



Missouri Court of Appeals

Southern District

Division Two

STATE ex rel. JEREMIAH W. (JAY))
NIXON, Attorney General, the)
MISSOURI DEPARTMENT OF)
NATURAL RESOURCES, and the)
MISSOURI DAM AND RESERVOIR)
SAFETY COUNCIL,)

Plaintiff-Appellant,)

vs.)

PAUL and MARILIL OLIVE,)

Defendants-Respondents.)

No. SD28849

Filed: November 17, 2008

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable J. Miles Sweeney, Circuit Judge

Before Lynch, C.J., Burrell, P.J., and Rahmeyer, J.

REVERSED IN PART; TRANSFERRED TO THE SUPREME COURT IN PART

PER CURIAM. The Missouri Dam and Reservoir Safety Council (“the State”) filed a Petition for Injunctive Relief and Civil Penalties, alleging that Paul and Marilil Olive (collectively, “Respondents”) owned real property in Greene County, Missouri, on which a dam, referred to as Rainbow Lake Dam (“the dam”), was located. The petition

further alleged that the dam was subject to regulation by the State pursuant to the Dam and Reservoir Safety laws (“safety laws”), section 236.400 *et seq.*,¹ which were enacted in 1979, and that the dam did not comply with Chapter 236. The petition alleged that the dam’s emergency spillway was not sufficient either in capacity or design and requested an order compelling Respondents to comply with the safety laws, to complete the improvements required by the Department of Natural Resources, and to pay a civil penalty of \$1,000.00 per day per violation as authorized in section 236.495.2.

The dam was built in 1974; Respondents purchased the land on which the lake and dam sit in September of 1995. On August 4, 2000, and again on June 4, 2001, Respondents requested an agricultural exemption for the dam; however, the request for an exemption was never granted. After the State filed its petition, Respondents filed a motion for summary judgment, making two arguments: first, that retroactive and retrospective application of Chapter 236 was unconstitutional; and, second, that the dam was exempt from the construction and permitting requirements of the safety laws in that the dam was designed by an engineer and was intended for floodwater retardation purposes and, therefore, met the requirements of an exemption to the safety laws for “soil and water conservation” dams found in section 236.435.7. The court granted Respondents’ summary judgment motion but made no findings of fact or conclusions of law, stating that “[Respondents’] Motion for Summary Judgment is sustained.”

The State brings three points on appeal: (1) the grant of summary judgment was in error because the permitting requirements of the statute were not applied retroactively or retrospectively in that the State is only applying the law to acts that occurred after the

¹ All references to statutes are to RSMo 2000, and all rule references are to Missouri Court Rules (2008), unless otherwise specified.

enactment of the law; (2) the grant of summary judgment was error because the dam does not meet the exception as set forth in the statute; and (3) the trial court erred in overruling the State's objections to exhibits and the motion to strike both the affidavit and exhibits because they lacked foundation to support a summary judgment motion. Because we cannot discern on what basis the trial court entered summary judgment, we only address the State's second point which contends that the dam does not come within the exception of section 236.235.7.² An affirmance of summary judgment on the basis that the dam comes within an exception would have relieved us of our obligation to address the constitutional challenge; however, we find no basis in the exception under section 236.235.7 on which to affirm the summary judgment in favor of Respondents. Therefore, we do not address, nor can we, the State's contentions regarding the retroactive and retrospective application of Chapter 236 because it is within the exclusive jurisdiction of the Missouri Supreme Court. MO. CONST. art. V, Sec. 3.

Summary judgment is proper "where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *ITT Commercial Finance v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). When reviewing appeals from summary judgments, this Court will review the record in the light most favorable to the party against whom the judgment was entered. *Id.* Because the trial court's decision is founded on the record submitted and the law, this Court's review is *de novo*. *Id.* The standard used by this Court to test the propriety of summary judgment is the same standard as that which should have been used by the trial court to determine whether to sustain the motion. *Bridges v. White*, 223

² Although the State's third point has merit, our decision on the second point obviates the need to address the third point.

S.W.3d 195, 198 (Mo. App. S.D. 2007). Summary judgment “is the undisputed right to judgment as a matter of law; not simply the absence of a fact question.” *ITT Commercial*, 854 S.W.2d at 380.

