

**IN THE
SUPREME COURT OF MISSOURI**

SC89752

**STATE EX REL. JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL, THE
MISSOURI DEPARTMENT OF NATURAL RESOURCES, AND THE MISSOURI
DAM AND RESERVOIR SAFETY COUNCIL,**

Appellant,

v.

PAUL AND MARILIL OLIVE,

Respondents.

**Appeal from the Greene County Circuit Court
The Honorable Miles Sweeney, Judge**

SUBSTITUTE REPLY BRIEF OF APPELLANT

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REPLY TO RESPONDENT’S ARGUMENT

I. The Olives Want No Oversight of Their Dam

The State of Missouri has an interest in ensuring that dams in the State of Missouri are operated in a safe manner that is protective of public health and safety. The Safety Law is the only mechanism to regulate the construction and operation of dams in the State of Missouri. In their brief, the Olives claim that “[t]here are other constitutional methods by which appellant could accomplish its purported goal....” (Resp. Brf. 12). The Olives fail to mention any such methods. The Olives have taken the position that their dam is exempt from regulation under the Safety Law. (LF. 32). Their arguments would apply to *any* statute passed after the dam was built. If, as the Olives apparently believe, they have a vested right in the unregulated nature of their dam, then their claim that there are “other constitutional methods” by which the State of Missouri can ensure the dam’s safety is a fiction.

II. Application for a Construction Permit

In their brief, the Olives make much of the fact that the State sued the Olives for failing to submit a construction permit. (Resp. Brf. 13). Despite the Olives' apparent belief to the contrary, the State did not allege and does not claim that the Olives violated any requirement to submit a construction permit application when the dam was built. Instead, the Safety Law violation alleged by the State occurred when the Olives failed to apply for a construction permit to fix the spillway when requested to do so in December 2000. (LF. 14).

One of the Chief Engineer's duties is to inspect dams and to recommend needed alterations or repairs. §236.420, RSMo. The Chief Engineer did so in this case and concluded that the dam's spillway was deficient. (LF. 14) Section 236.445.2, RSMo provides that an owner violates the Safety Law if that owner fails to alter or remove a dam as directed. Both the Chief Engineer and the Dam and Reservoir Safety Council directed the Olives to submit a construction permit application designed to address the problems identified by the Chief Engineer with the dam's spillway. (LF. 14, 16). In their failure to submit a construction permit application designed to correct the spillway when requested to do so, the Olives violated the Safety Law.

III. William White's Affidavit Does Not Include "Ancient Documents"

In their brief, the Olives argue that the documents attached to Mr. White's Affidavit that accompanied the Olives' summary judgment motion are "ancient documents" and are admissible even though they would otherwise be excluded as hearsay. Those documents do not qualify as ancient documents and were not admissible. A document may qualify as an "ancient document" if: a) it has been in existence for thirty years or more; (b) it was found in "proper custody;" and (c) it appears authentic. *Davis v. Wood*, 61 S.W. 695, 698 (Mo. 1901). A document is in "proper custody" if it is "in a place consistent with its genuineness." *Id.* Documents that are not originals do not qualify as "ancient documents." *Bell v. George*, 204 S.W. 516, 520 (Mo. 1918).

In this case, Mr. White's affidavit never identifies the custodian of Exhibits A through D. (LF. 44-45). Nor does Mr. White's affidavit identify how he came into contact with Exhibits A through D, where these documents are kept, or whether they are originals or copies. They do not meet the test to qualify as "ancient documents" and are inadmissible as unauthenticated, hearsay documents.

CONCLUSION

For the reasons state above and in Appellant's Substitute Brief, the grant of summary judgment should be reversed, and this matter should be remanded to the Circuit Court of Greene County, Missouri, to proceed to a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE WITH RULE 84.06(b)

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains 740 words, excluding the cover and this certification, as determined by Microsoft Word 2003 software; and

2. That the disk simultaneously filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a disk containing a copy of this brief, were mailed, postage prepaid on this 8th day of January, 2009, to:

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