
Case No. SC93511

IN THE SUPREME COURT OF MISSOURI

RONALD BREHM,

Plaintiff/Appellant,

vs.

BACON TOWNSHIP, CITY OF SCHELL CITY, VERNON COUNTY,
MISSOURI and MISSOURI DEPARTMENT OF CONSERVATION,

Defendants/Respondents.

APPEAL FROM THE 28TH CIRCUIT
VERNON COUNTY, MISSOURI CIRCUIT COURT

The Honorable JAMES R. BICKEL

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Jurisdiction in this court is proper under Article V, Section 3 of the Missouri Constitution of 1945, because this appeal involves the validity of a statute of the State of Missouri. Appellant claims the statute upon which the trial court relied in granting Summary Judgment to Defendants, 228.190.2 RSMo., is invalid as a violation of the United States Constitution, Article I, Section 9, and the Missouri Constitution of 1945, Article I, Section 13, which prohibit ex post facto laws, and the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Missouri Constitution of 1945, by purporting to authorize the taking of Plaintiff's private property without due process and without just compensation.

STATEMENT OF FACTS

Plaintiff/Appellant Ronald Brehm (“BREHM”) purchased property adjoining the road that is the subject of this dispute in 1977, at which time the disputed road was used as a private driveway by his predecessor in title. Aff. of Ronald Brehm, ¶1, LF 53. After BREHM purchased the property he continued to use the road as a private driveway. Aff. of Ronald Brehm, ¶2, LF 53.

In approximately 1990 a gate was erected at the intersection of the road with 5th Street, in the City of Schell City. Aff. of Ronald Brehm, ¶3, LF 53. The gate was locked and keys were kept by BREHM, Missouri Public Service and Union Pacific Railroad personnel. Aff. of Ronald Brehm, ¶4, LF 53. In 2008 the gate was removed by Defendant/Respondent the City of Schell City. Aff. of Ronald Brehm, ¶5, LF 53.

From 1990 until 2008, the road was used by persons other than BREHM only with BREHM’S permission. Aff. of Ronald Brehm, ¶6, LF 53. Prior to 2008, BREHM from time to time permitted employees of Defendant Missouri Department of Conservation (“MDC”) to access the road and provided a key to the lock for such permissive purposes. Aff. of Ronald Brehm, ¶7, LF 53.

From 1977 until 2008, the road was maintained exclusively by BREHM. Aff. of Ronald Brehm, ¶8, LF 54. No public funds were expended for the maintenance of the road until after the gate was removed in 2008. Aff. of Ronald Brehm, ¶9, LF 54.

Any use of the road by MDC, including use by its agent Mike Burton, was with the permission of BREHM. Aff. of Ronald Brehm, ¶10, LF 54. Any members of the public who traveled the road between 1990 and 2008 did so without permission, and were trespassers. Aff. of Ronald Brehm, ¶11, LF 54. Any employees or representatives of MDC who used the road between 1990 and 2008 did so either with permission, or were trespassers. Aff. of Ronald Brehm, ¶12, LF 54.

The road in dispute in this case is known as Vernon County Road 2710 and is identified in the records of the Missouri Department of Transportation (“MODOT”) as CRD 2825/726. Aff. of Pamela F. Richter, ¶7, LF 45.

Within the central office of MODOT, MODOT maintains maps, plats, inventories and surveys of county roads, commonly referred to as CART roads, for which counties in Missouri receive county aid road trust (“CART”) funds. Aff. of Pamela F. Richter, ¶2, LF 44. According to MODOT records, the road in dispute in this case, known as Vernon County

Road 2710 and as MODOT road CRD2825/726, has been on Vernon County's CART road inventory since at least 1992. Aff. of Pamela F. Richter, ¶6, LF 44. Vernon County has been receiving allocations of CART funds for the road since at least 1992. Aff. of Pamela F. Richter, ¶6, LF 44-45.

On a number of occasions since 1998 MDC agent Mike Burton traveled the disputed road. Aff. of Mike Burton, ¶9, LF 49. Other conservation agents and MDC employees have traveled on the road from time to time since 1978. Aff. of Mike Burton, ¶10, LF 49. Members of the public have traveled on the road from time to time since 1978. Aff. of Mike Burton, ¶11, LF 49.

