

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 BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This appeal relates to the validity of provisions of the Missouri Dam and Reservoir Safety Law, §236.400 - §236.500, RSMo, particularly the validity of §236.440.3, RSMo 2000. This appeal has been transferred to the Supreme Court of Missouri by the Court of Appeals, Southern District, on the authority of the Missouri Constitution which, in relevant part, provides that this Court shall have exclusive appellate jurisdiction in all cases involving the validity of a statute of the State of Missouri. Mo. Const. art. V, § 3.

STATEMENT OF FACTS

The State of Missouri, with the Missouri Department of Natural Resources and the Missouri Dam and Reservoir Safety Council (collectively “the State”), filed its Petition for Injunctive Relief and Civil Penalties on November 19, 2001 in the Circuit Court of Greene County, Missouri. (LF. 6). This petition alleged that the Respondents/Defendants Paul and Marilil Olive owned real property in Greene County, Missouri on which a dam was located. (LF. 7). The petition further alleged that this dam was subject to regulation by the Missouri Dam and Reservoir Safety Council pursuant to §236.400, RSMo 2000, and that dam did not comply with the Missouri Dam and Reservoir Safety Law, §236.400 - §236.500, RSMo, (“Safety Law”), in that the dam was not “registered” under §236.440.3, RSMo. (LF. 7-8). Finally, the petition alleged that the dam’s emergency spillway was not sufficient either in capacity or design. (LF. 8). The petition requested that the Court order the Olives to comply with the Safety Law, to make necessary and authorized improvements to the dam, and to pay a civil penalty of up to \$1,000.00 per day per violation, as authorized in §236.495, RSMo 2000. (LF. 12-13). The Olives filed responsive pleadings and affirmative defenses. (LF. 17-26).

The Olives subsequently filed a motion for summary judgment. (LF. 32-54). The Olives argued that “section 236” was being applied retroactively and retrospectively. (LF. 32). They also argued that the dam was exempt from the construction and permitting requirements of the Safety Law, 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 Law for “soil and water conservation” dams found in §236.435.7,

RSMo 2000. (LF. 32, 39). The Olives' statement of uncontroverted material facts included several attachments. The first was an affidavit signed by William White, in which Mr. White claimed that the United States Department of Agriculture ("USDA") designed the dam and was "particularly interested" in its construction for flood retardation purposes. (LF. 44). Several drawings, apparently technical in nature, were attached to Mr. White's affidavit. (LF 46-49). Mr. White's affidavit also included a document titled "Soil and Water Conservation Plan," a document titled "Geological Investigation of the White Lake Site," and an "Earthwork Computation Sheet." (LF. 50-54).

In its response, the State disagreed with the Olives' legal arguments (LF. 55), denied or objected to many of the facts proposed by the Olives (LF 62-64), and objected to and moved to strike the Olives' exhibits for lack of foundation (LF. 84).

Facts Not in Dispute

The parties' initial pleadings and their summary judgment statements of fact make certain facts clear. Both parties agree that Rainbow Lake Dam was built in 1974. (LF. 41, 62). In conjunction with the design of Rainbow Lake Dam, the USDA prepared a document titled "Soil and Water Conservation Plan" for Rainbow Lake Dam. (LF. 42, 63). The Safety Law, §236.400 - §236.500, RSMo, did not become law until 1979. (LF. 39, 58). On or about September 1, 1995, the Olives purchased the land on which the lake and dam sit, and continue to own the property. (LF. 8, 18). The dam is still there. (LF. 7, 17).

On August 4, 2000, and again on June 4, 2001, the Olives requested an exemption for the dam under §236.435.7, RSMo. (LF. 42, 64). Nothing in the record indicates that the request for this exemption was ever granted.

On November 1, 2007, the Court overruled the State's objections and motion to strike exhibits, sustained the Olives' motion for summary judgment, and overruled or dismissed both parties' remaining claims as moot. (LF. 96). The State filed its notice of appeal on December 3, 2007.

POINTS RELIED ON

I. The trial court erred in granting the Olives' motion for summary judgment, because the permitting requirements in §236.435.1, RSMo and §236.440.3, RSMo, of the Safety Law were not applied retroactively or retrospectively, in that the State of Missouri does not purport to apply either section as a basis for pursuing claims of violations of the Missouri Dam and Reservoir Safety Law occurring prior to their enactment, but only as a basis for pursuing claims of violations that occurred after enactment.

Mo. Const. art. I, § 13

Beatty v. State Tax Commission, 912 S.W.2d 492 (Mo. banc 1995)

Fisher v. Reorganized School District No. R-V of Grundy County, 567 S.W.2d 647 (Mo. banc 1978)

II. The trial court erred in granting the Olives' motion for summary judgment, because §236.435.7, RSMo, does not exempt soil and water conservation dams from all statutory requirements to register dams and to ensure their safe construction and operation, in that the requirements to register dams and to ensure their safe construction and operation are not found in the "provisions of this section."

