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Silver Lake Sanitary Dist. v. Wisconsin Dep't of Natural Resources, No. 99-0620, 1999 WL 1125252 (Wis. Ct. App. Dec. 9, 1999)

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been written in 1939, and Subdivision had placed its first pier in 1989, Subdivision failed to meet the statutory requirement. Accordingly, the court affirmed the DNR's decision to deny Subdivision's pier application.

Michael Fischer

Silver Lake Sanitary Dist. v. Wisconsin Dep't of Natural Resources, No. 99-0620, 1999 WL 1125252 (Wis. Ct. App. Dec. 9, 1999) (holding that the Department of Natural Resources ("DNR") did not have standing as a state agency to challenge the constitutionality of two Wisconsin statutes).

Silver Lake Sanitary District ("Silver Lake") sought judicial review of the Department of Natural Resources' ("DNR") decision to set the Ordinary High Water Mark ("OHWM") for Big Silver Lake at 868.9 feet above mean sea level. The OHWM is an important boundary because it establishes the extent of state ownership in the lake, which impacts the public's right to use the lake as well as the riparian owners' rights in the land above it.

As a direct response to Silver Lake's suit, the legislature enacted a statute, which set the OHWM of Big Silver Lake at 867 feet above mean sea level. This statutory OHWM was nearly two feet below DNR's mark. The DNR subsequently filed a counterclaim challenging the constitutionality of the statute on four grounds: (1) it was a local bill in a multiple subject bill and therefore invalid under Wisconsin's Constitution; (2) it violated the public trust doctrine; (3) it violated the equal protection clause; and (4) it unlawfully encroached on the executive branch's authority. In granting the DNR's motion for declaratory judgment, the circuit court held that (1) the DNR had standing to challenge the constitutionality of the law; and (2) the statute was unconstitutional.

After several months, the legislature enacted a second statute permitting a sanitary district to set the OHWM of any lake that was wholly within its district. The second statute also prohibited the DNR from setting a different level. The DNR filed a second counterclaim in response to the second statute's enactment, seeking a declaratory judgment that this statute was also unconstitutional. The circuit court held that the second statute was unconstitutional because it violated the public trust doctrine and the forever-free clause of the Wisconsin Constitution. The court of appeals granted Silver Lake's petition for leave to appeal both orders.

Silver Lake argued that the circuit court erred in concluding that the DNR had standing to challenge the constitutionality of both statutes because a state agency could not challenge the constitutionality of a statute. Although the DNR conceded that generally a state agency could not attack a statute's constitutionality, it argued that in limited circumstances, a state agency could challenge a statute's constitutionality if it presented an issue of great public concern. Silver Lake argued, however, that the great public concern exception applies only to cases where a private litigant and

a creature of the state are involved, not to suits only limited to creatures of the state.

In considering whether the DNR had standing, the court referred to precedent and stated that, under the no-standing rule, agencies, municipal corporations, and quasi-municipal corporations are all creatures of the state and have no standing to challenge the actions of their creator. The court further explained that courts could modify the no-standing rule only for cases between private litigants and a municipality or state agency and not to suits between agencies of the state, or between an agency or municipal corporation and the state. The exceptions to the no-standing rule which a circuit court may apply when a private litigant is a party are available: (1) if the agency has an official duty to challenge the statute, or the agency will be personally affected if it fails to bring the challenge and the statute is held invalid; and (2) if the issue is of "great public concern."

The DNR urged the court to apply the "great public concern" exception. The court found, however, that the state supreme court declared that the "great public concern" exception applied only in cases where private litigants were parties. Despite the Supreme Court's ruling, the DNR argued that private litigants were not essential for an arm of the state to challenge the constitutionality of a statute.

The DNR relied heavily on the Supreme Court's decision in *Unified Sch. Dist. No. 1 of Racine County v. WERC*, where the court considered the merits even though the case involved no private litigants. The state agency in that case challenged a statute's constitutionality. DNR argued this precedent implicitly held that no private actors are necessary for standing. Therefore, the DNR contended that the presence of private litigants was not necessary for it to challenge the constitutionality of state statutes.

The court disagreed with DNR for two reasons. First, the court stated that under black letter law an opinion does not establish binding precedent for an issue if that issue was neither contested nor decided. Because the parties in *Unified* did not challenge standing, the court failed to analyze whether the "great public concern" exception required involvement of private litigants. Second, the court in *Unified* quickly dismissed the school district's argument on the merits. The court of appeals declined to read *Unified* as changing the law so as to permit a state agency to challenge a statute's constitutionality when no private litigant was present in the lawsuit.

The court noted that in its most recent opinion on the no-standing rule, it confirmed that the "great public concern" exception applies only to cases with private litigants. Moreover, because the supreme court had expressly stated that private litigants are an essential element to a lawsuit before a circuit court may consider whether to permit an arm of the state to contest a statute's constitutionality under the "great public concern" exception, the court concluded that the "great public concern" exception cannot apply in a suit between two creatures of the state, in the absence of private litigants. Since this case contained no private litigants, the court concluded that the DNR did not have standing to contest the constitutionality of the statutes. Thus, the court reversed the circuit court's orders and remanded with

instructions to dismiss the DNR's counterclaims.

A separate concurrence would like the Supreme Court to revisit the private-litigant requirement because existing case law establishing and applying this requirement does not make apparent its purpose. A reexamination of the requirement would provide municipalities and state agencies clarification in the existing case law.

Kris A. Zumalt

West v. Marek, 604 N.W.2d 34 (Wis. Ct. App. 1999) (holding that state statutes did not create rights for an easement holder to build a dock or pier when the easement was opposed by the riparian owner, and that no pier placement or maintenance was granted or implied by the easement).

In 1982, Roland and Jeanine West granted a five-foot easement to Shari Marek and Greg Willis (collectively "Marek") for "private walkway purposes" over the West's property to Wood Lake. Marek built a pier over the water at the end of the walkway easement on the West's property.

The Wests sued Marek to force the pier's removal. The trial court concluded that maintaining the pier violated a state statute because it was inconsistent with the terms of the easement. Marek argued that the easement did not specifically, or impliedly, prohibit the pier; therefore, the right of access to the lake implied a right to construct and maintain a pier. The court, however, asserted that in the absence of a specific grant of permission to build a pier, no such right exists for the easement-holder when the riparian owner opposes the easement. The court held that the easement must be in accordance with, and confined to, the terms and purposes of the grant.

Marek appealed the judgment on the basis that the statute allowed them to place a pier at the end of the easement. Marek argued, again, that the written easement's terms did not expressly prohibit a pier or dock. However, the statute only makes constructing and maintaining a pier lawful. It does not grant rights to the non-riparian owner vis-à-vis the riparian owner.

The court asserted that, as the riparian owner, the West's have certain rights that do not apply to the Marek's unless that right was specifically granted by the easement. In other words, the easement holder did not have title to the shoreline in order to construct a pier unless the riparian owner granted this right. The court held that the language of the easement did not contain a grant of riparian rights, but only rights to use the easement "for private walkway purposes over and across the land." Thus, the West's had the exclusive right to construct a pier. The court thus affirmed the trial court decision.

M. Elizabeth Lokey