Plaintiff/Appellant BREHM filed a PETITION FOR DECLARATORY JUDGMENT AND INJUNCTION, LF 10, seeking a declaration that the road is private, not public, and enjoining Defendants from removing any gate or access control device erected by BREHM. Defendants/Respondents Bacon Township, City of Schell City, Vernon County, Missouri, and Missouri Department of Conservation filed DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT. LF 26. After a hearing, the trial court granted the motion and entered judgment against BREHM. LF 75. BREHM appeals.

POINT RELIED ON

The trial court erred in granting summary judgment against Appellant BREHM because the statute upon which the court relied, Section 228.190.2, enacted in 2006, purports to establish a conclusive, retroactive presumption that a road shown on a Missouri Department of Transportation (“MODOT”) map as a County Aid Road Trust (“CART”) road for at least five years after January 1, 1990, is a public road, irrespective of whether the road was ever legally established and regardless of the use or nonuse of such road between 1990 and 2006, and thus violates:

- A. Article I, Section 9, of the U.S. Constitution and Article I, Section 13 of the Missouri Constitution, which prohibit ex post facto laws; and
- B. The Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Missouri Constitution, by purporting to allow the taking of BREHM’s property without due process; and
- C. The Fifth Amendment to the U.S. Constitution and Article I, Section 26 of the Missouri Constitution by authorizing the taking of BREHM’s property without just compensation.

Section 228.190.2 RSMo

U.S. Constitution, Article 1, Section IX

U.S. Constitution, Amendment V

U.S. Constitution, Amendment XIV

Missouri Constitution of 1945, Article I, Section 10

Missouri Constitution of 1945, Article I, Section 13

Missouri Constitution of 1945, Article I, Section 26

Mendelsohn v. State Board of Registration for the Healing Arts,

3 S.W. 3d 783, 785 (Mo. banc 1999)

O'Brien v. Ash, 69 S.W. 8, 12 (Mo. 1901)

Woodson v. Woodson, 92 S.W. 3d 780 (Mo. banc 2003)

State ex rel Wilhoit v. Seay, 248 S.W. 3d 135, 139 (Mo.App.S.D. 2008)

ARGUMENT

The trial court erred in granting summary judgment against Appellant BREHM because the statute upon which the court relied, Section 228.190.2, enacted in 2006, purports to establish a conclusive, retroactive presumption that a road shown on a Missouri Department of Transportation (“MODOT”) map as a County Aid Road Trust (“CART”) road for at least five years after January 1, 1990, is a public road, irrespective of whether the road was ever legally established and regardless of the use or nonuse of such road between 1990 and 2006, and thus violates:

- D. Article I, Section 9, of the U.S. Constitution and Article I, Section 13 of the Missouri Constitution, which prohibit ex post facto laws; and
- E. The Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Missouri Constitution, by purporting to allow the taking of BREHM’s property without due process; and
- F. The Fifth Amendment to the U.S. Constitution and Article I, Section 26 of the Missouri Constitution by authorizing the taking of BREHM’s property without just compensation.

STANDARD OF REVIEW

The standard of review of appeals from Summary Judgment is de novo. The record is reviewed in the light most favorable to the party against whom Summary Judgment was entered. Hargis v. JLB Corporation, 357 S.W. 3d 574, 577 (Mo. banc 2011). Because summary judgment is "an extreme and drastic remedy," an appellate court "exercise[s] great caution in affirming it because the procedure cuts off the opposing party's day in court." Conrad v. Waffle House, Inc., 351 S.W.3d 813, 820 (Mo. App. S.D. 2011).

DISCUSSION

The trial court's summary judgment is based entirely on the provisions of Section 228.190.2, enacted in 2006, which provides:

2. From and after January 1, 1990, any road in any county that has been identified as a county road for which the county receives allocations of county aid road trust funds from or through the department of transportation for a period of a least five years shall be conclusively deemed to be a public county road without further proof of the status of the road as a public road. No such public road shall be abandoned or vacated

except through the actions of the county commission declaring such road vacated after public hearing, or through the process set out in section 228.110.

