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CASE SUMMARIES

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S.Ct. 1624 (1999).

Del Monte Dunes at Monterey, Ltd. ("Del Monte Dunes") brought a § 1983 action against the city of Monterey, alleging that the city's rejections of Del Monte Dunes' development proposals had effected a regulatory taking without compensation or adequate postdeprivation remedy. Del Monte Dunes alleged that the regulatory taking violated Del Monte Dunes' due process and equal protection rights.

Del Monte Dunes desired to develop a 37.6-acre oceanfront parcel within the zoning control of the city of Monterey. Over a period of five years the city rejected over 19 different proposals, each denial entailing more stringent demands on the developers. After the series of rejections, Del Monte Dunes concluded that the city would not allow development of the cite under any circumstances and brought the § 1983 action in the United States District Court for the Northern District of California.

A jury returned a general verdict for Del Monte Dunes and a damages award of \$1.45 million. The Ninth Circuit Court of Appeals affirmed and the petition for writ of certiorari was granted.

The United States Supreme Court addressed three questions: 1) whether issues of liability on Del Monte Dunes' regulatory takings claim were properly submitted to the jury, 2) whether the Court of Appeals erred in basing its decision on a standard that allowed the jury to "reweigh" the reasonableness of the city's decision, and 3) whether the Court of Appeals erred in using the rough-proportionality standard.

The Supreme Court held that although the rough-proportionality standard was inappropriate for the case, the Court of Appeals mention of proportionality was unnecessary to uphold the jury's verdict because the instructions made no mention of proportionality.

The Court rejected the city's argument that the Court of Appeals adopted a standard for regulatory takings liability that allows juries to "second-guess" city policy. The Court concluded that since the city itself essentially proposed the instructions to the jury, the city could not then argue that the instructions were not an accurate statement of the law.

On the issue of whether it was proper for the district court to submit the question of liability on the regulatory taking claim to the jury, the Court held that a right to a jury trial is not automatic with a § 1983 claim, but the regulatory takings claim is an "action of law" for Seventh Amendment purposes because it is a tort-like cause of action. The Court concluded that the issues of whether the city's rejections deprived Del Monte Dunes of all economically viable use of land and whether there was a reasonable relationship to the city's justification for rejecting the development plans to be issues of law and fact, and thus appropriately submitted to the jury. The Supreme Court affirmed the Court of Appeals decision.

KRISTIN KREBS

Borron v. Farrenkopf, 5 S.W.3d 618 (Mo.App. 1999).

In 1997, the county commissioners of Linn County, Missouri, passed a health ordinance that promulgated regulations regarding the permits necessary to operate a concentrated animal feeding operation ("CAFO"). The ordinance was passed pursuant to § 193.300 RSMo. The ordinance outlined requirements which landowners must meet to avoid the damage that could be caused to soil, air and water by CAFOs. The ordinance also included building and setback requirements relevant to CAFOs.

Plaintiffs-appellants Jeremy and Janice Borron ("the Borrons") owned 1,210 adjacent acres of land in Linn County. The Borrons wished to use this land to conduct a hog finishing operation consisting of 18,000 hogs, as well as a farrowing operation involving approximately 2,750 sows. The Borrons filed for declaratory relief from the county ordinance. The issues in the trial court and on appeal were whether Linn County was either forbidden by state law or,

in the alternative, was without the necessary authority to enact the ordinance in question, and whether other state statutes preempted Linn County from enacting the ordinance. The trial court granted Linn County's motion for summary judgment, determining that the ordinance was valid and enforceable.

The Borrns claimed that § 64.620 RSMo. preempted the county ordinance by depriving second and third class counties, such as Linn County, of the power to legislate building restrictions on land used for the raising of livestock, and that a county may only exercise power expressly granted to it by the state. Relying upon Missouri case law, however, the court determined that, because the county ordinance at issue referenced its own intention to protect the public health, and because health problems can easily be linked to livestock animals, the Linn County ordinance was a health rather than a zoning statute. The court thus determined that the Linn County ordinance was permissible under § 192.300 RSMo.