The State argues in its second point that there is no factual scenario in this case to support a finding that Respondents are entitled to relief from the exception as set forth in section 236.435.7, “in that the requirements to register dams and to ensure their safe construction and operation are not found in the ‘provisions of this section.’” We agree.

To understand the State’s second point, we must begin with Respondents’ contention to the trial court when they were granted summary judgment. Respondents claimed that the dam was exempt from construction and permitting requirements pursuant to section 236.435.7 because the dam construction was monitored by a qualified engineer regularly engaged in dam construction for soil and water conservation irrigation, namely the USDA, Soil Conservation Service, and because the dam and water regulation specifically related to floodwater retardation and wildlife conservation. Respondents based this defense to the actions of the attorney general upon their alleged uncontroverted facts:

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3. The [USDA] designed [the dam].
 4. An engineer from the [USDA] approved the plans for [the dam].
 5. In conjunction with its design of [the dam], the [USDA] also prepared a Soil and Water Conservation Plan for [the dam].
 6. The USDA was particularly interested in the construction of [the dam] for floodwater retardation purposes.
 7. The [USDA] supervised every aspect of the construction of [the dam].
 8. The [USDA] prepared all the plans for [the dam] and performed various calculations regarding soil fill.
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10. [I]n 1974, there was no such requirement that “the plans for the dam shall be filed with the chief engineer prior to construction, or other listed action.”

Assuming all of these allegations to be true, Respondents rely upon section 236.435.7, which states:

7. Dams or their construction, alterations, enlargements, reductions or removals designed by, and their construction, alteration, enlargement, reduction or repair or removal monitored by, a qualified engineer regularly engaged in dam construction for soil and water conservation or irrigation or relating to wildlife conservation are for the purposes of such construction or other listed actions exempt from the provisions of this section except that the plans for the dam shall be filed with the chief engineer prior to construction, or other listed action. Amended plans shall be filed at the completion of construction or other listed action if there have been significant deviations from the previously filed plans.

Respondents contend that their dam was designed by a qualified engineer regularly engaged in dam construction for soil and water conservation or irrigation; they claim that the only prerequisite that was not complied with in section 236.435.7 was that the plans for the dam could not be filed with the chief engineer prior to construction because that requirement did not exist at the time the dam was built. Respondents further argued to the trial court that a holding that they were not entitled to an exemption based on their inability to file plans prior to construction would be an unconstitutional retrospective application of Chapter 236.

The State counters that Respondents have incorrectly interpreted section 236.435.7. The State admits that section 236.435.7 exempts certain dams from “the provisions of this section” but states that the registration and construction requirements which are the bases of the State’s Petition against the Respondents are not found in “this section,” but rather are found in sections other than section 236.435. In particular, section 236.440 requires Respondents to register the dam and to demonstrate that it has

been properly constructed. When sections 236.435 and 236.440 are reviewed side by side, section 236.435 focuses on construction permit requirements for new dams, while section 236.440 focuses on registration and safety permit requirements for not just new dams but also for existing dams.

Section 236.435.1 states the general requirement that before constructing a dam, the owner must apply for a construction permit. Subsection 2 lists some of the requirements that must be included in an application for a construction permit. It does not mention a registration permit. Subsection 3 lists a number of interested persons who may consult with the chief engineer about a dam. Subsection 4 discusses the procedure and timing for when the Missouri Dam and Reservoir Safety Council (“the Council”) may issue or deny a construction permit. Again, there is no mention of a registration permit. Likewise, subsection 5 provides grounds upon which a construction permit may be rejected – never mentioning a registration permit. Subsection 6 grants an exemption for agricultural purposes that is not relevant for the purposes of this appeal. Subsection 7, as previously discussed, limits the soil and water conservation dam exemption to “this section.”

Since section 236.435.7 exempts a soil and conservation dam only from permitting requirements in section 236.435, the requirements found in section 236.440 – focusing on registration and safety permit requirements for newly-built and existing dams – still apply to soil and conservation dams. Subsection 1 of section 236.440 provides that a dam owner must notify the Council upon completion of a dam project. Any such owner must apply for and obtain a safety permit. Subsection 2 describes some of the circumstances under which a newly completed dam will be issued a safety permit.

Subsection 3 directly addresses dams existing on September 28, 1979. Section 236.440.3 provides owners of such dams must obtain registration permits within four to six years, depending on height. Nothing in this subsection exempts soil and water conservation dams.