From 1953 until 2006, Section 228.190 provided:

All roads in this state that have been established by any order of the county commission, and have been used as public highways for a period of ten years or more, shall be deemed legally established as public roads; and all roads that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads, and nonuse by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same.

The 2006 amendment purports to establish a conclusive, retroactive presumption that roads shown on a Missouri Department of Transportation map for at least five years after January 1, 1990, are public roads, irrespective of whether such roads were legally established, and regardless of the use or nonuse of such roads between 1990 and 2006.

The statute violates Article I, Section 9, of the U.S. Constitution, and Article I, Section 13 of the Missouri Constitution of 1945, which prohibit ex post facto laws. The statute also violates the 5th and 14th Amendments to the U.S. Constitution and Article I, Section 10 of the Missouri Constitution of 1945, by purporting to authorize the taking of BREHM's private property without due process, and the 5th Amendment to the U.S. Constitution, and Article I, Section 26 of the Missouri Constitution by purporting to authorize the taking of BREHM's private property without just compensation.

The U.S. Constitution provides:

Amendment V (1791)

No person...shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1

...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.

Article I, Section 9

...No bill of attainder or ex post facto law shall be passed.

The Missouri Constitution of 1945 provides:

Article I, Section 10:

No person shall be deprived of life, liberty, or property, without due process of law.

Article I, Section 13:

That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

Article I, Section 26:

That private property shall not be taken or damaged for public use without just compensation...

EX POST FACTO LAWS

The constitutional limitation on ex post facto laws prohibits any law that impairs vested rights. Mendelsohn v. State Board of Registration for Healing Arts, 3 S.W. 3d 783, 785 (Mo. banc 1999). “The right to own and hold property...is a natural right of the citizen, which, when acquired under existing laws, becomes a vested right, and not subject to be defeated by subsequent legislation.” O’Brien v. Ash, 69 S.W. 8, 12 (Mo. 1901).

It is undisputed the road was blocked from 1990 through 2008 by a locked gate. Aff. of Ronald Brehm, ¶2-5, LF 53. During the period the road was blocked by the locked gate, persons using the road other than BREHM did so only with permission from BREHM. Aff. of Ronald Brehm, ¶6-12, LF 53-54.

Section 228.190.1 provides (and provided in 1990, when the road was first blocked by a locked gate):

Nonuse by the public for five years continuously
of any public road shall be deemed an
abandonment and vacation of the same.

The 2006 enactment of Section 228.190.2 is a prohibited ex post facto law in that it purports to deprive BREHM of his property rights in the

disputed road, rights that vested as early as 1977, when he purchased his property, and not later than 1995, five years after he blocked the road with a locked gate, and eleven years prior to the enactment of 228.190.2.

DUE PROCESS

Due process protects fundamental rights and liberties that are “deeply rooted in this nation’s history and traditions,” and “implicit in the concept of ordered liberty.” Woodson v. Woodson, 92 S.W. 3d 780 (Mo. banc 2003). The right to own property is so fundamental in the United States that it is not even listed as an enumerated right in either the U.S. or Missouri Constitution, and is mentioned only in the context of limitations on the right of the U.S. and Missouri governments to take private property.

“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” State ex rel Wilhoit v. Seay, 248 S.W. 3d 135, 139 (Mo.App.S.D. 2008).

Section 228.190.2 unconstitutionally purports to deprive BREHM of rights in his property based on a map in the Jefferson City offices of MODOT, without any notice or opportunity to be heard.

“There is no constitutional way for divesting a man’s title except by his own act or default.” Masterson v. Roberts, 78 S.W. 2d 856, 861 (Mo.1934). BREHM cannot reasonably be accused of any action or default

sufficient to deprive him of his rights in the disputed road. Indeed, his action (blocking the road with a locked gate) was inconsistent with a public road, and he was not guilty of any default, because he never received any notice and had no opportunity to be heard regarding inclusion of the disputed road on a MODOT map.

BREHM had no notice that his property was shown on a MODOT map and no opportunity to be heard regarding the inclusion of a purported public road on his property. Respondents are now attempting to utilize the provisions of Section 228.190.2 to deprive BREHM of the opportunity to be heard at a meaningful time, in a meaningful manner, regarding the status of the disputed road, in violation of his due process rights under the U.S. and Missouri Constitutions.