Section 236.435.7, RSMo 2000

Holtcamp v. State, 259 S.W.3d 537 (Mo. banc 2008)

Concord Publishing House, Inc. v. Director of Revenue, 916 S.W.2d 186 (Mo. banc 1996).

Section 236.435, RSMo 2000

Section 236.440, RSMo 2000

III. The trial court erred in overruling the State of Missouri’s objections to exhibits and motion to strike, because the exhibits could not be the basis for granting a motion for summary judgment, which can be granted based only on admissible evidentiary materials, in that the evidentiary materials supporting the Olives’ motion lacked foundation and would not have been admitted at trial.

L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P., 75 S.W.3d 247 (Mo. banc 2002)

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ARGUMENT

I. The trial court erred in granting the Olives' motion for summary judgment, because the permitting requirements in §236.435.1, RSMo and §236.440.3, RSMo, of the Safety Law were not applied retroactively or retrospectively, in that the State of Missouri does not purport to apply either section as a basis for pursuing claims of violations of the Missouri Dam and Reservoir Safety Law occurring prior to their enactment, but only as a basis for pursuing claims of violations that occurred after enactment.

STANDARD OF REVIEW

The standard of review on appeal from summary judgment is *de novo*. As summary judgment is decided on the record submitted and the applicable law, there is no need to defer to the trial court's order. *ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The record is reviewed in the light most favorable to the party against whom judgment was entered. Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. The non-moving party receives the benefit of all reasonable inferences from the record. *Id.*

THE SAFETY LAW IS NOT UNCONSTITUTIONAL

The Safety Law requires that dams be constructed, operated and maintained according to permitting standards established by the Missouri Dam and Reservoir Safety Council. Section 236.435, RSMo; Section 236.440, RSMo. The Olives call this an unconstitutional

retroactive application of law, in the apparent belief that no dam built prior to 1979 can be subject to stricter regulation. The Olives' interpretation of what constitutes an unconstitutional retrospective application of law is incorrect, as the Missouri Constitution does not prohibit the passage of new laws to protect public safety, such as laws designed to improve dams. The State does not claim that Rainbow Lake Dam was unlawfully built in 1974, or that the Olives should pay civil penalties for an unpermitted or unsafe dam prior to 1979, only that the dam must now be upgraded to comply with current safety requirements.

Article I, section 13 of the Missouri Constitution prohibits the passage of a law “retrospective in its operation....” Mo. Const. art. I, § 13. The constitution does not prohibit a law that is itself retrospective, only its application. *Beatty v. State Tax Commission*, 912 S.W.2d 492, 496 (Mo. banc 1995), citing *Dial v. Lathrop R-II School District*, 871 S.W.2d 444, 447 (Mo. banc 1994). A statute runs afoul of the constitution if it impairs a vested or substantial right or imposes a new duty in respect to a past transaction. *Beatty v. State Tax Commission*, 912 S.W.2d 492, 496 (Mo. banc 1995), citing *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 340 (Mo. banc 1993). A mere expectation based upon an anticipated continuance of existing law is not a vested right. *Beatty v. State Tax Commission*, 912 S.W.2d at 496. No vested right in a general rule of law or legislative policy exists that would entitle one to insist that a law remain unchanged. *Id.* The lack of any substantial prejudice is an indication that no vested right has been implicated. *Fisher v. Reorganized School District No. R-V of Grundy County*, 567 S.W.2d 647, 650 (Mo. banc 1978).

Consistent with those holdings, this Court has repeatedly upheld use of the police power to require changes in conditions or practices, despite the retrospective application ban.

This Court has held that where the State of Missouri applied an asbestos regulation only to acts that occurred after the rule's enactment, the rule was not retrospective. *Corvera Abatement Technologies, Inc. v. Air Conservation Commission*, 973 S.W. 2d 851, 856 (Mo. banc 1998). It has also been held that where the State only pursued the substantive relief it was entitled to at the time of the occurrence of the prohibited act, §407.100, RSMo, (merchandising practices) was not applied retrospectively and did not, therefore, offend the Missouri Constitution. *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 289 (Mo. App. WD. 1989). This is the case here – the State of Missouri does not propose to hold the Olives liable for the construction of a dam built prior to the Safety Law's enactment. The State of Missouri does, however, seek injunctive relief compelling the Olives to upgrade their dam to make it safe.

