
IN THE COURT OF APPEALS OF ARKANSAS

ST. FRANCIS RIVER REGIONAL WATER DISTRICT **APPELLANT**

v. **No. CV-19-595**

CITY OF MARMADUKE, AR **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, ARKANSAS CIVIL DIVISION

THE HONORABLE MELISSA RICHARDSON, CIRCUIT JUDGE

APPELLANT'S REPLY BRIEF

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ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT.

1. Standard Of Review For Summary Judgment.

Summary judgment is appropriate when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Danner v. MBNA America Bank, N.A.*, 369 Ark. 435, 255 S.W.3d 863 (2007). The standard is whether the evidence is sufficient to raise a fact issue, not whether the evidence is sufficient to compel a conclusion. A fact issue exists, even if the facts are not in dispute, if the facts may result in differing conclusions as to whether the moving party is entitled to judgment as a matter of law. In such case, summary judgment is inappropriate. *Id.* As to issues of law presented the appellate court's review is de novo. *Preston v. Stoops*, 373 Ark. 591, 285 S.W.3d 606 (2008). Both parties filed for summary judgment herein.

2. The City of Marmaduke Was And Is Not Entitled To Provide Water Service In St. Francis River Regional Water District's Service Area.

In an attempt to minimize and limit the authority of St. Francis River Regional Water District ("SFRRWD") to provide water service to persons and

entities located in its service area, the City of Marmaduke (the "City") states that the Regional Water Distribution District Act ("RWDDA") codified at Ark. Code Ann. §§ 14-116-101 *et seq.* limits SFRRWD's ability to furnish water service "to persons desiring it." Ark. Code Ann. § 14-116-102(4). In other words, the City's argument is that SFRRWD has no ability to prevent others from coming into SFRRWD's service area and providing water service to any person in the service area if that person wants water service from another. This argument guts the RWDDA because the water district could be "cherry-picked", thereby, causing the water district to be forced out of business or forced to increase the cost of its water service, potentially, to the point of being cost prohibitive. All of this is not in the best interest of the inhabitants of the water district.

Additionally, the City's argument lacks support as Ark. Code Ann. § 14-116-105 [RWDDA] provides as follows: "[t]his chapter shall be **construed liberally**. The enumerating of any object, purpose, power, manner, method or thing **shall not be deemed** to exclude like or similar objects, purposes, powers, manners, methods or things." (Emphasis added). See also, *City of Fort Smith v. River Valley Regional Water Dist.*, 344 Ark. 57, 66, 37 S.W.3d 631, 636 (2001)(the Act [RWDDA] mandates liberal interpretation). Obviously, this provision indicates that the RWDDA permits regional water districts, like

SFRRWD, to provide water service in its service area to the exclusion of others. Thus, contrary to the City's argument, the 1987 Order **(RP 511-517)** does not have to contain the word "exclusive" in order for SFRRWD to exclude others from coming in and taking customers located in SFRRWD's service area.

Further, the City's argument that it initially provided water service to American Railcar Industries ("ARI") is of no consequence as the initial service was not in SFRRWD's service area. By the same token, the City's citation to Ark. Code Ann. §§ 14-54-702(b) and 14-234-111(a) as its ability to go beyond its corporate limits to provide water service is incorrect because the City was and is intruding into SFRRWD's service area, not merely providing water service outside its corporate limits to an area where water service was not in another's service area. The City's broad reading of its water powers would effectively allow it to take property without paying just compensation in violation of the law.

Additionally, the City claims that it is entitled to summary judgment because as of June 19, 2018, the service area of SFRRWD in which ARI expanded its operation was annexed into the City. **(RP 593-596)**. Thus, the City argues, at that point, it was entitled to provide water service to ARI to the exclusion of SFRRWD's claim. In so arguing, the City seems to forget two (2) important facts. First, the annexation did not occur until after the Complaint was filed on June 21,

2017 **(RP 14-24)** and after the filing of SFRRWD's Reply and Brief in Support there of on March 7, 2018. **(RP 252-265)**. Thus, the annexation did not cure the City's intrusion before the annexation.