The Borrns next argued that the county ordinance was preempted by state law, because it was in direct conflict with state law, specifically, §§ 640.700 through 640.758 RSMo., which establish state regulations for CAFOs. The court held that although the Linn County ordinance did require CAFOs to comply with regulations additional to those outlined in §§ 640.700 through 640.758, the county was entitled to require CAFOs to comply with additional requirements. Moreover, the court stated its position that although the Linn County ordinance promulgated additional requirements to be met by CAFOs, those additional requirements did not amount to a prohibition on CAFOs.

The Borrns' final argument was that the county ordinance was unenforceable because it regulated an area already occupied by state law, namely §§ 640.700 through 640.758 RSMo., which already regulated CAFOs. Citing the Missouri Supreme Court's decisions in the cases of *Union Electric Company v. City of Crestwood*, and *City of Maryville v. Wood*, the court determined that the test for whether state law occupies an area of the law is whether the state "has created a comprehensive scheme on a particular area of the law, leaving no room for local control." If the state's laws have done so, then the local act is preempted. The Borron Court determined, however, that the rule established by *Union Electric Company* and *City of Maryville* did not apply to the case at hand, because § 640.710(5) plainly states, "Nothing in this section shall be construed as restricting local controls." The Borron court interpreted this statement as implying the state legislature's intent of leaving a window for local regulation of CAFOs. Thus, the court reasoned, Linn County's regulations did not conflict with state law, but only created more rigorous regulations and, therefore, were not preempted.

The Missouri Court of Appeals for the Western District held that because Linn County was given the authority to make health ordinances to promote the public health and prevent the spread of disease into the community. Because the disputed ordinance was a health ordinance and not a zoning ordinance, § 192.300 RSMo allowed Linn County to enact such an ordinance. Moreover, the court held that state law did not preempt the ordinance because the ordinance was not in conflict with any state law and because state law did not occupy the area governed by the ordinance.

WILLIAM C. ELLIS

St. Croix Waterway Assoc. v. Meyer, 178 F.3d 515 (8th Cir. 1999).

In January 1996, St. Croix Waterway Association (the Association) filed a complaint in United States District Court against George E. Meyer, Secretary of the Wisconsin Department of Natural Resources, and Rodney W. Sando, Commissioner of the Minnesota Department of Natural Resources, in their official capacities. The Association is an unincorporated group of individuals who regularly operate motorboats on the Lower St. Croix River, which forms part of the boundary between Minnesota and Wisconsin, in areas where slow-no wake regulations exist. Specifically, the regulations state that "'slow-no wake' means operation of a motorboat at the slowest possible speed necessary to maintain steerage." The Association sought a declaratory judgment these regulations were unconstitutionally vague on their face.

In court, Meyer and Sando filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)(failure to state a claim upon which relief can be granted). Eventually, the claim was dismissed without

prejudice. In January 1997, the Association filed an amended complaint in United States District Court, reasserting its claim that the regulations were unconstitutionally vague. The Association made three allegations in its amended complaint: (1) the regulations "failed to provide adequate notice of what conduct is prohibited or sufficient standards to prevent arbitrary and discriminatory law enforcement;" (2) "Minnesota and Wisconsin law enforcement officers enforced the regulations in a selective, arbitrary or discriminatory manner against its members, individuals who operated certain types of motorboats, and individuals who operated motorboats registered in other states;" and (3) the regulations violated the public trust doctrine. Meyer and Sando again filed Rule 12(b)(6) motions to dismiss for failure to state a claim.

The district court held that the slow-no wake regulations were not unconstitutionally vague on their face. It found that the regulations provided sufficient notice of what is prohibited because they did not use overly technical terms to describe the forbidden conduct, used clear and unambiguous language, and were specific enough for a person of ordinary intelligence to understand them. The district court further held that the regulations set forth minimal guidelines which provided law enforcement officers with enough standards to prevent arbitrary and discriminatory enforcement. It also noted that the public trust doctrine did not apply because the states had the authority to regulate activity on waterways held in trust for the public. The district court dismissed the Association's complaint with prejudice; Association appealed.