The State of Missouri has an interest in ensuring that dams constructed in the State of Missouri continue to operate in a safe manner that is protective of public health and safety. Public health is a “paramount end” of the State's police power. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 507 (Mo. banc 1991). The Missouri legislature has demonstrated its interest in the safe operation of dams since the early 20th century, imposing additional requirements in response to a growing understanding what is required for a dam to be safe. In 1909, Missouri first enacted a law regulating the construction of dams and mills. Section 236.010, RSMo. Shortly thereafter, in 1919, Missouri first enacted legislation regulating drainage and levee districts. Sections 246.010 to 246.060, RSMo. The Safety Law builds on that foundation, imposing additional safeguards on dams based on modern advances in dam engineering.

The State’s police power may extend to “all kinds of restraints and burdens, in order to secure the general comfort health, and prosperity of the state, and this includes the right to enact suitable regulations looking to the accomplishment of a public purpose, and designed for the promotion of public interests.” *Morrison v. Morey*, 48 S.W. 629, 633 (Mo. banc 1898). In holding that a property owner’s rights of ingress and egress are not absolute, this Court has held that a property owner’s interest in his property is subject to the valid exercise of police power. *State ex rel. State Highway Commission v. Meier*, 388 S.W.2d 855, 859 (Mo. banc 1965). Such an exercise of police power must be reasonable. *State v. Missouri Pac. R. Co.*, 147 S.W. 118, 121 (Mo. banc 1912). But the Olives never complain that the new standards are unreasonable, just that they are new.

In their memorandum of law offered in support of their motion for summary judgment, the Olives complained that when Rainbow Lake Dam was built, there was no requirement that dams “meet the standards of Sections 236.400 – 236.500 and rules and regulations thereunder.” (LF. 38). The Olives apparently expected the law to never change to require their pre-1979 dam to be brought up to current safety requirements. This is a claim to a vested right that the law affecting their dam would remain unchanged. The Olives’ expectation that no law would ever affect their dam is not reasonable, particularly since they did not even purchase the property until sixteen years after the Safety Law was enacted.

In their brief to the Court of Appeals, Southern District, the Olives incorrectly compare the Safety Law’s requirement in §236.440.3, RSMo, to register a dam to the “Megan’s Law” requirement in §589.400.2, RSMo, to register as a sex offender. This Court analyzed the Megan’s Law registration requirement and concluded that the registration

requirement did not apply to persons convicted of a specific category of criminal offenses prior to the enactment of Megan’s Law. *Doe v. Phillips*, 194 S.W.3d 833, 852 (Mo. banc 2006). In contrast, §236.440.3, RSMo, of the Safety Law requires current owners of *existing* dams to apply for a registration permit for those dams within four to six years. Registration permits are permits for dams which “are in a properly maintained condition” or which have been altered to correct observable defects. §236.400(17), RSMo. Registration permits are required for the “continued operation of a dam....” 10 CSR 22-2.020(2). The obligation to apply for a registration permit is not tied to “offenses” that may have occurred prior to the Safety Law’s enactment. This is very different from the Megan’s Law registration requirement that is triggered by a past criminal conviction. The Safety Law’s requirement to apply for a registration permit is prospective in nature, in that it seeks to ensure the ongoing safe maintenance and operation of a dam. There is no constitutionally prohibited retrospective application of law in this case.

If this Court were to agree with the Olives that the Safety Law can only regulate dams built after the Safety Law became law, the result could be catastrophic. Aging dams would continue to deteriorate and ultimately fail, with the State of Missouri powerless to compel improvements. This is not the result intended by the Missouri Constitution's ban on the retrospective application of laws.

II. The trial court erred in granting the Olives’ motion for summary judgment, because §236.435.7, RSMo, does not exempt soil and water conservation dams from all statutory requirements to register dams and to ensure their safe construction and operation, in that the requirements to register dams and to ensure their safe construction and operation are not found in the “provisions of this section.”

As an alternative to arguing that the State cannot require them to bring their dam up to current standards, the Olives argued that the statute on which the State relies does not apply to their dam. The Olives claim that Rainbow Lake Dam is a soil and water conservation dam and is therefore exempt, under §236.435.7, RSMo, from any requirement to register the dam or to demonstrate that it was properly constructed. The Olives have incorrectly interpreted §236.435.7, RSMo.

Courts are to give effect to a statute as written, and are to consider the words of a statute in their plain and ordinary meaning. *Holtcamp v. State*, 259 S.W.3d 537, 539 (Mo. banc 2008). Statutes are to be given a common-sense and practical interpretation. *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186, 194 (Mo. banc 1996). Section 236.435.7, RSMo, exempts certain dams from “the provisions of this section...,” but the majority of the Safety Law’s registration and construction requirements are not found in “this section”, i.e., they are found in sections other than §236.435, RSMo. If the General Assembly had intended to exempt soil and water conservation dams from all permitting requirements, then the General Assembly would not have limited the exemption to “this section”; it would have exempted such dams from all permitting requirements, not just those

found in §236.435, RSMo. And the Olives are required by other sections – particularly §236.440, RSMo - to register Rainbow Lake Dam and to demonstrate it meets current safety standards.