Second, the City forgets Ark. Code Ann. § 14-208-102 (2011) which, in pertinent part, at the time this action was filed provided as follows:

> (a)(1) Unless otherwise agreed between a municipality that owns or operates a water service and a rural water service, the inclusion by annexation of any part of the assigned service area of a rural water service within the boundaries of any Arkansas municipality shall not in any respect impair or affect the rights of the rural water service to continue operations and extend water service throughout any part of its assigned service area unless a municipality that owns or operates a water service elects to purchase from the rural water service all customers, distribution properties, and facilities located within the municipality reasonably utilized or reasonably necessary to serve customers of the rural water service within the annexed areas under this chapter, excluding water sources, treatment plants, and storage serving customers outside the annexed areas. . . .
>
> (B) The affected rural water service is entitled to injunctive relief for any violation of this chapter. . . .
>
> (b)(3)(A) Before an acquisition under this chapter by the municipality, the municipality shall receive approval from the Arkansas Natural Resources Commission that the action complies with the Arkansas Water Plan under § 15–22–503 . . . .

None of the above provisions were followed by the City in regard to the annexation. Further, in the hearing on April 8, 2019, counsel for SFRRWD raised these issues in regard to the effect of the annexation on this litigation and

SFRRWD's ability to seek injunctive relief post-annexation as well as the fact that the City was required to seek approval of the Arkansas Natural Resources Commission ("ANRC") before annexation. **(RT73-76)**. Thus, it cannot use annexation as a shield for its improper intrusion into SFRRWD's service area.

Also, the City's argument that the RWDDA permitted ARI to buy water from the City because ARI desired to do so is without merit. In this regard, the City again turns a blind eye to the statutes as Ark Code Ann. § 14-116-403 provides as follows:

> Any person aggrieved by the service furnished or rates charged by the water district shall have, as a matter of right, the right to petition the grievance from the decision or action of the water district, to the circuit court wherein the water district was formed. Upon the petition being filed, the circuit court shall hear the petition de novo and is empowered to make orders as necessary and proper in equity.

The proper procedure for ARI to have followed was to petition the circuit court if it was aggrieved by SFRRWD providing water service to ARI's facilities located in SFRRWD's service area, not unilaterally decide to obtain water from the City. ARI did not do this, thus, the City should not be rewarded for its improper action. Thus, the City was not entitled to summary judgment and the trial court's decision should be reversed.

3. The Trial Court Erroneously Interpreted SFRRWD's Right to Provide Water In Its Service Area per Ark. Code Ann. §§ 15-22-223(a).

The trial court erroneously concluded that SFRRWD was not entitled to the protection of Ark. Code Ann. § 15-22-223(a) when it found that SWRRWD was not the current provider of water in the area and that SFRRWD was not indebted to the ANRC during all applicable time frames. **(RP801)**. Ark. Code Ann. § 15-22-223(a) and Section 605.1 of the Arkansas Natural Resources Commission Water Plan Compliance Review Procedures provide as follows:

> [i]t is unlawful for a person to provide water or wastewater services to an area where such services are being provided by the current provider that has pledged or utilizes revenue derived from services within the area to repay financial assistance provided by the Arkansas Natural Resources Commission, unless approval for such activity has been given by the commission and the new provider has received approval under the Arkansas Water Plan established in § 15-22-503, if applicable. *Id.*

There is no dispute that ARI's facilities known as the East Plant and Refurb Plant are located in SFRRWD's service area. (**RP24, 747, 749)**. The City argues that it is the provider of water service to the East Plant and Refurb Plant [for purposes of Ark. Code Ann. § 15-22-223(a)] because the City began serving ARI when ARI was located solely in the City's municipal limits and later when the City jumped

into SFRRWD's service area to serve the East Plant and Refurb Plant when they were built. Additionally, the City argues that SFRRWD was not indebted to ANRC during all applicable time frames. Both of these arguments are contrary to the protections provided by Ark. Code Ann. § 15-22-223(a).