The issue before the United States Court of Appeals was whether the Association could nullify the district court's decision to grant the Rule 12(b)(6) motion to dismiss by proving any set of facts, which would entitle it to relief. On appeal, the Association made five basic arguments. First, it argued that the district court erred by not believing that the Association could prove the factual assertions in its complaint. Second, it argued that the district court erred in holding that the slow-no wake regulations were not unconstitutionally vague on their face. It asserted that it was impossible to know the speed prescribed by the regulations, because so many variables came into play. Third, the Association claimed that the regulations were unconstitutionally vague because they failed to establish adequate standards for law enforcement. Fourth, it claimed the regulations were unconstitutionally vague because they were selectively enforced against certain types of individuals. Finally, the Association argued that the regulations violated the public trust doctrine.

The United States Court of Appeals affirmed the order of the district court. It held that (1) the issues presented to the district court were questions of law and the specific facts put forth by the Association's complaint were not relevant; (2) the slow-no wake regulations are not unconstitutionally vague on their face because they use ordinary words that are easily understood by persons of ordinary intelligence; (3) the slow-no wake regulations are not unconstitutionally vague because they set forth a standard which provides minimal guidelines to govern law enforcement; (4) selective enforcement is irrelevant to a void-for-vagueness facial challenge; and (5) the regulations do not violate the public trust doctrine because it supports the states' authority to regulate navigation and to protect and preserve the public waters.

CHRISTOPHER J. LUCAS

State of Nebraska v. Central Interstate Low-Level Radioactive Waste Compact Commission,
187 F.3d 982 (8th Cir. 1999).

Congress created the Low-Level Radioactive Waste Act ("LLRWA" or "the Act") of 1980 for the storage and disposal of slightly radioactive materials. A centerpiece of this Act encouraged states to form regional compacts to deal with their waste. In dealing with the Central Midwest Compact, Nebraska brought this action for declaratory judgment regarding the Central Interstate Low-Level Radioactive Waste Commission's ("Commission") imposition of deadlines for the processing of license applications.

Nebraska, as the host state for the disposal facility, contracted with an environmental construction company, U.S. Ecology, to build and operate a disposal plant for the region. The Compact granted the host state authority to

establish procedures and regulations for licensing and review of license standards; Nebraska established such procedures.

Problems quickly mounted in the construction of the facility. Due to construction and other delays, the Commission held a meeting in August of 1996 in order to set an appropriate scheduling deadline for the completion of the facility. The Commission made three demands, to be completed by December 14 of that year but no later than January 14 of 1997: first, Nebraska must issue a first Draft Environmental Impact Analysis; second, Nebraska must issue a Draft Safety Evaluation Report; finally, Nebraska must make its decision regarding license drafts. In response to the Commission's actions, Nebraska filed this action in November of 1996. It challenged the deadlines as unlawful and unreasonable.

The court considered whether the Compact granted the Commission the authority to impose the deadline on Nebraska. The court examined the text of the Compact. Article V(e)(2) supposedly granted the Commission power to set deadlines; it provided that development and operations of new facilities be completed within a reasonable time. Ultimately, the court did not accept Nebraska's interpretation; it stated that the authority of the Commission was not exclusive. The authority to license disposal plants still lies within the state, but the Commission is required to regulate this action by obligating the state to process the licensing within a reasonable time. In a similar vein, the court also rejected Nebraska's claim that the Commission relied on implied powers not expressed in the agreement. The court found otherwise, deciding the Compact provisions "are limited but clear delegations of authority," and upholding them as valid.

Nebraska's next argument focused on the action taken by the Commission. Specifically, it disagreed with the decision of the Committee to file this action to enforce the imposed deadline instead of taking some other course of response. The only potential remedies for the Commission included an injunction and a revocation of a member state's charter. In agreeing with the district court, the court here found that once the Commission took its action in setting a deadline, the only possible recourse is the enforcement of that decision via the Compact. The court then pointed out revoking a state's membership would be pointless because "it would do nothing to require the State to process the license within a reasonable time." The remaining members of the Compact would then have no disposal site and no plans for one, thus leading to more costly delays on behalf of the members.

Lastly, the state challenged the time of the deadline set as unreasonable. Ironically, the state had already taken the action required by the Commission. In the time pending between lawsuits, the state denied the licensing application. Because of this denial, the court stated it could not give relief because the issue became moot. Due to the deadline and licensing decision both passing, the court stated it could not give any specific relief. The court also avoided legislative history arguments as it found the language of the Compact "straightforward and clear."