This interpretation makes even more sense when §236.435, RSMo and §236.440, RSMo, are reviewed side by side to compare what each section is designed to accomplish. The difference, generally stated, between the two sections is that §236.435, RSMo, focuses on construction permit requirements for new dams, while §236.440, RSMo, focuses on registration and safety permit requirements for not just new dams but also for existing dams. A subsection by subsection review of the two sections is helpful in understanding this difference. Section 236.435.1, RSMo, 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.”

Section 236.435.7, RSMo, exempts a soil and conservation dam only from permitting requirements in §236.435, RSMo; the requirements found in §236.440, RSMo, that focus on

registration and safety permit requirements for newly-built and existing dams still apply to soil and conservation dams. Subsection 1 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. After dealing with new dams, the section goes on to address existing dams, like the Olives' dam.

Subsection 3 provides that dams existing on September 28, 1979, 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 engineers 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 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.

III. The trial court erred in overruling the State of Missouri’s objections to exhibits and motion to strike, because the exhibits could not be the basis for granting a motion for summary judgment, which can be granted based only on admissible evidentiary materials, in that the evidentiary materials supporting the Olives’ motion lacked foundation and would not have been admitted at trial.

Only evidentiary materials that are admissible at trial can sustain summary judgment. *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P.*, 75 S.W.3d 247, 253 (Mo. banc 2002). Before a document may be received in evidence, it must meet a number of foundational requirements including: relevancy, authentication, the best evidence rule, and hearsay. *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993). Evidence is logically relevant if it tends to prove or disprove a fact in issue or corroborate other evidence. *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). Unsworn, ex parte, written reports introduced to prove the matter asserted are hearsay and are inadmissible. *McKenna v. McKenna*, 928 S.W.2d 910, 912 (Mo. App. E.D. 1996).

The trial court erred in overruling the State’s objections to and motion to strike the exhibits the Olives filed in support of their statement of uncontroverted material facts. The exhibits were attached as part of William White’s affidavit. Mr. White was the previous owner of the property on which Rainbow Lake Dam now sits. (LF. 44). In his affidavit he stated that the dam’s construction was planned and supervised by the USDA, and that the USDA was “particularly interested” in the dam for a certain purpose (LF. 44-45). Nothing in Mr. White’s affidavit indicates that he is a USDA employee or custodian of records regarding

any of these exhibits. None of the documents were prepared by him. In fact, Mr. White makes the bare assertion that these documents were prepared by others, but there is no indication as to how Mr. White makes this conclusion. (LF. 44-45). Nothing in the record indicates that Rainbow Lake Dam was constructed in accord with these “plans,” assuming that these documents even are “plans.” All of the documents are unsworn, are ex parte, and were offered to prove the truth of the matter asserted. Mr. White’s affidavit incorporates a number of irrelevant, unauthenticated and hearsay documents. The trial court erred in sustaining the Olives’ motion for summary judgment on the basis of these exhibits because they are not admissible evidence.

EXHIBITS A THROUGH D

Mr. White claims, in his affidavit, that Exhibits A and D are true and correct copies of “sketches” of a proposed dam, a soil and conservation plan, and “an Earthwork Computation Sheet” prepared by the USDA Soil and Conservation Service. (LF. 44-45). In addition, Mr. White claims that he knows that the USDA was “particularly interested” in constructing Rainbow Lake Dam for floodwater retardation purposes. (LF. 44). Finally, Mr. White claims that Exhibit C is a geologist’s report of aspects of the site for Rainbow Lake Dam. (LF. 45). The Olives offered all four documents to prove that the USDA designed and constructed the dam as a soil and water conservation dam. (LF. 41-42). The Olives also claimed that a USDA engineer “approved the plans for Rainbow Lake Dam.” (LF. 41). Yet none of the documents were verified by the person who allegedly prepared them. None of the documents were included as a part of a business records affidavit. None of the documents were accompanied by affidavits from the alleged preparers describing their

involvement in the project. None of the documents support the Olives' claim that the dam was built by a "qualified engineer regularly engaged in dam construction," as required in §236.435.7, RSMo. All of the documents are unsworn, are ex parte, and were offered to prove the truth of the matter asserted. All four documents are irrelevant, hearsay documents and are inadmissible. They should have been stricken.

CONCLUSION

For the reasons stated above, 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 4,615 words, excluding the cover, this certification and the appendix, 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, this 8th of December, 2008, to:

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Don Willoh, Assistant Attorney General

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APPENDIX

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APPENDIX**

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