Subsection 4 provides that an application for a registration permit must include a certification that the dam has been inspected and that the owner of the dam has complied with the inspecting engineer's or agency's recommendation to correct defects. Rather than exempt soil and conservation dams, subsection 4 specifically mentions dams certified by an engineer "regularly engaged in dam construction for soil or water conservation . . ." in the class of dams that must be inspected for defects. Subsection 5 provides that dams built prior to current construction permitting requirements may be issued a registration permit that includes terms and conditions to bring the dam into compliance with the safety law's current requirements. Subsection 6 applies when a dam has been removed by the owner and is not relevant for the purposes of this appeal. Subsection 7 provides that safety permits shall be issued for a soil and water conservation dam if the state or federal agency overseeing the dam issues a statement that the dam conforms to the filed plans and is in a safe, properly maintained condition. No exemption for soil and water conservation dams may be found in subsections 3, 4, 5 or 7. Therefore, the legislature has determined that soil and water conservation dams must maintain registration and/or safety permits.

The State is correct that Respondents are not entitled to an exemption to the registration provisions of Chapter 236, on the basis set forth in their motion for summary judgment. The trial court erred in granting summary judgment if it did so on the basis

that an exception to the registration requirement was provided in section 236.435. Point II has merit to the extent that the trial court granted summary judgment based on such an exception; however, Respondents argued alternatively to the trial court and to this Court that holding Respondents ineligible for the exemption based on their inability to file plans prior to construction (because the statute did not exist at the time) would be an “unconstitutional retrospective application of section 236.” To the extent that the trial court may have granted summary judgment on that basis, we turn to our analysis of the State’s first point.

Respondents claimed that at the time the dam was built, there was no requirement that dams meet the standards of sections 236.400 to 236.500 and the applicable rules and regulations. Respondents claim that the State now demands that Respondents “go back and alter” the dam to comply with subsequently enacted standards. Respondents argue that on its face, then, section 236.440 is applied retrospectively. They note that a law is retrospective if it

“looks backward or contemplates the past; one which is made to effect acts or facts occurring or rights accruing, before it came into force. Every statute which creates a new obligation, imposes a new duty, or attaches a new disability in respect to past transactions or considerations already [in the] past.”

State v. Thomaston, 726 S.W. 2d 448, 459 (Mo. App. W.D. 1987) (quoting Black’s Law Dictionary 1884 (5th ed. 1979)).

The State counters in its first point that the permitting requirements in sections 236.435.1 and 236.440.3 were not applied retroactively or retrospectively in that the State is not pursuing claims of violations of the law occurring prior to their enactment but only as a basis for pursuing claims that occurred after enactment. As noted, it was

Respondents who claimed the statutes regarding registration of the dam constituted a constitutional violation in their summary judgment motion. Although the State claims that we need not address the constitutionality of the statute because it is not being applied retroactively or retrospectively, we find that there is a substantial constitutional challenge to Chapter 236.

From the record before us, it appears Respondents have properly raised and preserved the issue of the validity of section 236.440. Respondents raised the issue in their Amended Answer to Appellant's petition and in their motion for summary judgment. They alleged that section 236.440 violates their due process rights because of its retrospective application. We do not know the basis of the court's decision to grant summary judgment. The court could have found a constitutional violation in ruling for Respondents and we have found there is not merit to a claim that the dam comes within any exception to section 236.440 *et seq.* Finally, the issue regarding the constitutionality of section 236.440 was addressed in both Appellant's and Respondents' appellate briefs, so it has been properly preserved on appeal.

Next, we address whether Respondents have made a real and substantial claim such that jurisdiction in the Supreme Court is proper. One clear indicator that a constitutional challenge is real and substantial and not merely colorable is that the challenge is one of first impression. *Sharp v. Curators of University of Missouri*, 138 S.W.3d 735, 738 (Mo. App. E.D. 2003). On its face, section 236.440 imposes new safety and permitting requirements on dams that were built prior to 1979, the year section 236.400 *et seq.* was enacted. Article I, section 13 of the Missouri Constitution specifically prohibits the passage of a law that is retrospective in its operation.

Respondents' contention that section 236.440 operates retrospectively and is therefore unconstitutional has never been decided by our Supreme Court.

We transfer this case to the Supreme Court in conformance with article V, section 3 of the Missouri Constitution.

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