

Summary of SC93816, *Linda LaBrayere as Trustee of the Don E. LaBrayere Trust, et al. v. Bohr Farms LLC, et al.*

Appeal from the Boone County circuit court, Judge Jodie Asel

Argued and submitted September 2, 2014; opinion issued April 14, 2015

Attorneys: The property owners were represented by Anthony L. DeWitt, Edward D. Robertson Jr. and Mary Doerhoff Winter of Bartimus Frickleton Robertson & Goza PC in Jefferson City, (573) 659-4454; and Charles F. Speer, Peter B. Bieri and Charles D. Miller Jr. of the Speer Law Firm PA in Kansas City, (816) 472-3560. Bohr Farms was represented by D. Keith Hanson of Paule, Camazine & Blumenthal PC in St. Louis, (314) 244-3628. Cargill Pork was represented by Jacob D. Bylund of Faegre Baker Daniels LLP in Des Moines, (512) 248-9000.

The state attorney general, who filed a brief as a friend of the Court, was represented by Solicitor General James R. Layton and Thomas M. Phillips of the attorney general's office in Jefferson City, (573) 751-3321. The National Pork Producers Council and Missouri Farmers Care, which filed a brief as friends of the Court, were represented by Jean Paul Bradshaw II, Kurt U. Schaefer and Chad E. Blomberg of Lathrop & Gage LLP in Kansas City, (816) 292-2000; and Eugene E. Matthews III and Tennille J. Checkovich of McGuire Woods LLP in Richmond, Virginia, (804) 775-1000.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Certain property owners appeal the circuit court's judgment in favor of large-scale hog operations nearby, challenging the constitutional validity of a statute governing private nuisance actions. In a decision written by Judge Richard B. Teitelman and joined by three judges, the Supreme Court of Missouri affirms the circuit court's judgment. The statute does not authorize an unconstitutional private taking because it advances a legitimate public purpose of promoting the agricultural economy to create a public advantage or benefit. The statute also recognizes the constitutionally required just compensation of a diminution of rental value for a temporary taking for a public use. The statute does not deny equal protection or due process and is not an unconstitutional special law, and the property owners lack the legal ability to challenge whether a portion of the statute violates separation of powers. Further, the property owners' additional claims are barred by the statute because they are based on the same facts as their nuisance claims.

Judge Zel M. Fischer concurs in an opinion joined by two other judges. Although he agrees with the principal opinion's analyses of private/public use and just compensation, he would hold there has been no taking and, therefore, no need to reach those issues.

Judge James K. Journey, presiding judge of the 27th Judicial Circuit (Bates, Henry and St. Clair counties), sat in this case by special designation in place of Judge Patricia Breckenridge.

Facts: Section 537.296, RSMo, which took effect in August 2011, supplants common-law private nuisance actions and precludes recovery of non-economic damages caused by the

nuisance, authorizing the recovery only of economic damages for the diminution in the market value of affected property and for documented medical costs caused by the nuisance. Days after the law became effective, Bohr Farms LLC began operating a concentrated animal feeding operation (CAFO) capable of raising more than 4,000 hogs owned by Cargill Pork LLC. Those owning or possessing property in Callaway and Montgomery counties that is near the CAFO sued Bohr and Cargill, alleging the CAFO causes certain emissions that constitute a temporary nuisance that substantially impairs the neighbors' use and quiet enjoyment of their property. The property owners did not claim damages for diminution in rental value or documented medical costs as authorized by section 537.296. The circuit court entered summary judgment (judgment on the court filings, without a trial) in favor of the hog operations. The property owners appeal.

AFFIRMED.

Court en banc holds: (1) Section 537.296 advances a legitimate public purpose and does not authorize an unconstitutional private taking under article I, section 28 of the state constitution. Even assuming, for the sake of argument, that the statutory limitations on nuisance damages constitute a taking of private property, the property owners cannot overcome the presumption of constitutional validity by clearly establishing that the alleged taking is for private use. That private parties benefit from a taking does not eliminate the public character of the taking so long as there is some benefit to any considerable number of the public. Not only does section 537.296 not delegate any authority to private parties or authorize any landowner to create a nuisance, it provides that a nuisance is unlawful and authorizes the party suffering a nuisance to recover damages. Further, section 537.296 plainly is aimed at promoting the agricultural economy to create a public advantage or benefit, which is sufficient to satisfy the public use requirement.

