use and presented affidavit and video evidence that recreational canoes and kayaks can and do navigate the sections of the River at issue. Although Van’s Camp presented a conclusory affidavit of an expert stating his opinion that the River was not navigable, it presents no issue of material fact because the evidence shows that the river has been navigated, is being navigated, and supports “valuable floatage.” When the analysis from *Brownlee* is applied to the uncontested physical facts in this case, there is no question of material fact remaining as to whether the South Saluda River is navigable as it passes through the Van’s Camp property.

Even if Blythe Shoals and the boulder garden could not be travelled by boat, that would not destroy the navigability of the River. The South Saluda River is navigable both prior to and immediately after the Van’s Camp property. Therefore, the River is navigable as it flows through the Van’s Camp property regardless of whether the Shoals and boulder garden are passable by boat.

CONCLUSION

For all of these reasons, the Court grants the Defendants’ motion. Because these rulings apply equally to all of the Defendants in this matter, the Court further directs that this case be dismissed in its entirety.

IT IS SO ORDERED.

Perry H. Gravely
Judge

July ____, 2016



Greenville Common Pleas

Case Caption: Vans Camp LLC vs. Upstream Property Owners , defendant, et al

Case Number: 2013CP2306719

Type: Order/Summary Judgment

Motion/Order Granted

s/ Honorable Perry H. Gravely, #2755