In support of these arguments, the City cites the case of *Pub. Water Supply Dist. No. 3 of Laclede County, Mo. v. City of Lebanon*, 605 F.3d 511 (8th Cir. 2010) which involves 7 U.S.C.A. § 1926(b). The City argues that, essentially, Ark. Code Ann. § 15-22-223(a) is the same as 7 U.S.C.A. § 1926(b). This is incorrect. First, in *Lebanon*, the Court found that § 1926(b) provides that a rural district's service "shall not be curtailed and limited" which "connote something being taken from the current holder, rather than something being retained by the holder to the exclusion of another." *Id*. at 516. Additionally, that court found that the provision in § 1926(b) which provides that service "shall not be curtailed or limited . . . during the term of such loan" limits the exclusivity to the period in which the loan is outstanding. *Id.* at 517.

Conversely, Ark. Code Ann. § 15-22-223(a) does not use the words "curtailed" or "limited". As a result, § 15-22-223(a) does not reduce SFRRWD's right to provide water service in its service area. Thus, SFRRWD retains the right to serve its area to the exclusion of anyone else who has not obtained approval

from the ANRC or under the Arkansas Water Plan. The mere fact that the City without authority moved into SFRRWD's service area and provided water to ARI facilities in that area does not void the protections of Ark. Code Ann. § 15-22-223(a). Also, unlike § 1926(b), Ark. Code Ann. § 15-22-223(a) does not designate a time for being indebted to ANRC and pledging its revenue for repayment of the loan only that it must have a loan with ANRC and have pledged its revenue from the water service to ANRC for repayment of the loan. Therefore, the City's arguments fail and this Court should reverse the trial court's judgment.

4. The City Never Obtained Approval From the ANRC In Accordance With Ark. Code Ann. § 15-22-503.

The City readily admits that it never requested permission from the ANRC at any time whatsoever in regard to its providing water service to ARI's East Plant and Refurb Plant in SFRRWD's service area. **(RP718, 744-749)**. Instead, the City argues that it was not required to do so under any section of the Arkansas Water Plan (Ark. Code Ann. § 15-22-503). In so arguing, the City uses the testimony of Crystal Phelps (ANRC's counsel) as support for this position. However, when questioned by counsel for SFRRWD regarding the need to seek approval from the ANRC, Ms. Phelps testimony contradicted the City's claim. In this regard, Ms. Phelps testified as follows:

Mr. Lyons: And based on your letter of Exhibit 2 -- marked as Exhibit 2, not only was the district properly formed, but the East Plant of ARI was located in St. Francis River Regional Water District's territory; is that correct?

Ms. Phelps: Yes.

Mr. Lyons: Okay. Has there been any action taken since 1987 to change those district boundaries, that you've seen?

Ms. Phelps: No.

. . .

Mr. Lyons: So, as far as you're concerned as we sit here today, the boundaries that were originally granted to St. Francis River Regional Water District, those still remain the boundaries in which they are supposed to be able to serve or provide water; is that correct?

Mr. Mann: Object to the form.

Ms. Phelps: The boundaries of the district are the boundaries of the district. **(RP717)**.

. . .

Mr. Lyons: Marmaduke has not submitted any paperwork or any requests to serve the ARI East Plant located in St. Francis River Regional Water District's territory --

Ms. Phelps: Not --

Mr. Lyons: -- true?

Ms. Phelps: Yes.

Mr. Lyons: Under your rules is that the proper thing to do for -- proper thing for Marmaduke to do if they want to serve something outside their territory?

Mr. Mann: Object to the form of the question.

Ms. Phelps: Yes.

Mr. Lyons: If they want to invade someone else's territory, is it proper for Marmaduke to come to the ANRC before they begin serving that invaded territory?

Ms. Phelps: Yes.

(RP718).

This testimony not only contradicts the testimony used by the City, but indicates that SFRRWD was properly formed, had an approved territory which included ARI's East Plat and if its service territory was invaded, the invader was to seek approval from ANRC before providing water service in SFRRWD's territory. This clearly supports SFRRWD's position that the City did not comply with Ark. Code Ann. § 15-22-503 or at least raises a material question of that fact such that the City was not entitled to summary judgment.

B. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT IN FAVOR OF SFRRWD.