JUST COMPENSATION

The Fifth Amendment to the U.S. Constitution and Article 1, Section 26 of the Missouri Constitution prohibit the taking of private property without just compensation.

Chapter 228 RSMo makes provision for the establishment of public roads and grants to counties the right of eminent domain for the purpose of acquiring the land necessary for public roads (Section 228.100). The Missouri Conservation Commission enjoys the right of eminent domain

under Article 4, Section 41, of the Missouri Constitution. Missouri law also provides for the establishment of private roads in favor of owners of real property for which there is no access, as a “way of strict necessity.” Section 228.342 RSMo.

Section 228.342 is the statutory framework for establishment of both public and private roads and requires that the owners of property taken for such roads be justly compensated. Thus, if Respondents desire to establish either a public or private road, they may avail themselves of eminent domain, but would be required to establish the necessity for such a public or private road, and would be required to pay just compensation to BREHM. Respondents in this case are attempting to establish a public road without establishing a need therefor and without just compensation to BREHM.

Counsel for BREHM has found no reported Missouri case on point. In the court below, Respondents cited several cases, all of which are inapposite.

This Court in McCullough v. Doss, 318 S.W. 3d 676 (Mo. banc 2010), (the only case found by BREHM dealing specifically with 228.190.2) affirmed a judgment finding a public road had been abandoned by nonuse by the public for five years, under Section 228.190.1, and found that Section 228.190.2 was inapplicable because the abandonment occurred prior to

1990, holding that “a prerequisite to the application of Section 228.090.2 is that the alleged abandonment must have occurred after 1990.” Id at 679. Appellants did not raise, and this Court did not address, the constitutionality of the statute.

Burris v. Mercer County, 252 S.W. 3d 199 (Mo.App.W.D.2008), was decided under Section 228.190 as it existed prior to the 2006 amendment, which added Section 228.190.2. See footnote 1, at 206: “All statutory references are to RSMo 2000 and Cumulative Supplement 2005,” and footnote 2, at 215: “All statutory citations are to RSMo 2000 unless otherwise noted.”

Przybylski v. Barbosa, 289 S.W. 3d 641 (Mo.App.W.D.2009), was decided under Section 228.190.1. There is no mention in the opinion of Section 228.190.2. The parties did not raise, and the court did discuss, the validity of Section 228.190.2.

In Boone County v. Redden, 262 S.W. 3d 291 (Mo.App.W.D.2008), Appellant permitted a default judgment against her in the trial court and first attempted to raise the constitutionality of Section 228.190 in the Court of Appeals. The Western District affirmed the trial court’s summary judgment because Appellant failed to file a motion to set aside the default judgment against her. The court never reached the constitutional issue.

CONCLUSION

There is no evidence the disputed road was ever established as a public road, but, even if it was a public road, it was abandoned by non-use under the provisions of Section 228.190, as in effect in 1995, five years after the road was blocked with a locked gate.

Section 228.190.2 unconstitutionally permits, indeed requires, a trial court to find and adjudge that a private road is a public road based solely on a MODOT map, without just compensation to the owner, and without due process, in violation of the constitutions of the United States and the State of Missouri, and the statute, enacted in 2006, purports to authorize a governmental body to impair vested rights acquired under existing law, and is thus an unconstitutional ex post facto law.

The trial court's entry of Summary Judgment against BREHM should be reversed. The case should be remanded to the trial court for a hearing to determine whether the road was ever legally established, and whether, if legally established, it was abandoned by non-use by the public. BREHM deserves his day in court.

NICHOLS & NICHOLS

BY: /s/ George D. Nichols
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CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(b) and (c)

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function of Microsoft Office Word, by which it was prepared, contains 3,533 words.

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CERTIFICATE OF SERVICE

Comes now, the undersigned, and hereby certifies that on September 13, 2013, an electronic version of the Appellant’s Brief and the accompanying Appendix were submitted to the Clerk of the Supreme court for filing by using the Court’s electronic filing system. The undersigned further understands that by so filing electronically, service is accomplished on all attorneys of record.

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