



IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERICAN LITTORAL SOCIETY, INC.,
DELAWARE RIVERKEEPER NETWORK,
DELAWARE RIVERKEEPER,
DELAWARE AUDUBON SOCIETY, and
NEW JERSEY AUDUBON SOCIETY,

Applicant-Intervenors-
Appellants,

v.

BERNIE'S CONCHS, LLC, and
CHARLES AUMAN,

Plaintiffs-Appellees,

and

STATE OF DELAWARE, DEPARTMENT OF
NATURAL RESOURCES &
ENVIRONMENTAL CONTROL,
JOHN HUGHES, State of Delaware,
Secretary of Division of Natural Resources and
Environmental Control,

Defendants.

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§ No. 335, 2007
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§ Court Below:
§ Superior Court of the
§ State of Delaware in and
§ for Sussex County
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§ C.A. No. 06A-12-005
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Submitted: May 27, 2008
Decided: June 24, 2008

Before **HOLLAND, JACOBS,** and **RIDGELY,** Justices.

ORDER

This 24th day of June 2008, it appears to the Court that:

(1) American Littoral Society, Inc. (“ALS”), Delaware Audubon Society, the Delaware Riverkeeper, acting on behalf of the Delaware Riverkeeper Network, and New Jersey Audubon Society (the “Applicant-Intervenors” or “Appellants”) appeal from the Superior Court order denying a Motion to Intervene for Purpose of Appeal.¹ Applicant-Intervenors claim that the Superior Court improperly denied the motion. They further assert that, if permitted to intervene, the Superior Court’s decision invalidating a moratorium on horseshoe crab harvesting should be reversed. Plaintiffs-Appellees Bernie’s Conchs, LLC and Charles Auman (“Appellees”) argue first that the appeal is moot, and second, the Superior Court committed no error. We agree that the issue has become moot and dismiss the appeal.

(2) On its edges, this appeal involves the cause and effect of chinks in the coastal food chain. The populations of horseshoe crabs in Delaware and the red knot, a migratory shore bird, have both declined over the past several years, the latter being threatened with the increasing probability of extinction.² The Atlantic

¹ Applicant-Intervenors claim that they should have been permitted to intervene under Superior Court Civil Rule 24.

² For an overview of the red knot, see *Crash: A Tale of Two Species*, <http://www.pbs.org/wnet/nature/crash/conservation.html> (last visited June 17, 2008).

States Marine Fisheries Commission (“ASMFC”)³ and the Department of Natural Resources and Environmental Control (“DNREC”) have worked to “promote the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause”,⁴ which includes conservation of horseshoe crabs.

(3) In part because of the decreasing horseshoe crab population, and because horseshoe crab eggs provide a crucial food source for migratory birds (including the red knot), ASMFC adopted a series of management measures for the horseshoe crab, including harvest limits to prevent overfishing. In June 2006, ASMFC approved Addendum IV, which placed a harvest limit cap for New Jersey and Delaware of 100,000 male horseshoe crabs per state per year for two years. To comply with this requirement, DNREC proposed two alternative horseshoe crab regulations for Delaware. Proposed “Option 1” would prohibit the harvest of female horseshoe crabs and limit the number of male horseshoe crabs that could be harvested.⁵ “Option 2” would prohibit all harvest and landing of horseshoe crabs

³ The ASMFC is an interstate compact commission between fifteen Atlantic seaboard states (including Delaware) to conserve and manage shared state waters fisher resources. *See 7 Del. C. §§ 1501-1505.*

⁴ *7 Del. C. § 1501, Article I.*

⁵ This was the minimum measure called for in Addendum IV.

for a period of two years (a two-year moratorium). The Appellants, among others, submitted comments.

(4) On September 28, 2006, DNREC held a public hearing regarding the proposed regulations, overseen by Hearing Officer Roy W. Miller from the Delaware Division of Fish and Wildlife.⁶ Less than a month later, Miller issued a report to John A. Hughes, Secretary of DNREC, recommending that Option 1 be adopted.⁷ Despite this recommendation, Hughes adopted Option 2, creating a two-year moratorium on horseshoe crab harvesting (“Regulation 3215”).⁸

(5) Plaintiffs Bernie’s Conchs, LLC and Charles Auman, horseshoe crab harvesters, filed suit under the Delaware Administrative Procedures Act against DNREC to challenge the validity of Regulation 3215.⁹ The Superior Court issued an opinion and order vacating Regulation 3215, finding that the moratorium did not have a rational basis in the record and was not valid.¹⁰ DNREC did not choose to appeal, and the Applicant-Intervenors filed a Motion to Intervene for Purpose of

⁶ *Bernie’s Conchs, LLC v. State of Del., Div. of Natural Res. & Envtl. Control*, 2007 WL 1732833, at *1 (Del. Super.).