(2) The property owners have not met their burden of demonstrating that section 537.296 authorizes a taking for public use without just compensation under article I, section 26 of the state constitution. Because the property owners allege a temporary nuisance claim based on non-permanent interference with their use and enjoyment of property, they allege a temporary taking. Just compensation for a temporary taking requires payment of the diminution in value of the use of occupancy of the property – usually measured as the property's rental value – while the property was taken or damaged. By authorizing a plaintiff to recover the diminution in rental value in a temporary nuisance, section 537.296.2(2) provides for the constitutionally required just compensation in the event the alleged temporary nuisance amounts to a temporary taking of private property. To the extent the property owners claim subsection 2(2) of the statute effectuates a regulatory taking, the challenge fails because diminution of rental value is the benchmark for awarding just compensation for a temporary taking. To the extent the property owners claim subsection 3 of the statute effectively creates an easement allowing the hog operations to interfere permanently with the property owners' full use and enjoyment of their properties, their claim is not ripe (ready) for consideration. Because the subsection applies only to subsequent claim, and the property owners now are seeking damages only for a temporary nuisance, there is no immediate, concrete dispute between the parties regarding the permanent nuisance provision of section 537.296.3.

(3) Section 537.296 does not deny equal protection or due process. There is no basis for concluding the statute creates a suspect classification requiring strict scrutiny. Even assuming

that section 537.296 creates a classification based on residency, the property owners cite no case that even hints that rural landowners and residents are a suspect class – a historically marginalized class in need of extraordinary protection from the majoritarian political process – and the statute provides obvious benefits to the large number of rural landowners who devote their property primarily to agriculture. Further, land use regulations do not impinge on a fundamental right subjecting them to heightened judicial scrutiny. As such, section 537.296 is subject to rational-basis review, not strict scrutiny. The property owners have not overcome the presumption of constitutional validity by showing it clearly is arbitrary and irrational. Irrespective of the perceived desirability of section 537.296, the statute rationally advances the legitimate state interest in promoting the agricultural economy by reducing the litigation risk faced by Missouri farmers while permitting nearby landowners to recover the diminution in property value caused by agricultural operations. The same reasons foreclosing the property owners’ equal protection arguments also foreclose their arguments that the statute denies substantive due process and violates the constitutional right to the gain of one’s own industry.

(4) The property owners do not have standing (legal ability to sue) to argue section 537.296.5 – which confers standing only on persons with an “ownership interest” in the affected property – violates the constitutional separation of powers doctrine. Because they have not demonstrated the requisite personal stake arising from a threatened or actual injury from the statute’s application, their argument is premised on a theoretical possibility rather than a record of facts.

(5) The property owners have not demonstrated that section 537.296 violates the open courts provision of article I, section 14 of the state constitution because they do not argue the statute restricts access to the courts to pursue a recognized cause of action.

(6) Section 537.296 is not an unconstitutional special law in violation of article III, section 40 of the state constitution. Special laws apply to localities rather than to the state as a whole or benefit individuals rather than the general public, thereby creating an unconstitutional closed classification. Section 537.296, however, creates an open-ended classification because providing some protection from nuisance lawsuits for those who devote their property primarily for agriculture. This is an open-ended classification based on current land use because landowners and land uses can change. The open-ended classification is reasonable because section 537.296 advances the legitimate state purpose of promoting the agricultural economy.

(7) The circuit court did not err in entering judgment in favor of the hog operations on the property owners’ negligence and conspiracy claims. Under section 537.296.6(1), the property owners can recover their alleged non-economic damages for “use and enjoyment” only if their negligence and conspiracy claims are independent of their nuisance claim. But their negligence, conspiracy and vicarious liability claims are based on the same facts – that the CAFO operation substantially interferes with the use and enjoyment of their properties – that form the basis of their nuisance claims. As such, their additional claims are barred by section 537.296.6(1).

Concurring opinion by Judge Fischer: Although the author concurs in the principal opinion’s analyses of private/public use and just compensation, the author would hold there has been no taking and, therefore, there is no need to reach those issues. A takings analysis begins with whether the government’s action actually interfered with constitutionally protected property

rights, known as the “bundle of rights” – if there has been no interference with this bundle of rights, there has been no taking. The state has not interfered with the property owners’ bundle of rights because section 537.296.2 does not take their rights to use and enjoy property. Rather, it sets out the nuisance damages recoverable from crop and animal producers, leaving intact the right to seek injunctive relief. This makes abundantly clear that the state continues to recognize and give effect to the property owners’ rights to use and enjoy their property, to the exclusion of crop and animal producers.