KEVIN M. JOHNSON

Kalamazoo River Study Group v. Rockwell International Corporation, 171 F.3d 1065 (6th Cir. 1999).

The plaintiffs, Kalamazoo River Study Group ("KRSG"), is composed of four paper mill companies located on or near the Kalamazoo River. KRSG is an unincorporated association that was formed after the Michigan Department of Natural Resources ("MDNR") identified the three companies as potentially responsible parties for polychlorinated biphenyl ("PCB") contamination of a specific site along the Kalamazoo River. The plaintiffs were chosen as potentially responsible parties for the contamination of the Kalamazoo River after 20 years of investigation of this area by the MDNR. The MDNR concluded that a total of 38 miles of the river and surrounding area, known as "the Site," were contaminated with PCBs. The Site was then listed as an environmental contamination site by the MDNR under the Michigan Environmental Response Act, and the Environmental Protection Agency ("EPA") listed the site on the National Priority List ("NPL") as a Superfund site. After the plaintiffs were chosen as responsible parties for the cleanup of the Site, they entered into an Administrative Order by Consent, which required them to perform a Remedial Investigation and Feasibility Study ("RI/FS") at the Site.

The Defendant, Benteler, operates an automotive parts plant located 3200 feet north of the far southeastern boundary of Morrow Lake, which is located upstream from the Site. Next to Benteler's parking lot is a headwall with a drain that discharges storm water run-off and floor drainage from the plant into a ditch. Benteler purchased this plant in 1989, and discovered that it contained transformers and capacitors that contained PCBs. While repairing a leak from one of the transformers, they discovered PCBs throughout the plant including within the ditch. Benteler then hired environmental consultants to assess the damages and devise a Remedial Action Work Plan. The cleanup was completed on October 11, 1993, and in October of 1996, the MDNR sent Benteler a clean closure letter.

In 1995 KRSO filed the present action against eight corporations, including Benteler. The plaintiffs alleged that Benteler was responsible for some of the PCB contamination at the Site and should be held liable for some of the cleanup costs. KRSO claimed that PCB contaminated water flowed from Benteler's ditch into the Morrow Lake to the Kalamazoo River and eventually downstream to the Site.

Benteler filed a motion for summary judgement and argued that KRSO could not establish a prima facie case. To establish a prima facie case for CERCLA liability, the plaintiff must prove that: (1) there was a release or threatened release of a hazardous substance, (2) the site of the release or threatened release is a "facility" as that term is defined in the statute, (3) the release or threatened release has caused KRSO to incur response costs, and (4) Benteler is among a statutorily defined group of persons, which includes the owner or operator of a facility. Benteler's motion challenged KRSO's ability to establish causation. Benteler presented evidence from several experts that there were no PCBs located past 1,500 feet of the ditch. Benteler also presented evidence from an expert who stated that any of the contaminated water discharged into the ditch would have been absorbed within 600-800 feet of the headwall, where the ditch began. Finally, Benteler presented an affidavit from an expert, stating that "the soil and vegetation in the ditch is not consistent with a continuous flowing stream, and intermittent stream, or even with occasional discharges of sufficient magnitude to carry water down the ditch to Morrow Lake.

The plaintiff's main argument relied on an affidavit from an expert doctor. The doctor stated that "a logical interpretation of the facts leads to the conclusion that the ditch has discharged water and PCBs to the Kalamazoo River and, therefore, PCBs from Benteler's facility are within the borders of the National Priorities List site." KRSO argued that there was a genuine issue of fact between evidence presented from the doctor's affidavit and the consultants hired by Benteler. KRSO argued that the district court "overstepped its discretionary bounds" by granting summary judgment because "the credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions." The district court disagreed with KRSO, and ruled that they were unable to establish a causal connection between Benteler's release of hazardous substances (PCBs) and KRSO's response costs that incurred in cleaning them up.

The Court of Appeals for the Sixth Circuit also disagreed with KRSO, and affirmed summary judgment in favor of the defendant. The Court affirmed the district court's decision by concluding a district court judge "may, indeed must, look beyond the conclusions (of the experts) to determine whether the expert testimony rests on a reliable foundation." The Court held that KRSO's evidence was based merely on speculation, and that the existence of a possibility does not create a material issue of fact for trial.

AARON BRYANT