⁷ *Id.* at *3.

⁸ *Id.* at *4.

⁹ The ALS, Delaware Audubon Society, and New Jersey Audubon Society moved to intervene, which the Superior Court denied.

¹⁰ *Id.* at *1. The court held that the Secretary’s decision was not supported by substantial evidence, and that the Department’s rationale for its decision lacked a rational basis for this use of discretion. *Id.* at *7.

Appeal, which the Superior Court denied. Applicant-Intervenors appealed that decision to this Court.

(6) Subsequently, the Department issued emergency regulations consistent with the Superior Court's Opinion, which imposed a male-only horseshoe crab harvest ("Option 1").¹¹ On October 15, 2007, DNREC promulgated separate horseshoe crab regulations, which effectively adopted Option 1 through 2008, through a separate rulemaking process.

(7) Before addressing Appellant's arguments on appeal, we must first address Appellee's argument that the underlying appeal has become moot through the promulgation of these new regulations. This Court will ordinarily "decline to decide moot issues."¹² Under the mootness doctrine, "although there may have been a justiciable controversy at the time the litigation was commenced, the action will be dismissed if that controversy ceases to exist."¹³ A proceeding may become moot if the legal issue in dispute is no longer amenable to a judicial resolution.¹⁴

¹¹ The emergency regulations provide that "[t]he emergency regulations are consistent with recommendations of [ASMFC]. Without the emergency regulations, there is an actual and imminent threat that an excessive number of horseshoe crabs will be harvested, and that females will be harvested."

¹² *Radulski v. Del. State Hosp.*, 541 A.2d 562, 566 (Del. 1988); *McDermott Inc. v. Lewis*, 531 A.2d 206, 211 (Del. 1987).

¹³ *Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 823 (Del. 1997); *see also Glazer v. Pasternak*, 693 A.2d 319, 320 (Del. 1997) ("This Court generally does not provide advisory opinions. As a result, a controversy that has become moot normally will be dismissed.").

¹⁴ *Gen. Motors Corp.*, 701 A.2d at 823 ("A proceeding may become moot in one of two ways: if the legal issue in dispute is no longer amenable to a judicial resolution; or, if a party has been

“Two recognized exceptions to the mootness doctrine are situations that are capable of repetition but evade review or matters of public importance.”¹⁵

(8) Appellants have challenged the denial of their motion to intervene for purposes of appeal and the underlying decision of the Superior Court vacating DNREC’s adoption of Option 2. The subject matter of the Superior Court decision, Regulation 3215, has been superseded by a subsequent rulemaking process and no longer has any force. Any judicial pronouncement on the merits of that regulation would be purely advisory. Because the question decided by the Superior Court is moot, whether the Motion to Intervene for Purpose of Appeal was improperly denied is itself moot. Accordingly, the subject matter in dispute is no longer amenable to a judicial resolution.

(9) Further, none of the exceptions to the mootness doctrine apply. Appellants assert that this appeal raises matters of public importance due to the negative implications of the red knot’s extinction and the potential for DNREC to

divested of standing.”). *See also Ctr. for Sci. in the Pub. Interest v. Regan*, 727 F.2d 1161, 1163-64 (D.C. Cir. 1984) (noting that “it is not improper for an agency to engage in new rulemaking to supersede defective rulemaking” and that the controversy on appeal that surrounds an agency decision may become moot when the agency properly promulgates a superseding regulation).

¹⁵ *Gen. Motors Corp.*, 701 A.2d at 823 n.5. *See also Texaco Ref. & Mktg. Inc. v. Wilson*, 570 A.2d 1146, 1147 (Del. 1990) (“Although the underlying controversy was rendered moot, this Court agreed to decide the legal issue because of its importance to the functioning of the Board and the prospect of recurrence.”). The public-interest exception has been recognized by this Court “where the question is of public importance, and its impact on the law is real.” *McDermott*, 531 A.2d at 211. This exception is typically applicable to cases presenting issues that are “capable of repetition, yet evading review.” *Radulski*, 541 A.2d at 566.

lose its power to respond to “environmental crises” and only to be able “to fight future environmental battles with a paper sword.” They also contend that similar issues will arise once the current horseshoe crab regulations expire at the end of 2008, “[t]here is an inherent difficulty in obtaining full review of regulations that have a two-year lifespan,” and “it is unknown whether there remains sufficient time for DNREC to reinstate Regulation 3215 in time for a portion of the 2008 moratorium to be saved.” These circumstances do not demonstrate that the issue in this case is “capable of repetition, yet evading review.”

NOW, THEREFORE, IT IS ORDERED that the appeal is dismissed as MOOT.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice