

LOUISIANA SUPREME COURT

No. 2021-CA-01414

WESTLAWN CEMETERIES, L.L.C.
Plaintiff--Appellee

Versus

THE LOUISIANA CEMETERY BOARD
Defendant—Appellant

ON APPEAL FROM THE 24TH JUDICIAL DISTRICT COURT
HONORABLE STEPHEN C. GREFER PRESIDING
DOCKET NO. 795-617; DIVISION “J”

CIVIL CASE

ANSWER TO APPEAL

GAUDRY, RANSON, HIGGINS
& GREMILLION, L.L.C.

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Perpetual Care Trust Fund

ANSWER TO APPEAL

NOW INTO COURT, through undersigned counsel, comes the Plaintiff, Westlawn Cemeteries, L.L.C. (“Westlawn”) and Intervenors, Boyd L. Mothe, Boyd L. Mothe, Jr., Laurie M. Knowles, Nicole M. Lawson, Katherine M. Illg, and Boyd L. Mothe, III, in their capacities as Trustees of the Westlawn Memorial Park Perpetual Care Trust Fund (“Intervenors”) (Westlawn and Intervenors are collectively referred to herein as the “Appellees”), who respectfully answer the Suspensive Appeal filed by the Appellant, the Louisiana Cemetery Board, seeking the following relief:

1.

On February 24, 2021 Westlawn filed a declaratory judgment action challenging the constitutionality of two regulations of the Louisiana Cemetery Board. Based on these regulations the Louisiana Cemetery Board is claiming that Westlawn was required to forfeit \$392,657.30 received by it over approximately 18 years and used by it for the maintenance of Westlawn Cemetery in accordance with the statutory mandate found at La. R.S. 8:454.1.

2.

On March 11, 2021 the district court rendered a judgment on cross motions for summary judgment strictly on the facial constitutional challenges to the regulations, leaving for another day the “as-applied” constitutional challenges. On June 29, 2021, the district court entered a judgment granting Appellees’ motion for new trial and reversing, in part, its judgment denying Westlawn’s motion for summary judgment, and held La. Admin. Code 46:XIII.1503(C) unconstitutional on its face (the judgment on motion for summary judgment, as amended by the motion for new trial is hereinafter referred to as the “Judgment”). The Judgment was not declared a final judgment by the district court.

3.

On July 8, 2021, Appellant filed a Motion for Suspensive Appeal from the Judgment asserting that this Court has exclusive appellate jurisdiction over this matter pursuant to La. Const. art. V., § 5(D) on grounds that the Judgment resulted in La. Admin. Code 46:XIII.1503(C) being declared unconstitutional.

4.

The record of this matter was lodged in this Court on September 28, 2021.

5.

It is respectfully submitted that this Court does not have appellate jurisdiction over this matter but the Appellees request that the Court exercise its general supervisory jurisdiction over this matter to convert the instant appeal to an application for supervisory writs for the reasons set forth below.

6.

La. Const. art. V, § 5(D) provides, in pertinent part, that “a case shall be appealable to the supreme court if (1) a law or ordinance has been declared unconstitutional...” An appeal of right pertaining to a law or ordinance may be taken only when the legislative act of a governing authority, a body which exercises the legislative functions of a political subdivision, has been declared unconstitutional. *See Holthus v. Louisiana State Racing Comm’n*, 569 So.2d 547 (La.1990); citing *Benelli v. City of New Orleans*, 474 So.2d 1293, 1294 (La.1985). “[R]ules and regulations promulgated by an administrative agency or department are not a ‘law or ordinance’ under La. Const. art. V, sec. 5(D); thus, a trial court’s declaration of their unconstitutionality is not directly appealable to the Louisiana Supreme Court.” *See Coastal Drilling Co. v. Dufrene*, 15-1793, p. 7 (La. 3/15/16), 198 So.3d 108, at note 2; citing *Vicksburg Healthcare, LLC v. State through Dept. of Health and Hospitals*, 10–1248 (La. App. 1 Cir. 3/25/11) 63 So.3d 205; *Holthus, supra*; and *Benelli, supra* at 1294.

7.

The Louisiana Cemetery Board is not a governing authority which exercises the legislative functions of a political subdivision. Therefore, this Court does not have appellate jurisdiction over an appeal from a judgment of a district court holding that La. Admin. Code 46:XIII.1503(C), a regulation, is unconstitutional.

8.

However, the Court can and should exercise its general supervisory jurisdiction over this matter and convert the instant appeal to an application for supervisory writs. *See* La. Const. art. V, § 5(A). The constitutional grant of supervisory authority to the Court is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court. *Greater New*

Orleans Expressway Comm'n v. Olivier, 02–2795 (La.11/18/03), 860 So.2d 22, 24 (Knoll, J., dissenting); *see also Progressive Sec. Ins. Co. v. Foster*, 97–2985, p. 2 (La.4/23/98), 711 So.2d 675, 678 n. 3. Furthermore, Rule I, §11 of the Rules of the Louisiana Supreme Court provides that, “[i]f an appeal is taken to this court when such remedy is not available, the court may in its discretion treat such appeal as an application for supervisory or other writs.”

9.

This Court has exercised its supervisory jurisdiction in other cases where a direct right of appeal was unavailable. *See, e.g., Louisiana Associated Gen. Contractors, Inc. v. New Orleans Aviation Bd.*, 99–0025 (La. 7/7/99), 764 So.2d 31 (granting writs in order to avoid further delay in the disposition of the matter that had previously been remanded to the trial court); *Progressive Sec. Ins. Co.*, 711 So.2d at 680 (granting writs to definitively address the merits of the litigation); *State Bond Comm'n v. All Taxpayers, Prop. Owners and Citizens of State*, 510 So.2d 662, 663 (La.1987); *State v. Peacock*, 461 So.2d 1040, 1041 (La.1984) (granting writs in interests of judicial economy); *Hainkel v. Henry*, 313 So.3d 577, 578 (La. 1975).

10.

The exercise of supervisory jurisdiction by the Court is appropriate here as this case involves matters of public import and is in the interests of judicial economy and efficiency. A ruling in this matter affirming the district court’s ruling on the constitutionality of La. Admin. Code 46:XIII.1503(C) will result in mooting all remaining issues.

11.

Westlawn filed a declaratory judgment action over two years ago challenging the constitutionality of La. Admin. Code 46:XIII.1503(C) and La. Admin. Code 46:XIII.1505 (A) and (B). After discovery was completed a motion for summary was filed in December 11, 2019 by Westlawn and a cross motion was filed by the Louisiana Cemetery Board. Due to procedural maneuvers by the Appellant, substantial delays have occurred and the parties will face even further delay if this appeal is dismissed.

12.

After the Appellant answered the suit without exception and the completion of extensive discovery, the parties agreed to file cross-motions for summary judgment to resolve what are purely legal issues presented by this case. Appellant had a sudden change of heart and the parties

became embroiled in a dispute concerning exhaustion of administrative remedies and the district court's jurisdiction over this matter resulting in three writ applications being filed by the Appellant with the Louisiana Fifth Circuit Court of Appeal. The Fifth Circuit ultimately ruled that the district court had jurisdiction to rule on the constitutionality of Appellees' facial challenges to the regulations and remanded to the district court to determine whether Appellees' challenges to the regulations at issue were facial or as-applied challenges.

13.

The district court ruled that Appellees' enunciated both facial and as-applied challenges to the regulations but found that the challenged regulations were constitutional on their face, and remanded the case to the Louisiana Cemetery Board for a full administrative hearing on the merits.

14.