In this case, both parties sought summary judgment. The trial court granted summary judgment to the City and denied SFRRWD's motion for summary judgment. An order denying a motion for summary judgment is only an interlocutory order and is not appealable. *City of North Little Rock v. Garner*, 256 Ark. 1025, 511 S.W.2d 656 (1974). However, an order denying summary judgment may be reviewable in conjunction with an appeal of an order granting summary judgment. Thus, the denial of SFRRWD's summary judgment is reviewable as it is in conjunction with an appeal of an order granting summary judgment in this case.

Despite the arguments of the City in its Appellee's Brief, the City was not entitled to summary judgment. Instead, for the reasons set forth above and in its Appellant's Brief, SFRRWD was entitled to summary judgment. Further, the City's arguments in its Brief that the cases of the *City of Fort Smith v. River Valley Regional Water Dist.*, 344 Ark. 57, 37 S.W3d 631 (2001) and *Arkansas Soil and Water Conservation Commission v. City of Bentonville*, 351 Ark. 289, 92 S.W.3d 47 (2002) are inapposite to this case are incorrect. First, in *City of Fort Smith*, the court determined that although the purpose for forming the district was not one of

the purposes enumerated in the Act [RWDDA], the petition was sufficient because of the liberal interpretation mandate of the Act. *Id*. at 66, 636. As a result, the *City of Fort Smith* supports SFRRWD's position that due to the liberal interpretation of the RWDDA, SFRRWD retains the right to serve its area to the exclusion of anyone else who has not obtained approval from the ANRC or under the Arkansas Water Plan.

Additionally, in *City of Bentonville*, Bentonville claimed that § 14-56-413 granted it exclusive jurisdiction over the five-mile extraterritorial area surrounding the city limits thus trumping any authority that ASWCC (now the ANRC) had over the area for utilities. The *Bentonville* Court disagreed and found that "[a] municipality clearly does not have absolute power to control water projects within its own boundaries, much less within its five-mile extraterritorial planning area" without approval of the ANRC. *Id.* at 300, 53. In the instant case, the City claims its has authority to provide water service to ARI pursuant to Ark. Code Ann. §§ 14-54-702(b) and 14-234-111(a) without ANRC's approval. However, in light of *City of Bentonville*, this argument fails. As a result, both the *City of Fort Smith* and the *City of Bentonville* are applicable and offer support that SFRRWD was incorrectly denied its right to provide service to ARI's facilities located in SFRRWD's service area. Thus, the trial court erred in denying SFRRWD's

Motion for Summary Judgment when it granted the City's Motion for Summary Judgment.

C. CONCLUSION

For all of the above reasons, the trial court erred in granting the City's Motion for Summary Judgment and in denying SFRRWD's Motion for Summary Judgment due to its granting the City's Motion for Summary Judgment. Thus, the trial court's decision should be reversed and SFRRWD's Motion for Summary Judgment should be granted.

Respectfully submitted,

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By /s/ Jim Lyons
Attorneys for St. Francis River Regional Water District

IV.

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that a true and correct copy of the foregoing will be served on the following counsels of record via eFlex on this 30th day of October, 2019, pursuant to Administrative Order No. 21, § 7(a). Additionally, a true and correct copy of the foregoing has been served upon the following via U.S. Mail, First Class Postage prepaid, on the 30th day of October, 2019: William C. Mann, III
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The undersigned attorney does hereby further certify that a true and correct copy of the foregoing has been served upon the following via U.S. Mail, First Class Postage prepaid, on the 30th day of October, 2019:

Honorable Melissa Richardson
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V.

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER NO. 19 AND WITH WORD-COUNT LIMITATIONS

I, the undersigned attorney, hereby certifies that the attached Appellant's Brief complies with Administrative Order No. 19 in that all "confidential information" has been be excluded from the "case record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

Further, the undersigned states that the foregoing Brief conforms to the word-count limitation identified in Rule 4-2(d) and said Brief contains 2,803 words.

Identification of paper documents not in PDF format:

The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None

/s/ Jim Lyons
Jim Lyons (Bar #77083)
LYONS & CONE, P.L.C.
October 30, 2019