As such, the district court initially denied Westlawn's motion for summary judgment, and granted the Appellant's motion for summary judgment, in part, finding La. Admin. Code 46:XIII.1503(C) and La. Admin. Code 46:XIII.1505 (A) and (B) not facially unconstitutional but leaving open the possibility that one or both of the regulations could later be declared unconstitutional as-applied to the Appellees but only after the delay caused by ordering an administrative hearing.

15.

Thereafter, Appellees filed a motion for new trial seeking to set aside that portion of the district court's March 11, 2021 judgment holding that La. Admin. Code 46:XIII.1503(C) is facially constitutional on the grounds that the ruling was clearly contrary to the law and evidence as the regulation violates the separation of powers provisions of La. Const. art. II §2.

16.

The district court granted the motion for new trial and declared La. Admin. Code 46:XIII.1503(C) unconstitutional on its face as the regulation violates the separation of powers provisions of La. Const. art. II §2.

17.

A ruling from this Court on the constitutionality of La. Admin. Code 46:XIII.1503(C), which the main issue in this case, could bring this protracted litigation to an end and avoid further

delays and piecemeal litigation. It would also bring much needed clarity and finality to an area of public import affecting Westlawn and all other perpetual care cemeteries in this state.

18.

In the event that this Court finds that it does have appellate jurisdiction over this matter or exercises its supervisory jurisdiction, Appellees seek reversal and/or modification of the Judgment denying Westlawn's motion for summary judgment, as follows:

(a) Declaring La. Admin. Code 46:XIII.1503(C) unconstitutional both facially and "as-applied" to Appellees because it violates substantive due process rights, is void for vagueness under the due process clause of the Fourteenth Amendment and Article 1, §2 of the Louisiana Constitution of 1974, is an exercise of primary legislative authority and thus is beyond the authority constitutionally delegable to an administrative agency or otherwise such authority was not delegated to the Louisiana Cemetery Board, is in violation of the constitutional requirement of separation of powers, and directly conflicts with the mandatory provisions of La. R.S. 8:454.1; and

(b) Declaring La. Admin. Code 46:XIII.1505 (A) and (B) unconstitutional both facially and "as-applied" to Appellees because it violates substantive due process rights, is void for vagueness under the due process clause of the Fourteenth Amendment and Article 1, §2 of the Louisiana Constitution of 1974, exceeds the authority delegated to the Louisiana Cemetery Board by the legislature, conflicts with other provisions of Title 8 of the Louisiana Revised Statutes, and is an exercise of primary legislative authority and thus beyond the authority constitutionally delegable to an administrative agency in violation of the constitutional requirement of separation of powers.

19.

The district court's judgment declaring La. Admin. Code 46:XIII.1505 (A) and (B) facially unconstitutional is an erroneous interpretation or application of the Constitution and the law and should be reversed and/or modified.

20.

The district court's June 29, 2021 judgment declaring La. Admin. Code 46:XIII.1503(C) unconstitutional on its face as in violation of the separation of powers provisions of La. Const. art. II §2 should be affirmed.

WHEREFORE, Westlawn Cemeteries, L.L.C. and Intervenors, Boyd L. Mothe, Boyd L. Mothe, Jr., Laurie M. Knowles, Nicole M. Lawson, Katherine M. Illg, and Boyd L. Mothe, III, in their capacities as Trustees of the Westlawn Memorial Park Perpetual Care Trust Fund, pray that this Court affirm the trial court's ruling that La. Admin. Code 46:XIII.1503(C) is unconstitutional and modify the Judgment as set forth above, and that all costs herein be assessed against Appellant.

Respectfully submitted,

GAUDRY, RANSON, HIGGINS &
GREMILLION, L.L.C.

/s/ Ryan C. Higgins

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and Trustees of the Westlawn Memorial Park
Perpetual Care Trust Fund

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all parties via facsimile, electronic mail, and/or by depositing same in the U.S. mail, postage prepaid and properly addressed, on this 12th day of October, 2021.

/s/ Ryan C. Higgins

RYAN C. HIGGINS